SOUTH AFRICAN LAW COMMISSION

DISCUSSION PAPER 83

Project 94:

DOMESTIC ARBITRATION

CLOSING DATE FOR COMMENT:

29 October 1999

ISBN: 0-621-29371-7

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 Chief Justice I Mahomed (Chairperson)
The Honourable Madam Justice Y Mokgoro (Vice-Chairperson)
Adv JJ Gauntlett SC
The Honourable Madam Justice L Mailula
Mr P Mojapelo
Prof RT Nhlapo
Ms Z Seedat

The Secretary is Mr W Henegan. The Commission's offices are on the 12th floor, Sanlam Centre c/o Pretorius and Schoeman Street, Pretoria. Correspondence should be addressed to:

The Secretary
South African Law Commission
Private Bag X668
PRETORIA 0001
Telephone: (012)322-6440
Fax : (012)320-0936
E-mail : alouw@salawcom.org.za
Website: www.law.wits.ac.za/salc/salc.html

The members of the Project Committee for this investigation are -

The Honourable Mr Justice JH Steyn (Chairperson)
Prof DA Ailola
Prof DW Butler
Prof RH Christie QC
Adv JJ Gauntlett SC
Mr Justice JM Hlophe
Ms S Pather
Mr CM Sardiwalla
Adv N Singh SC

The project leader responsible for the investigation is The Honourable Mr Justice JH Steyn. The researcher allocated to the project is Ms AM Louw.

PREFACE

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

This discussion paper (which reflects information accumulated up to the end of July 1999), has been prepared to elicit responses from key parties and to serve as a basis for the Commission=s deliberations. Following an evaluation of the responses and any final deliberations on the matter the Commission may issue a report on this subject which will be submitted to the Minister of Justice for Tabling in Parliament. The views, conclusions and recommendations in this paper are accordingly not to 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 relating to the reform of this particular branch of the law with sufficient background information to enable them to place focussed submissions before the Commission.

For the convenience of the reader a summary of issues discussed and requests for comment appear on the next page.

The Commission will assume that respondents agree to the Commission quoting from or referring to comments and attributing comments to respondents, unless representations are marked confidential. Respondents should be aware that the Commission may in any event be required to release information contained in representations under the Constitution of the Republic of South Africa, Act 108 of 1996.

Respondents are requested to submit **written** comments, representations or requests to the Commission by **29 October 1999** at the address appearing on the previous page. The researcher will endeavour to assist you with particular difficulties you may have.

The researcher allocated to this project, who may be contacted for further information, is Ms A-M Louw. The project leader responsible for this project is The Honourable Mr Justice JH Steyn.

SUMMARY OF RECOMMENDATIONS

Arbitration is increasingly recognized as an important method of resolving commercial and other disputes, which can help to relieve the pressure on the civil justice system. Arbitration needs to be supported by appropriate legislation. The objects of a modern arbitration statute are the fair resolution of disputes by an impartial tribunal without unnecessary delay and expense; party autonomy; balanced powers for the courts; and adequate powers for the arbitral tribunal to conduct the reference effectively. It is clear that the existing Arbitration Act 42 of 1965 fails to meet these objectives adequately.

In July 1998 the Commission published a report which recommended that the UNCITRAL Model Law on International Commercial Arbitration of 1985 should be adopted by South Africa for international commercial arbitrations. The Commission has now turned its attention to domestic arbitration legislation.

The Commission's investigation has revealed that there are three basic options for a new domestic arbitration statute. The first is to improve the existing statute while retaining its basic provisions. In view of the dramatic improvements to arbitration legislation in other jurisdictions during recent years, notably England, this option does not appear to be practical. The second is to follow the approach adopted by several other countries and to adopt the UNCITRAL Model Law for both domestic and international arbitration. Because of the need, in the context of international arbitration, to keep changes to the content and language of the Model Law to a minimum, this approach also appears to be inappropriate for the needs of a new domestic arbitration statute for South Africa. The third approach, and that proposed by the Commission for consideration in this Discussion Paper, is to have a new statute combining the best features of the Model Law and the English Arbitration Act of 1996, while retaining certain provisions of the 1965 Act which have worked well in practice.

It is notorious that the potential advantages claimed for arbitration compared to litigation, as a more expeditious and cost-effective method of resolving disputes, are often not achieved in practice, particularly in complex commercial disputes and in the construction industry. The Commission therefore proposes that a statutory duty should be imposed on the arbitral tribunal to adopt procedures which, while fair, in the particular circumstances of the dispute will avoid unnecessary delay and expense. Increased powers are proposed for the tribunal to enable it to comply with this duty. These powers include the power to rule on its own jurisdiction, the power to depart from the ordinary rules of evidence, a limited power to order interim measures and security for costs, the power to call witnesses, more effective powers to deal with a party in default and the power to limit recoverable costs. True to the principle of party autonomy the tribunal's statutory powers can be excluded or modified by the parties in their arbitration agreement.

The Commission proposes that the powers of the court should be reviewed and generally brought into line with the powers of the court under the Model Law, while retaining certain powers of the court in the 1965 Act not found in the Model Law, but in modified form. Particular attention has been given to the need to prevent applications to court being abused by unscrupulous parties intent on delaying the arbitration process. The Draft Bill annexed to the Discussion Paper also contains certain provisions designed to facilitate the use of conciliation by the parties to an arbitration agreement. In the interests of consumer protection, certain restrictions are imposed on arbitration clauses in standard-form contracts entered into by consumers.

The Commission proposes:

That the UNCITRAL Model Law should not be adopted for domestic arbitrations in South Africa.

That the existing Arbitration Act 42 of 1965 should be repealed and replaced with a comprehensive new arbitration statute for domestic arbitration, based on the principles set out above.

TABLE OF CONTENTS

LIST OF SOURCES

Asouzu AA	AConciliation under the 1988 Arbitration and Conciliation Act of Nigeria@ (1993) 5 ***African Journal of International and Comparative Law*** 825
Bernstein R, Tackaberry J & Marriott AL	***Handbook of Arbitration Practice*** 3 ed Sweet & Maxwell London 1998
Butler D W	ASouth African Arbitration Legislation - the Need for Reform@ (1994) 27***CILSA*** 118
Butler D W	AExpediting Commercial Arbitration Proceedings - Recent Trends@ (1994) 6 ***SA Merc LJ*** 251
Butler D W	AA New Domestic Arbitration Act for South Africa: what Happens after the Adoption of the UNCITRAL Model Law for International Arbitration?@ (1998) 9 ***Stel LR*** 3
Butler DW	AThe Proposed New International Arbitration Act: a Contribution to the African Renaissance?@ (Unpublished paper presented at the SLTSA Conference in Bloemfontein on 19 January 1999
Butler DW & Finsen E	***Arbitration in South Africa - Law and Practice*** Juta Cape Town 1993
Christie RH	AAmiable Composition in French and English Law@ (1992) 58 ***JCI Arb*** 259
Christie R H	ASouth Africa as a Venue for International Commercial Arbitration@ (1993) 9 ***Arbitration International*** 153
Chukwumerije O	AJudicial Supervision of Commercial Arbitration: the English Arbitration Act of 1996" (1999) 15 ***Arbitration International*** 171
Departmental Advisory Committee on Arbitration Law	***Report on the Arbitration Bill (Saville Report)*** February 1996

Departmental Advisory Committee on Arbitration Law	***Supplementary Report on the Arbitration Bill ((1979) Saville Report)*** *January 1997*
Diamond A	AMultiparty Arbitrations - A Plea for a Pragmatic Piecemeal Solution@ (1991) 7 ***Arbitration International*** 403
Freeman R, Edwards JM & Cox A	***London Arbitration Scheme*** Chartered Institute of Arbitrators London 1998
Hanotiau B	AComplex - Multicontract-Multiparty - Arbitrations@ (1998) 14 ***Arbitration International*** 369
Harris B, Planterose R & Tecks J	***The Arbitration Act 1996*** Blackwell Oxford 1996
Hill R	AOn-line Arbitration: Issues and Solutions@ (1999) 15 ***Arbitration International*** 199
Holtzmann HM & Neuhaus JE	***A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*** Kluwer Deventer 1989
Landau T	AThe Arbitration Act 1996 - New Duties and Liabilities: Party Autonomy v Powers of the Tribunal@ paper delivered at a seminar "A Practical Guide to the New Arbitration Bill/Act" London 4 July 1996
Lane PMM	ACost Effective Arbitration@ (1997) 63 ***JCI Arb*** 5
Lew J D M	AIntroduction to the Work of the Arbitration Practice Sub-Committee@(1997) 63 ***JCI Arb*** 166
Lew J D M (ed)	***Contemporary Problems in International Arbitration*** Centre for Commercial Law Studies Queen Mary College London 1986
Mustill, M J	Report of the Departmental Advisory Committee on the UNCITRAL Model Law London 1989 reproduced in (1990) 6 ***Arbitration International*** 3-62
Mustill MJ & Boyd SC	***Commercial Arbitration*** 2ed Butterworths London 1989
Neill P	AConfidentiality in Arbitration@ (1996) ***JCI Arb*** vol 62 no 3(S)1

New Zealand Law Commission — **Arbiration** NZLC R20 1991

Oyre T — AProfessional Liability and Judicial Immunity@ (1998) 64 ***JCI Arb*** 45

Rogers A & Miller D — ANon-confidential Arbitration Proceedings@ (1996) 12 ***Arbitration International*** 319

SA Law Commission — ***Arbitration: A Draft International Arbitration Act for South Africa*** Discussion Paper 69 1997

SA Law Commission — ***Alternative Dispute Resolution*** Issue Paper 8 1997

SA Law Commission — ***Arbitration: An International Arbitration Act for South Africa*** Report July 1998

Saville M — AAn Introduction to the 1996 Arbitration Act@ (1996) 62 ***JCI Arb*** 165

Simms D P — AArbitrability of Intellectual Property Disputes in Germany@ (1999) 15 ***Arbitration International*** 193

Turley IF — AThe Proposed Rationalisation of South African Arbitration Law@ 1999 ***TSAR*** 235

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

Williams DAR — AArbitration and Dispute Resolution@ 1998 ***New Zealand LR*** 1

Yat-Sen Li J — AArbitral Immunity: A Profession Comes of Age@ (1998) 64 ***JCI Arb*** 51

TABLE OF CASES

South Africa

Administrator, Transvaal v Kildrummy Holdings Ltd 1978 2 SA 124 (T)

Administrateur, Kaap v Asla Konstruksie (Edms) Bpk 1989 4 SA 458 (C)

Austen v Joubert 1910 TS 1095

Benab Properties CC v Sportshoe (Pty)Ltd 1998 2 SA 1045 (C)

Blaas v Athanassiou 1991 1 SA 723 (W)

Carephone (Pty) Ltd v Marcus NO 1999 3 SA 304 (LAC)

Dickenson & Brown v Fisher's Executors 1915 AD 166

Goldschmidt v Folb 1974 1 SA 576 (T)

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

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

Joubert t/a Wilcon v Beacham 1996 1 SA 500 (C)

Kannenberg v Gird 1966 4 SA 173 (C)

Kathrada v Arbitration Tribunal 1975 1 SA 673 (A)

Mervis Brothers v Interior Acoustics 1999 3 SA 607 (W)

Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd 1971 2 SA 388 (W)

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)

Patcor Quarries CC v Issroff 1998 4 SA 1069 (SE)

Petz Products (Pty) Ltd v Commercial Electric Contractors (Pty) Ltd 1990 4 SA 196 (C)

Pitt v Pitt 1991 3 SA 863 (D)

Ressell v Ressell 1976 1 SA 289 (W)

Schoch NO v Bhettay 1974 4 SA 860 (A)

Sera v De Wet 1974 2 SA 645 (T)

Tucker v FB Smith & Co (1908) 25 SC 12

Universiteit van Stellenbosch v JA Louw (Edms) Bpk 1983 4 SA 321 (A)

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

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

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

Wilton v Gatonby 1994 4 SA 160 (W)

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

Yorigami Maritime Construction Co Ltd v Nissho-Iwai Co Ltd 1977 4 SA 682 (C)

England

Ali Shipping Corp v Shipyard Trogir [1998] 2 All ER 136

Anton Piller KG v Manufacturing Processes Ltd [1976] 1 All ER 779 (CA)

King v Thomas McKenna Ltd [1991] 1 All ER 653 (CA)

Moscow V/O Exportkhleb v Helmville Ltd (The Jocelyne) [1977] 2 Lloyd:s Rep 121

Portnet (A Division of Transnet Ltd) v Finnemore [1999] 2 BLLR 151 (LC)

Zambia Steel & Building Supplies Ltd v James Clark & Eaton Ltd [1986] 2 Lloyd:s Rep 225 (CA)

Australia

Esso Australia Resources Ltd v Plowman 128 ALR 391 (1995)

SELECTED LEGISLATION

SOUTH AFRICA

Arbitration Act 42 of 1965

Labour Relations Act 66 of 1995

ENGLAND

Arbitration Act 1979

Arbitration Act 1996

GERMANY

Arbitration Act of 1998

INDIA

Arbitration and Conciliation Act 26 of 1996

NETHERLANDS

Arbitration Act of 1986

NEW ZEALAND

New Zealand Arbitration Act 99 of 1996

ZIMBABWE

Zimbabwe Arbitration Act of 1996

CHAPTER 1

INTRODUCTION

(a) A brief history of the Law Commission's arbitration project1

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

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

1.3 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 UNCITRAL Model Law, beyond recommending that it 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. Responses were invited on how South Africa should respond to the Model Law.

1.5 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

---

1 A more detailed account of the work of the Law Commission on international arbitration appears from SA Law Commission ***Arbitration: an International Arbitration Act for South Africa*** Report July 1998 (hereinafter referred to as the "Commission's Report on International Arbitration") paras 1.21-1.46.

Committee should be established for the arbitration project. This Project Committee was established with effect from 1 May 1996.

1.6 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 committee accepted that the reform of domestic arbitration was potentially a more controversial topic involving a much broader range of interest groups. As a result, the investigation of this aspect could be more protracted, particularly if, as subsequently occurred, the Project Committee was mandated to consider the promotion of alternative dispute resolution techniques as well.2

1.7 In the light of the responses to Working Paper 59, the Project Committee drew up Discussion Paper 69, which was published during December 1996. This Discussion Paper included a recommendation that the UNCITRAL Model Law should be adopted, initially at least, for international arbitrations only. The Discussion Paper and the Draft Bill were favourably received, with criticism being reserved for points of detail. Certain refinements were therefore made to the Draft Bill which accompanied the Law Commission's Report on International Arbitration in July 1998. The Draft Bill has been approved by the Cabinet and the necessary preparations are underway for its consideration by Parliament.

1.8 Proposals were made by the Commission in July 1998 for the expansion of the Project Committee. This was ultimately effected in May 1999. The expanded Project Committee has undertaken the preparation of this Discussion Paper dealing with the reform of domestic arbitration legislation. A Draft Arbitration Bill reflecting the committee's proposals is contained in Annexure A to this Discussion Paper. This forms the second stage of the inquiry into arbitration legislation. This will be followed by a third stage, which will consider alternative dispute resolution techniques for resolving commercial disputes.

(b) Basic options regarding domestic arbitration legislation

1.9 The existing Arbitration Act 42 of 1965 at the time of its enactment was in advance of arbitration legislation in most comparable jurisdictions. Although its arrangement is that of a modern arbitration statute, the substance of its provisions are dated in important respects, when it is compared with new arbitration legislation which has been introduced by both developed and

---

2 An expanded Project Committee was appointed for this purpose. Issue Paper 8 ***Alternative Dispute Resolution***, with a closing date for comments of 15 July 1997 has since been published on this aspect of the investigation. A draft discussion paper relating to community courts is currently in preparation.

developing countries in the period since 1979.

1.10 Although the UNCITRAL Model Law was intended for international commercial arbitrations, it has been adopted for both domestic and international arbitrations in a number of jurisdictions.3 The Model Law can also be regarded as having set the standard against which other arbitration legislation must be evaluated. The existing Arbitration Act of 1965 was based on English models. Although the initial reaction of those investigating the reform of English arbitration legislation was to reject emphatically the adoption of the Model Law,4 the Model Law subsequently had a far greater influence on the new English Arbitration Act of 1996 than was initially foreseen. The new English Arbitration Act is of particular relevance for South Africa in view of the influence of English law on the existing legislation. Changes made since 1965 to English arbitration law5 are potentially indicative of possible flaws in the South African Arbitration Act.

1.11 The Law Commission accepted in its report on international arbitration that the Arbitration Act of 1965 is totally inadequate for the requirements of international arbitration.6 As this Discussion Paper will demonstrate, it also has a number of serious defects for meeting the needs of domestic arbitration. There are three possible alternatives for dealing with the problem.

1.12 The first alternative is to attempt to improve the 1965 Act by making the necessary changes to its provisions. This was the approach adopted by the Association of Arbitrators in its initial proposals to the Law Commission in 1994. A copy of the Draft Bill accompanying the submissions of the Association of Arbitrators is contained in Annexure B to this Discussion Paper. There are two main difficulties with this approach.

1.13 First, it takes insufficient account of the provisions of the UNCITRAL Model Law. This Discussion Paper proceeds on the basis that the Model Law will be adopted by the legislature for international commercial arbitrations with minimum changes to the original UNCITRAL text. The approach under discussion will not only result in South Africa having different statutes for

---

3 Examples of countries which have adopted the Model Law with minimum changes for both domestic and international arbitration include New Zealand, Kenya, Zimbabwe and Germany. India, in the Arbitration and Conciliation Act 26 of 1996, made slightly more changes (compare s 37 regarding appeals) but can still properly be regarded as a country which has adopted the Model Law for domestic and international arbitrations, rather than adapting it.

4 See Mustill MJ ***Report of the Departmental Advisory Committee on the UNCITRAL Model Law*** London 1989 reproduced in (1990) 6 ***Arbitration International*** 3-62.

5 The two most important statutes since 1965 have been the Arbitration Act of 1979, which amended the Arbitration Act of 1950 and the Arbitration Act of 1996 which repealed and replaced it.

6 Compare the Commission's Report on International Arbitration para 1.3.

domestic and international arbitrations, but will also result in those statutes being fundamentally different in a number of important respects. If South Africa is to have a dualistic arbitration system, it is nevertheless desirable to promote a reasonable degree of commonality between the two. A further difficulty with this approach is that it has insufficient regard to the objectives of a modern arbitration statute discussed below.7

1.14 Secondly, while the drafters of the English Arbitration Act of 1996 had regard to the desirability of complying with the standards set by the Model Law, it was also necessary to address certain problems experienced in English arbitration practice. These same problems clearly exist in arbitration practice in South Africa.8 The implementation of statutory corrective measures necessitates a more drastic departure from the provisions of the existing Arbitration Act of 1965.

1.15 The second alternative is to adopt the UNCITRAL Model Law for both international and domestic arbitrations. The advantages and disadvantages of this alternative are considered in the next chapter.

1.16 The third alternative is to adopt what is essentially a new arbitration statute for domestic arbitration. This statute would retain the basic structure of the 1965 Act and those of its provisions which have worked well in practice. It would also incorporate those features of the Model Law and the English Arbitration Act of 1996 which will best ensure that the objectives of a modern system of arbitration law are achieved.

1.17 Before making a choice between the last two alternatives for purposes of this Discussion Paper, it is necessary to consider what the objectives of a modern domestic arbitration statute should be.

(c) Objectives for domestic arbitration legislation

1.18 The object of arbitration is to obtain the fair resolution of disputes by an impartial arbitral tribunal without unnecessary delay or expense.9 It follows logically that a prime objective of arbitration legislation should be to promote this object. The English Arbitration Act of 1996 contains a number of provisions, not found in the UNCITRAL Model Law, to ensure that this

---

7 See para (c) below.

8 See para 2.9 below.

9 See the English Arbitration Act of 1996 s 1(a).

objective is achieved.10

1.19 Arbitration is a consensual process in that the primary source of the arbitral tribunal's jurisdiction is the arbitration agreement between the parties. The consensual basis of arbitration gives arbitration the potential to be a very flexible method of dispute resolution. The parties can, by agreement, tailor the process to the needs of their dispute, bearing in mind its nature and complexity, as well as the amounts in dispute. The advantage of flexibility, if used, is one of the most important advantages of arbitration compared to litigation. A fundamental principle of modern arbitration legislation is therefore party autonomy. This entails that the parties should be free to agree how their dispute should be resolved, subject only to those safeguards that are necessary in the public interest.11 Party autonomy is one of the main principles of both the UNCITRAL Model Law12 and the English Arbitration Act of 1996.13 The second objective of a domestic arbitration should therefore be the promotion of party autonomy.

1.20 The third objective should be balanced powers for the court. This is an objective of both the Model Law14 and the English Arbitration Act of 1996.15 On the one hand, court support for the arbitration process is essential. The price for court support is supervisory powers for the court to ensure due process. On the other hand, experience in several jurisdictions, including South Africa, has shown that it is necessary to guard against the court's powers being abused by a party to an arbitration as a delaying tactic. The powers of the court are considered in greater detail in the next chapter.16

1.21 A further objective is to ensure that the arbitral tribunal has adequate powers to proceed with the arbitration and to complete it without avoidable delay by making an award, in a situation where either the parties cannot agree on the procedure to be followed or where one of the parties is failing or refusing to cooperate. This was also an objective of the Model Law.17

---

10 See ch 2 para (b) below.

11 See the English Arbitration Act of 1996 s 1(b).

12 See the Commission's Report on International Arbitration para 2.7.

13 See the 1996 Saville Report para 19.

14 See the Model Law article 5 and the Commission's Report on International Arbitration para 2.7.

15 See the English Arbitration Act of 1996 s 1(c).

16 See ch 2 para (c) below.

17 See the Commission's Report on International Arbitration para 2.7.

1.22 It must be conceded that there is a degree of tension between these objectives.18 The objective of party autonomy is not always easy to reconcile with those of the object of arbitration or the giving of adequate powers to the arbitral tribunal to conduct the reference effectively. It could happen that the parties agree on a procedure which the tribunal regards as being inappropriately slow and expensive in the circumstances of the particular dispute.19

1.23 A consideration of the proposals in this Discussion Paper will illustrate that the provisions of the existing Arbitration Act do not adequately meet any of these objectives. Although the Act does support the objective of party autonomy, party autonomy is undermined by supervisory powers of the court which are excessive compared with those in modern domestic arbitration statutes.20 The powers of the arbitral tribunal to conduct the reference in a cost-effective and expeditious manner are also inadequate by modern standards.21

---

18 See Butler D "South African Arbitration Legislation – the Need for Reform" (1994) 27 ***CILSA*** 118 at 122 (hereafter referred to as "Butler (1994 ***CILSA***)"); Butler D "A New Domestic Arbitration Act for South Africa: What Happens after the Adoption of the UNCITRAL Model Law for International Arbitration?" (1998) 9 ***Stel LR*** 3 at 17 (hereafter referred to as "Butler (1998)").

19 See further para 2.12 below.

20 For example ss 3(2) and 6 of the 1965 Act give the court a comparatively wide discretion not to enforce the parties' agreement to refer their dispute to arbitration. This obviously undermines party autonomy. Compare s 8 of the Draft Bill with this Discussion Paper. The powers of the court in s 21 of the existing Act are also wide by modern standards, allowing the court to deal with matters which other jurisdictions regard as being best left to the arbitral tribunal. Compare s 38 of the Draft Bill in this Discussion Paper.

21 Examples of present deficiencies include the following. S 14 of the existing Act fails to confer a general discretionary power on the arbitral tribunal to decide how to conduct the reference where the parties' agreement is silent. Compare s 28(2) of the Draft Bill. There is no provision regarding the power of the arbitral tribunal to deal with jurisdictional issues. Compare s 25 of the Draft Bill. The arbitral tribunal currently has no power to order interim measures. Compare s 28(1)(iv) of the Draft Bill. The arbitral tribunal cannot currently call a witness unless the parties agree (compare s 30(4) of the Draft Bill) and has no control over the decision by a party to subpoena a witness (compare s 16 of the existing Act with s 35(2) of the Draft Bill).

CHAPTER 2

UNDERLYING PRINCIPLES OF THE DRAFT BILL

2.1 The previous chapter identified the objectives of a modern domestic arbitration statute. The purpose of this chapter is to consider whether these objectives can best be achieved in South Africa by adopting the UNCITRAL Model Law for both domestic and international arbitrations or by drawing up a new statute which is nevertheless consistent with the principles of the Model Law. Obviously, the conclusion reached on this issue is a provisional one, subject to reconsideration in the light of the responses to this Discussion Paper.22

2.2 A crucial issue for the reform of domestic arbitration legislation concerns the powers of the court, particularly as the powers of the court under the UNCITRAL Model Law are significantly less extensive than those enjoyed by the courts under the existing Act. This chapter therefore examines this issue as an essential background to a consideration of the provisions of the Draft Bill in Chapter 3 of this Discussion Paper. The drafting principles which have been used in drawing up the Draft Bill are also set out. The final section of this chapter highlights certain other issues which must be considered in the context of a new domestic arbitration statute.

(a) Reasons for not adopting the UNCITRAL Model Law for domestic arbitrations

2.3 Two developed countries, namely New Zealand and Germany, and three developing countries, namely Kenya, Zimbabwe and India, have recently adopted the Model Law for both domestic and international arbitrations. These jurisdictions therefore accepted that the Model Law, although drafted for international arbitrations, is also suitable for domestic arbitration. Moreover, an eminent authority on the Model Law has argued that it "would be suitable also for any advanced system of domestic arbitration".23 It may also be argued that adopting the Model Law for both domestic and international arbitrations would avoid the complexities of a dualistic system as well as the need to define when an arbitration must be treated as international as

---

22 See para 2.25 below.

23 See Herrmann G "The Role of the Courts under the UNCITRAL Model Law Script" in Lew JDM (ed) ***Contemporary Problems in International Arbitration*** (1986) 164 167. See also Rogers A "The UNCITRAL Model Law: an Australian Perspective" (1990) 6 ***Arbitration International*** 348 349 who states that there is no inherent reason why the Model Law should not be selected as the sole regime for all arbitrations in a particular jurisdiction. He concedes that special treatment may be required in domestic arbitration for contracts of adhesion where the parties have an unequal bargaining position (*cf* the (New Zealand) Arbitration Act of 1996 s 11 which contains special requirements for the enforcement of a consumer arbitration agreement entered into in New Zealand).

opposed to domestic.24 However, even jurisdictions which basically have the same arbitral regime for domestic and international arbitrations usually find it necessary to make some distinction between the two, necessitating a definition of international arbitration.25 Moreover, the complications for South African parties and lawyers posed by a dual system are exaggerated. Those not involved in international arbitration will only have to work with the domestic statute. Those lawyers who represent clients in international arbitrations outside South Africa are accustomed to dealing with different arbitral regimes.26

2.4 There are however a number of arguments against adopting the Model Law for both domestic and international arbitration.27

2.5 The first argument concerns the positive contribution made by the Arbitration Act of 1965 to the development of South African arbitration law. Some jurisdictions which have adopted the Model Law used it to replace largely obsolete arbitration legislation which had been little used. In contrast, the Arbitration Act of 1965 has worked reasonably well in practice and is familiar to a large number of people involved in arbitration in this country, many of whom are unlikely to become involved in international arbitration. It has also been interpreted by the courts on numerous occasions, usually with satisfactory results. The replacement of the existing Act by the Model Law would undermine legal certainty among those involved in domestic arbitration until it is seen how the Model Law will be interpreted and applied by the courts. The powers of the court under the existing Act are wider than those under the Model Law and some changes will be necessary in this regard.28 There are however certain existing powers of the court which were rejected by the Law Commission in the context of international arbitration in the interests of keeping departures from the Model Law in the international context to a minimum. Examples are the power of the court to extend certain time limits for commencing arbitration proceedings and the power of the court to give an opinion on a question of law.29 Both these powers have been used beneficially over the years and it is proposed in this Discussion Paper that they should be retained, subject to certain refinements to prevent abuse.30

---

24 See the Commission's Report on International Arbitration paras 2.107-2.109 and 2.273 regarding certain practical problems regarding the application of the definition of an international arbitration in article 1(3) of the Model Law.

25 See the Zimbabwe Arbitration Act of 1996 sch 1 article 10, which distinguishes between domestic and international arbitrations in respect of the number of members of the arbitral tribunal.

26 See Butler (1998) 9 n 39.

27 See generally Butler (1998) 7-12.

28 See para (c) below.

29 See the Arbitration Act 42 of 1965 ss 8 and 20.

30 See ss 10 and 37 of the Draft Bill.

2.6 The second argument relates to the form in which the Law Commission recommended that the Model Law should be adopted for international commercial arbitration. The Commission recommended that the official English text of the Model Law should be adhered to as closely as possible. This was in compliance with UNCITRAL's goal of promoting uniformity of national laws applying to international arbitration procedure. It also had the object of promoting South Africa as an attractive arbitration venue for foreign parties and their lawyers.31 The official text will not necessarily be easy for South African lawyers to interpret and apply without the aid of the ***travaux préparatoires***. This is permitted in the Draft International Arbitration Bill proposed by the Law Commission.32 However, it is also important that the Model Law in South Africa should also be applied by our courts in a way consistent with the way it is applied in other Model Law jurisdictions. This will necessitate reference to foreign jurisprudence on the interpretation and application of the Model Law. This type of exercise is less practical for legal practitioners involved only in domestic arbitration.

2.7 For the reasons referred to in the previous paragraph, the Commission proposed that the Model Law should be adopted with minimum changes and additions. The Model Law however has certain gaps, compared to the relatively detailed and sophisticated provisions of the existing Arbitration Act of 1965 on certain topics. It would be necessary to fill these gaps if the Model Law were to operate effectively in domestic arbitrations in South Africa. If these additions were to apply to international arbitrations, the goals referred to in the previous paragraph would be seriously undermined. However, the problem will not arise if a separate domestic arbitration statute is retained.33

2.8 A good example of a gap in the Model Law compared to the existing Act concerns the provisions relating to the powers of the arbitral tribunal. Failing provisions in the arbitration agreement, the Model Law, subject to certain procedural safeguards, empowers the tribunal to "conduct the arbitration in such manner as it considers appropriate".34 There are good reasons for this approach. Over-detailed rules or statutory provisions on arbitral procedure undermine the flexibility of the arbitration process. However, the current position is that the existing Arbitration

---

31 See the Commission's Report on International Commercial Arbitration paras 2.9 and 2.52.

32 See the Commission's Report paras 2.52-2.60 and the Draft International Arbitration Bill s 8.

33 One way of dealing with this problem is the approach used in the New Zealand Arbitration Act 99 of 1996. Sch 1 contains the Model Law, as adapted, which applies to all arbitrations both domestic and international. Sch 2 contains additional provisions which in terms of s 6 apply automatically to domestic arbitrations unless the parties exclude them. These additional powers only apply to an international arbitration on a contract-in basis.

34 See article 19(2) of the Model Law. The procedural safeguards are contained in articles 18 and 24.

Act contains a fairly detailed list of powers, which apply unless the arbitration agreement provides otherwise.35 Arbitrators and parties familiar with international arbitration practice will have no difficulty in conducting their arbitration under the Model Law. It is however less experienced arbitrators and parties in a domestic arbitration who could experience uncertainty if the approach in the present statute is simply abandoned and replaced by that of the Model Law.36

2.9 A further strong reason for retaining a separate statute for domestic arbitration relates to the urgent need to take remedial measures regarding the type of procedure often used in more complex arbitrations, particularly in the construction industry. These procedures often result in the arbitration hearing being far longer and more expensive than it would have been if the parties went to court. This necessitates the reform of South African domestic arbitration practice. The causes and the possible solutions to the problem have been well documented.37 The problem should be familiar to any lawyer who has been involved in an arbitration involving a complex commercial or construction dispute in this country. The causes of the problem are linked to the English-style adversarial procedure as used in civil trials and arbitration in South Africa.

2.10 The drafters of the English Arbitration Act of 1996 were well aware of the problem. In the words of Lord Saville, who has been aptly described38 as the midwife of the new English Arbitration Act 1996:

> "Justice delayed or unnecessarily expensive justice is indeed justice denied. However 'correct' the final decision can be said to be, it will have produced injustice if it took too long or was too expensive."39

35 See the Arbitration Act 42 of 1965 s 14(1).

36 See further Butler (1998) 10-11.

37 See Butler DW "Expediting Commercial Arbitration Proceedings – Recent Trends" (1994) 6 ***SA Merc LJ*** 251 at 254-5; Lane PMM "Cost Effective Arbitration" (1997) 63 ***JCI Arb*** 5-6; Butler (1998) 6 and 12-14.

38 In the editor's introduction to the article cited in the next footnote.

39 See Saville M "An Introduction to the 1996 Arbitration Act" (1996) 62 ***JCI Arb*** 165 at 166.

(b) Lessons from the English Arbitration Act of 199640

2.11 One of the founding principles of the English Arbitration Act of 1996 concerns the object of arbitration, "namely to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense".41 This guiding principle is not intended to be empty rhetoric. It was intended to rectify the defects in English arbitration practice referred to in the previous section. Section 33 of the Act imposes a twofold statutory duty on the arbitral tribunal:

> "First, the tribunal is required to act fairly and impartially between the parties, giving each party a reasonable opportunity to put its case and to deal with that of its opponent. This duty is clearly based on article 18 of the Model Law. The second duty however has no equivalent in the Model Law. The tribunal is required to 'adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined'. Section 33 is one of the mandatory provisions of the Act and cannot be excluded by the parties' agreement. Obviously the tribunal cannot sacrifice a just result and fair procedures in an effort to save time and expense. However, it is also inherent in section 33 that procedures which do not avoid unnecessary delay and expense are fundamentally unfair."42

An arbitrator who ignores this duty runs the risk of incurring certain sanctions, namely removal from office or the setting aside of the award.43

2.12 The English Arbitration Act also provides arbitrators with a list of powers designed to educate arbitrators and parties with respect to ways in which arbitration may be handled as opposed to litigation.44 Subject to the duty of fairness, it is now beyond doubt that arbitrators may depart from English adversarial principles by devising radical and innovative procedures to limit costs and reduce delay.45 However, because of the principle of party autonomy, these

---

40 See further Butler (1998) 14-19.

41 See the Arbitration Act of 1996 s 1(a).

42 Butler (1998) 15 (footnotes omitted).

43 See further Butler (1998) 15-16 regarding ss 24 and 68 of the English Arbitration Act.

44 See the English Arbitration Act s 34(2) and T Landau "The Arbitration Act 1996 - New Duties and Liabilities: Party Autonomy v Powers of the Tribunal" paper delivered at a seminar A Practical Guide to the New Arbitration Bill/Act in London on 4 July 1996 4.

45 See Bernstein R, Tackaberry J and Marriott AL ***Handbook of Arbitration Practice*** (3 ed 1998) 27.

powers are subject to any agreement between the parties.46 The situation could arise that the parties agree on a procedure, which makes it objectively impossible for the tribunal to comply with its statutory duty to resolve the dispute without unnecessary delay or expense. The legislature protects the tribunal which does not wish itself to be abused in this way and which has been unable to persuade the parties to adopt cost-effective and expeditious procedures by allowing it to resign.47

2.13 Another potentially very effective tool which the legislature has given to the arbitral tribunal to enable it to comply with its duty to ensure cost-effective procedures is the power to cap costs. This entails the power to direct, before the costs are incurred, that recoverable costs shall be limited to a specified amount.48 Properly exercised,49 the power enables the arbitral tribunal to prevent an occurrence which is all too frequent in arbitration practice, namely where the costs of the proceedings are very much out of proportion to the amount in dispute.50

2.14 The English statute also imposes a duty on the parties to do all things necessary for the proper and expeditious conduct of the arbitral proceedings. This includes the duty to comply without delay with any determination of the arbitral tribunal as to procedural and evidential matters.51 The powers of the tribunal and the sanctions it may impose in the event of default, including the failure to comply with a peremptory order, are both more comprehensive and more drastic than those contained in the comparable provision of the Model Law.52

2.15 Given the present highly unsatisfactory state of arbitration practice in South Africa, the case for the inclusion of similar corrective measures, based on the English Arbitration Act, is a strong one. This has been done in the Draft Bill in this Discussion Paper53 to enable the Project Committee to elicit informed comment on this proposal.

---

46 See the English Arbitration Act ss 1(b) and 34(1).

47 See the Arbitration Act of 1996 s 25 and Departmental Advisory Committee on Arbitration Law ***Report on the Arbitration Bill (Saville Report)*** February 1996 (hereafter referred to as "1996 Saville Report") para 162.

48 See the English Arbitration Act s 65 and Butler (1998) 17-19.

49 The power is subject to the arbitral tribunal's duty in s 33(1)(a) to act impartially and fairly and should only be exercised after first giving the parties the opportunity to make submissions on the issue.

50 See further paras 3.159-3.160 below.

51 See the English Arbitration Act of 1996 s 40(1) and (2)(a).

52 See Butler (1998) 19 n 112 for a comparison between s 41 of the English Arbitration Act and article 25 of the Model Law.

53 See especially ss 1 (General Principles), 22 (Resignation of arbitrator), 27 (General duty of tribunal), 29 (Power of tribunal to consider evidence), 33 (General duty of parties), 34 (Powers of tribunal in case of party's default) and 53 (Power to limit recoverable costs).

(c) Balanced powers for the court54

2.16 One of the most controversial issues of arbitration law reform concerns the powers of the court in relation to arbitration.55 It is accepted that court support for the arbitral process, particularly as regards the enforcement of arbitration agreements and arbitral awards, is essential. It is also accepted that the courts are entitled to certain supervisory powers as the price for their powers of assistance. A court cannot be expected to enforce an arbitral award which has been obtained as a result of an arbitral procedure which was fundamentally unfair and which has substantially prejudiced the losing party.

2.17 The controversy concerns the extent of the courts' supervisory powers and the stage of the arbitral process during which these powers should be available. On the one hand, if it is alleged that the arbitral tribunal is biased or lacks jurisdiction, it could be unreasonable to expect a party raising this objection to continue to participate in the arbitral process until an award has been delivered, before that party is entitled to approach the court for redress. If the objection is sound, the arbitration will have been a waste of time and money. On the other hand, applications to court during the course of an arbitration have been a much abused delaying tactic in many jurisdictions, including South Africa. The delay can be aggravated where a decision by a court of first instance on the application is subject to appeal. As appears from the discussion in the previous section of this chapter, a major aim of a new South African domestic arbitration statute must be to reduce avoidable delay and expense in the arbitration process. Unnecessary applications to court are a cause of avoidable delay and expense.

2.18 The powers of the court are a particularly sensitive subject in the context of arbitration in South Africa.56 There is the danger of a perception, particularly among black lawyers, that some white members of the legal profession see arbitration as a form of "privatised litigation",57 enabling them and their corporate clients to avoid courts which increasingly comprise black judicial officers. This perception needs to be addressed. Objectively considered, arbitration holds equal advantages for black legal practitioners and their clients. The civil courts are struggling to cope with their present case load. A healthy arbitration industry helps to promote

---

54 See further the Commission's Report on International Arbitration paras 2.10-2.12 and the authorities cited; Chukwumerije O "Judicial Supervision of Commercial Arbitration: The English Arbitration Act of 1996" (1999) 15 ***Arbitration International*** 171-191, especially 182-183.

55 See generally Butler (1994) ***CILSA*** 123-9; Annexure B, Commentary para 1.3.

56 See Butler DW "The Proposed New International Arbitration Act: a Contribution to the African Renaissance?" (unpublished paper presented at the SLTSA Conference in Bloemfontein on 19 January 1999).

57 This involves conducting the arbitration substantially along the lines of a High Court trial. This is a major cause of the problems referred to in para 2.9 above.

the administration of justice by relieving the burden on the courts.

2.19 South Africa will not become an important regional centre for international arbitration unless it is seen to have the necessary court support for the arbitration process.58 Arbitration in this country therefore requires the support of judges who are sympathetic towards arbitration as a means of resolving disputes. Attention also needs to be given to the introduction of streamlined court rules to facilitate the expeditious handling of court applications relating to arbitration proceedings.59

2.20 The issue which requires to be addressed here is not the fear that the courts are incapable of exercising the powers conferred on them by arbitration legislation. The problem is the danger of the courts' statutory powers being abused by unscrupulous parties as a delaying tactic.

2.21 The drafters of the Model Law were well aware of this problem and gave careful attention to it. It is generally accepted that they achieved the right balance regarding the extent of the courts' powers and the time in the arbitration proceedings when they may be exercised. Even in England, which has traditionally been regarded as a jurisdiction where the courts have enjoyed excessive powers in the context of arbitration, there has been a clear and continuing trend since 1979 to curtail the powers of the courts. Zimbabwe, Kenya, New Zealand and India are examples of jurisdictions which recently replaced their previous arbitration statutes based on English models with the Model Law, also for domestic arbitrations. They did not regard the powers conferred on the courts by the Model Law as inadequate for purposes of domestic arbitration, although New Zealand60 and India61 did confer certain additional powers on the court.

2.22 The Project Committee has therefore generally followed the provisions of the version of the Model Law proposed by the Law Commission for international arbitrations in South Africa, in preference to the powers of the courts contained in the existing Arbitration Act of 1965.62 This

---

58 This comment was forcibly made by KRK Harding, the Secretary General of the Chartered Institute of Arbitrators, based in London, at an international arbitration conference held in Johannesburg during March 1997.

59 See the Commission's Report on International Arbitration para 2.288.

60 See the New Zealand Arbitration Act of 1996 s 6 and sch 2, clauses 4, 5 and 7. The powers contained in clauses 4 and 7 correspond to ss 8 and 20 of the Arbitration Act of 1965 and ss 10 and 37 of the Draft Bill with this Discussion Paper. As appears from the text below, the Project Committee is not in favour of the possibility of an appeal to the court on a question of law provided for by clause 5 of sch 2 of the New Zealand statute.

61 Compare s 37 of the Indian Arbitration Act 26 of 1996, which provides for a wider right of appeal to the courts on certain matters than is permitted by the Model Law.

62 Compare for example s 8 of the Draft Bill in this Discussion Paper with ss 3(2) and 6 of the 1965 Act regarding the enforcement of the arbitration agreement by the court. The general powers of the court under s 38 of the Draft Bill are more limited than those contained in s 21 of the existing Act. S 49(4) follows the example of the Model Law article 34(4) and the

approach also has the advantage of avoiding an unnecessary divergence between the law pertaining to international arbitration and that regulating domestic arbitration. However, the power of the court to extend certain time limits and the power of the court to give an opinion on a question of law during arbitration proceedings have been retained, subject to certain modifications.

2.23 The English Arbitration Act of 1996 retains the limited right of appeal to the courts on a point of law against an arbitral award, which was introduced by the Arbitration Act of 1979.63 This right of appeal is also found in New Zealand.64 It was introduced to compensate for the abolition of the judge-made rule of English law which enabled a court to set aside an award by reason of an error of law or fact on the face of the award.65 This rule has never been part of South African law.66 The legislature was invited 85 years ago to introduce this power, if it thought it to be necessary, an invitation which it has to date ignored.67 Other jurisdictions do not allow a court to review an arbitral award on its merits as this undermines the finality of arbitration. South African law does allow parties to provide in their arbitration agreement for a right of appeal to another arbitral tribunal.68 The Project Committee recommends that no change should be made to the law on this point.

(d) Guiding principles for a new domestic arbitration statute

2.24 The guiding principles on which the Draft Arbitration Bill discussed in the next Chapter of this Discussion Paper is based may be summarised as follows:

(a) The Draft Arbitration Bill endeavours to give effect to the objectives of a modern arbitration statute as set out in Chapter 1 paragraph (c) above.

(b) The Draft Arbitration Bill retains those provisions of the existing legislation which

---

English Arbitration Act of 1996 s 68(3)(a) by restricting the court's power to remit the award. Compare s 32 of the existing Act. See also s 1(c) of the Draft Bill which follows article 5 of the Model Law by providing that in matters governed by the Draft Bill the court may not intervene except as provided by the Draft Bill.

63 See the Arbitration Act of 1996 s 69 and the Arbitration Act of 1979 s 1(2)-(8). The right may be excluded by the parties in their arbitration agreement.

64 See the New Zealand Arbitration Act of 1996 sch 2 clause 5.

65 See the English Arbitration Act of 1979 s 1(1).

66 S 20 of the Arbitration Act 42 of 1965 does allow a question of law to be referred to the court for an opinion prior to the award. This provision is retained in modified form as s 37 of the Draft Bill.

67 See ***Dickenson & Brown v Fisher's Executors*** 1915 AD 166 at 177-81, especially at 180.

68 See the Arbitration Act 42 of 1965 s 28 and s 45 of the Draft Bill in this Discussion Paper.

have worked well in practice, with appropriate modifications to ensure the achievement of the objectives of a modern arbitration statute.

(c) The Draft Arbitration Bill seeks to achieve a high degree of commonality with the relevant provisions of the proposed Draft International Arbitration Bill, particularly as regards the powers of the court and the powers of the arbitral tribunal.

(d) Because of problems presently experienced in South African arbitration practice, the Draft Bill contains provisions based on the English Arbitration Act of 1996. These provisions impose duties on the arbitral tribunal and the parties and confer additional powers on the arbitral tribunal to ensure that the arbitration is conducted fairly but without unnecessary delay and expense.

2.25 It must be emphasised that the proposals of the Project Committee in the Draft Bill discussed in the next chapter of this Discussion Paper are of a preliminary nature only and are intended to elicit comments and criticism. The Project Committee sees this Discussion Paper as part of a consultation process with all interested parties. Once comments have been received and considered by the Project Committee, the committee will be able to make definite proposals to the Law Commission on which of the three alternative approaches69 should ultimately be adopted as the basis for a new domestic arbitration statute for South Africa, and as to its contents.

(e) Other matters for consideration

2.26 There are three further matters on which the Commission specifically invites comment.

The influence of the Bill of Rights on the powers of the court to review arbitral proceedings

2.27 The Project Committee has considered the possible implications of the Bill of Rights in the Constitution on arbitration legislation, particularly in the context of the powers of the court to review the arbitral tribunal's conduct of the proceedings. This issue has been raised in several reported decisions,70 but does not seem to have caused any serious difficulties.

---

69 See paras 1.9-1.17 for these alternatives.

70 See ***Patcor Quarries CC v Issroff*** 1998 4 SA 1069 (SE); ***Carephone (Pty) Ltd v Marcus NO*** 1999 3 SA 304 (LAC) which concerned a statutory arbitration; ***Portnet (A Division of Transnet Ltd) v Finnemore*** [1999] 2 BLLR 151 (LC) which concerned a private labour arbitration.

Arbitration provisions in other legislation

2.28 Certain other legislation, for example, the Labour Relations Act 66 of 1995, makes provision for statutory arbitration. Some of its provisions are based on the existing Arbitration Act 42 of 1965.71 The possible effect of changes to the law in a new domestic arbitration statute on arbitrations under the Labour Relations Act may require consideration.

Confidentiality

2.29 In recent years, the confidentiality of arbitration proceedings has received the attention of the English and the Australian courts. Whereas the privacy of the arbitration hearing has been accepted, the basis of any duty of confidentiality and the extent of the exceptions to any such duty have been the subject of conflicting decisions.72 In a recent English decision, it was accepted that an obligation of confidentiality is a natural element of an arbitration agreement, which is limited by certain exceptions.73

2.30 Where there is a duty of confidentiality in relation to arbitration proceedings under South African law, whether as a natural element of the arbitration agreement or as an express term of the arbitration agreement, it is clear that the duty is subject to important exceptions.74 The Commission concluded in its Report on International Arbitration75 that the development of the law regarding the extent of the exceptions is likely to be influenced by the Bill of Rights in the Constitution76 and that it seems neither possible nor desirable to attempt to formulate these

---

71 See eg the grounds for reviewing arbitral awards in s 145 which are based on s 33 of the Arbitration Act.

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

73 See ***Ali Shipping Corp v Shipyard Trogir*** [1998] 2 All ER 136.

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

75 See para 2.287.

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

exceptions comprehensively in legislation. This consideration is an important additional reason for agreeing with the conclusion of the Saville Reports in England that the further development of the law on confidentiality of arbitration proceedings is at this stage best left to the courts.77

appear to be opposed to the principles of the privacy of the arbitration hearing and the confidentiality of the result, s 34 is subject to s 36 ("Limitation of rights").

77 See the 1996 Saville Report paras 9-17 and 384 and the Departmental Advisory Committee on Arbitration Law ***Supplementary report on the Arbitration Bill (1997 Saville Report***) para 44.

CHAPTER 3

COMMENTARY ON DRAFT BILL

CHAPTER 1

General Provisions

S 1 General principles

3.01 S 1 follows s 1 of the English Arbitration Act of 1996 by setting out the principles on which the Draft Bill is based. The principles, particularly the first, concerning the object of arbitration, are not intended as empty rhetoric.78 Therefore the section commences with the statement that the provisions of the Draft Bill are founded on the three principles and are to be interpreted accordingly.

3.02 Examples of provisions specifically directed at giving effect to the stated object of arbitration are s 27 (the general duty of the arbitration tribunal), ss 28-30 (giving wider powers to the arbitral tribunal to give effect to that duty), s 33 (the general duty of the parties), s 34 (the arbitral tribunal's enhanced powers in the event of a party's default) and s 53 (the power to limit recoverable costs).

3.03 S 1(b) reflects the principle of "party autonomy". Arbitration is a consensual method of resolving disputes. Therefore, to get the benefits of the flexibility of the process, parties should generally be free to decide how the arbitration should be conducted, and mandatory provisions are therefore restricted to those which are necessary in the public interest.79

3.04 The proposed legislation follows the example of the Model Law80 and the English Arbitration Act of 1996 by restricting the powers of the court, particularly supervisory powers and powers of interference. The court's powers are not only more restricted than those available under the 1965 Act, but the proposed legislation also aims to discourage applications to court

---

78 See Butler (1998) 15; Saville M "An Introduction to the 1996 Arbitration Act" (1996) 62 ***JCI Arb*** 165-166; the 1996 Saville Report para 18.

79 See eg s 27 (the general duty of the arbitral tribunal and certain of the court's powers).

80 See article 5 and the Commission's Report on International Arbitration paras 2.7 and 2.116-2.117.

from being abused by a party intent on delaying the arbitral process.

3.05 In those aspects of arbitration covered by the Draft Bill, the Bill follows the Model Law (article 5) by emphasizing that the court's powers are restricted to those contained in the Act.

S 2 Definitions

3.06 The definitions in s 2 are mainly based on those in s 1 of the 1965 Act.

3.07 Following the English Arbitration Act of 1996, the term "arbitration proceedings" has been replaced by *"arbitral proceedings"*. Consideration was given to simply referring to "proceedings" instead of "arbitral proceedings". However, the Draft Bill also refers to "legal proceedings",81 "conciliation proceedings"82 and "proceedings which are a prerequisite" to arbitral proceedings.83 To promote clarity, it therefore appears preferable to retain the term "arbitral proceedings".

3.08 The definition of *"arbitration agreement"* in the 1965 Act is less specific than that contained in the Model Law as regards the requirement of an agreement in writing. The definition in the Model Law basically requires the agreement to be signed by the parties or to be contained in an exchange of documents. The definition in the 1965 Act simply requires a "written agreement" without requiring that agreement to be signed by the parties. An oral arbitration agreement is not invalid but falls outside the Arbitration Act and is regulated by the common law.84 The existing definition does not seem to have caused any problems in practice.85 The definition in the Draft Bill86 has nevertheless been amended to bring it into line with that proposed in the Draft International Arbitration Bill.87

3.09 Two extensions are proposed in the Draft International Arbitration Bill to the definition of an arbitration agreement contained in article 7 of the Model Law. These extensions were made to deal with problems relating to arbitration clauses in certain bills of lading and the situation where

---

81 See for example s 8.

82 See ss 12 and 15.

83 See s 10(1).

84 See Butler & Finsen 38.

85 See the discussion in Butler & Finsen 37-41; ***Mervis Brothers v Interior Acoustics*** 1999 3 SA 607 (W) 610 D-G.

86 S 2(1)(ii) read with s 2(2).

87 See s 2(1) and sch 1 article 7 of the Draft International Arbitration Bill.

a contract is concluded orally or by conduct in response to a written order or with reference to written terms which include an arbitration clause.88 Similar additions have been included in the Draft Arbitration Bill annexed to this Discussion Paper.89

3.10 An arbitration agreement for purposes of the Draft Arbitration Bill can in principle be concluded by e-mail, as a "means of telecommunication which provide[s] a record of the agreement".90

3.11 Consideration could possibly be given in the context of domestic arbitration to following the example of New Zealand91 and widening the definition of an arbitration agreement to include an oral agreement. However, it can be argued that because of the important consequences of an arbitration agreement, the parties should in the interest of legal certainty be required to have a written agreement if they wish to enjoy the benefits of the arbitration legislation. Comment is invited on this question.

3.12 In view of the inconsistent use of the terms "conciliator" and "mediator" in practice, a definition of *"conciliation"* and *"conciliator"* has been included, particularly for purposes of ss 12-15 of the Draft Bill to make it clear that those provisions also apply to mediation and a mediator.

3.13 The definition *"specified authority"* refers to the authority specified in terms of the International Arbitration Act and assumes that the relevant provision will be implemented in the form recommended by the Commission. The "specified authority" has two functions under the International Arbitration Bill recommended by the Law Commission. First, the authority must appoint the arbitral tribunal and secondly it must appoint a conciliator where the parties are unable to agree on the appointment, or where the mechanism which they have designated for this purpose has failed to function.92 The function of making default appointments under the existing arbitration legislation is vested in the court.93 In the context of an international arbitration, this can cause considerable delay and expense. The Commission therefore

---

88 See the Commission's Report on International Arbitration paras 2.131-2.133.

89 See s 2(1)(ii). S 2(1)(ii)(b) is wide enough to include an oral agreement with reference to terms that are in writing. This possibility also appears to be covered by the current definition in s 1 of the 1965 Act. See Butler & Finsen 39, citing ***Zambia Steel & Building Supplies Ltd v James Clark & Eaton Ltd*** [1986] 2 Lloyd's Rep 225 (CA).

90 See s 2(2) and Hill R "On-line Arbitration: Issues and Solutions" (1999) 15 ***Arbitration International*** 199 at 200-201, with reference to article 7 of the Model Law.

91 See the New Zealand Arbitration Act 99 of 1996 sch 1 article 7(1).

92 See the Draft International Arbitration Act s 11(1) and sch 1 articles 6(2) and 11(3) and (4) and the Commission's Report on International Arbitration paras 2.124-2.127.

93 See s 12 of the Arbitration Act 42 of 1965.

recommended that the appointment should be made by an appropriate arbitral institution. To ensure that the appointing authority is independent and sufficiently representative, the Commission recommended that the authority should be specified by the Chief Justice.94 Although the delay and expense resulting from an appointment by the court may be less in a domestic as opposed to an international context,95 the function to be performed is still administrative rather than judicial. It therefore appears more appropriate for the function to be performed by the specified arbitral institution rather than the court. The Commission invites comment on this issue.

3.14 The definition of *"tribunal"* replaces the definition "arbitration tribunal" in the existing legislation. The definition makes it clear that an arbitrator appointed as a member of the tribunal must be a natural adult person.96 The reason for the exclusion of an umpire from the definition is discussed below.97

3.15 S 2(3) contains a technical description of when a dispute is deemed to have been referred to arbitration for purposes of s 7, which deals with the effect of the death or insolvency of a party on an arbitration agreement and arbitration proceedings.

S 3 Application of Act

3.16 S 3(1) corresponds to s 40 of the existing Act of 1965. Its effect is to apply the Draft Bill to so-called "statutory arbitrations", where parties to a dispute are compelled to refer that dispute to arbitration by reason of a statutory provision. Save to the extent that the other statute provides otherwise, the Draft Bill applies to the statutory arbitration as if the statutory provision were an arbitration agreement.

3.17 S 3(2) is a new provision necessitated by the proposed introduction of a dual arbitration regime in South Africa for domestic and international arbitrations. S 3(2) stipulates that the Draft Bill does not apply to an arbitration subject to the proposed International Arbitration Act. The latter contains a corresponding provision (s 3) which excludes an international commercial arbitration from the application of the Arbitration Act of 1965.

---

94 See the Commission's Report on International Arbitration para 2.128.

95 In an international context, an important cause of expense and delay can be the need to serve papers concerning the court application in another jurisdiction, particularly if the papers first have to be translated. See the Commission's Report on International Arbitration para 2.126.

96 See Butler & Finsen 70 n 2 for the position of minors as arbitrators under the common law.

97 See paras 3.53-3.54 below.

4. This Act binds the State

3.18 S 39 of the existing Arbitration Act also binds the State, except in the case of an arbitration agreement between the State and the government of a foreign country or any undertaking which is wholly owned and controlled by such government. It was considered unnecessary to include this exception in s 4 of the Draft International Arbitration Act, because the latter statute is only intended to apply to international *commercial* arbitrations.

3.19 Although it may seem illogical to repeat the exception from s 39 of the 1965 Act in a statute intended primarily for domestic arbitrations, the limitation of the Draft International Arbitration Act to commercial matters may create a problem. An arbitration between the State and another state in a commercial matter will fall under the Draft International Arbitration Act. An arbitration in a non-commercial matter, for example relating to boundaries or territory, would not. The two states are free to agree the procedure which is to govern their arbitration, but in the absence of the exception under discussion, the State, being bound by the Draft Bill annexed to this Discussion Paper, could arguably not exclude its peremptory provisions in that arbitration agreement. The Commission invites comment on the necessity or desirability of retaining the exception.

S 5 Matters subject to arbitration

3.20 S 5(1) repeats s 2(a) of the 1965 Act which prohibits arbitration[98] in respect of "any matrimonial cause or any matter incidental to any such cause". An exception has however been added to s 5(1) of the Draft Bill, in the case of a property dispute not affecting the interests of any child of the marriage. The possibility of resolving matrimonial property disputes through conciliation or mediation has never been doubted. It could be argued that the policy objections to private adjudication of matrimonial disputes which affect the rights of minor children[99] do not necessarily apply to disputes regarding matrimonial property disputes where the interests of minor children are not involved. The Commission invites comment on this question.

3.21 S 5(2) and (3) of the Draft Bill replace the prohibition on arbitration in matters relating to status in s 2(b) of the 1965 Act with provisions which are identical to those contained in s 7 of the Draft International Arbitration Act. The proposed provision should be easier to apply and is more

98 The exclusion of arbitration logically also applies to an oral arbitration agreement. See ***Pitt v Pitt*** 1991 3 SA 863 (D) 864H-J.

99 See ***Ressell v Ressell*** 1976 1 SA 289 (W) 292A-B.

in keeping with the provisions in modern arbitration statutes in other jurisdictions.100 The references to "the public policy *of South Africa*" and "any other law *of South Africa*" are understandable in a statute governing international arbitration. Their purpose is to make it clear that restrictions on arbitrability in a foreign jurisdiction, which have no counterpart in South Africa, will not prevent the resolution of disputes relating to such issues by arbitration in South Africa. The Draft Bill annexed to this Discussion Paper will however apply to an arbitration concerning a non-commercial matter. For this reason, it appears desirable to retain the words "of South Africa" in the two places where they occur in s 5(2), although the Draft Bill is primarily intended for domestic arbitration.

3.22 S 5(2) makes it clear that s 5 does not define comprehensively what disputes are arbitrable and that another law can therefore impose restrictions on arbitrability. In terms of s 5(3), this result is not achieved merely by conferring jurisdiction on a court or other tribunal to determine any matter. An interesting example, because of its constitutional implications, is the possible interaction between s 5(3) and the Draft Administrative Justice Bill, which will empower the High Court and certain Magistrates' Courts to review administrative action. On the wording of s 5(3), this would not, by itself, preclude the entity whose administrative action is challenged and the party whose rights were affected by such action from agreeing that the validity or invalidity of the action should be determined by arbitration. Public policy considerations, however, may arguably require a different interpretation.101 The Commission invites comment on this and other possible examples of matters which should be regarded as non-arbitrable.

---

100 See the Commission's Report on International Arbitration paras 2.40-2.50. The wording of s 5(2) is based on article 1020(3) of the Netherlands Arbitration Act of 1986, rather than that of the new German Arbitration Act of 1998 article 130(1). An example of a matter which the parties would arguably not be capable of resolving by agreement or arbitration is the question as to whether a registered patent is invalid. It has been argued that because the patent has been registered, the question as to its validity may not only affect the rights of parties to the agreement. See Simms DP "Arbitrability of Intellectual Property Disputes in Germany" (1999) 15 ***Arbitration International*** 193 at 196.

101 It could be argued that the public interest in open democracy precludes arbitration because arbitration hearings are normally regarded as private and the results of an arbitration as confidential. This objection could however be met by the public interest exception to the principle of confidentiality. See paras 2.29-2.30 above regarding the confidentiality of arbitration awards.

CHAPTER 2

The Arbitration Agreement

S 6 Binding effect of arbitration agreement

3.23 S 6(1) repeats s 3(1) of the 1965 Act to the effect that unless the arbitration agreement provides otherwise, the agreement is not capable of being terminated except by the consent of all the parties to that agreement. S 6(1) makes it clear that this principle is subject to the court's limited power in s 8 not to enforce the arbitration agreement, unless the court is satisfied that "the arbitration agreement is null and void, inoperative, or incapable of being performed".

3.24 The discretionary power of the court in s 3(2) of the existing Act to set aside or refuse enforcement of an arbitration agreement on good cause shown has been provisionally omitted for two reasons: first to be consistent with the suggested narrower discretion of a court to refuse a stay of legal proceedings under s 8 below; and secondly because of the special protection envisaged for consumers who are parties to consumer arbitration agreements in terms of s 55 of the Draft Bill.102

S 7 Effect of death or insolvency of a party

3.25 This provision combines s 4 of the 1965 Act (dealing with the death of a party) and s 5 of the same Act (dealing with the insolvency or winding-up of a party), in a single section, in the interest of brevity. The provision gives effect to a proposal in a Draft Bill submitted to the Law Commission by the Association of Arbitrators in 1994. No change in the substance of the provisions is intended. The project committee intends to simplify the wording of this section in the next version of the Draft Bill.

S 8 Stay of legal proceedings where there is an arbitration agreement

3.26 This section is based on s 6 of the 1965 Act, but the court's discretion to refuse to stay the court proceedings to allow the dispute to be referred to arbitration has been curtailed.

3.27 The court can refuse a stay under s 6(2) of the present statute if it is satisfied that there is a "sufficient reason" why the matter should not be referred to arbitration. The courts have

---

102 See paras 3.162 –3.165 below.

decided that the test is the same as that for "good cause" for ordering that an arbitration agreement should be set aside or should cease to have effect under s 3(2) of the 1965 Act. In both cases, once it is established that there is a valid arbitration agreement covering the dispute, the onus is on the party seeking to avoid arbitration to persuade the court to exercise its discretion in that party's favour.103 On the whole, the courts have been supportive of arbitration in exercising their discretion under ss 3 and 6,104 but there are instances where the court has appeared to be unnecessarily ready to exclude arbitration and to tackle the dispute itself.105

3.28 The reasons for proposing the more restricted discretion are as follows. First, it would mean that the same standard is applied for both domestic and international arbitration. Secondly, the standard would be in line with generally accepted international standards.106 Thirdly, the present South African provisions date from a time when the courts were less supportive of arbitration. Fourthly, a powerful argument in favour of a wider discretion to refuse a stay in the context of domestic arbitrations is the need to protect consumers against arbitration clauses in standard-form contracts in situations where they may be in an unequal bargaining position. This problem has been addressed by including a separate provision in the Draft Bill (s 55) to deal with arbitration agreements entered into by consumers.107

3.29 Probably the strongest argument against the proposed change concerns the situation where the danger exists that the same issue of fact or law will have to be decided in different fora, giving rise to the possibility of conflicting decisions. This has been one of the grounds on which the courts have in the past declined a stay.108 The problem is aggravated by the impossibility of providing a statutory provision for the consolidation of arbitration proceedings, without undermining the principle of party autonomy. See further the commentary on s 11 of the Draft Bill below.

---

103 See Butler & Finsen 64-65.

104 See generally the cases referred to by Butler & Finsen 65-67.

105 See ***Sera v de Wet*** 1974 2 SA 645 (T); Christie RH "South Africa as a Venue for International Commercial Arbitration" (1993) 9 ***Arbitration International*** 153 at 154-157, who states that the philosophy underlying ss 3(2) and 6 of the current statute may be unkindly caricatured as "nanny knows best".

106 See article 8 of the Model Law and s 9 of the English Arbitration Act of 1996. The original intention of giving the English court a wider discretion to refuse a stay in the context of domestic arbitrations was subsequently abandoned and the relevant provision was not brought into operation. See the 1997 Saville Report paras 47-49 regarding why s 86 was not brought into operation.

107 See para 3.163- 3.164 below.

108 See ***Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd*** 1971 2 SA 388 (W) 393G-394D; ***Yorigami Maritime Construction Co Ltd v Nissho-Iwai Co Ltd*** 1977 4 SA 682 (C) 693G-694A; ***Universiteit van Stellenbosch v JA Louw (Edms) Bpk*** 1983 4 SA 321 (A) 335G-336D, 344B-C; Butler & Finsen 65.

3.30 As an alternative to applying for a stay under s 6 of the 1965 Act, it is at present possible to raise the arbitration agreement as a special defence under the common law.109 It is not entirely clear whether this possibility will be excluded by s 1(c) of the Draft Bill in the case of an arbitration agreement covered by the Draft Bill. However, if the proposal in s 8 of the Draft Bill is accepted, the party seeking to enforce the arbitration agreement will be well advised to use the statutory remedy because of the court's curtailed discretion to decline a stay.

3.31 The court is obliged by s 8(2) of the Draft Bill to decline a stay unless "the court is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed".110 Retaining the exact terminology used in the New York Convention, the Model Law and the English Arbitration Act of 1996 has two advantages. The South African law pertaining to international arbitration in both commercial and non-commercial matters will be identical to that applying to domestic arbitration on this point. Furthermore South African courts will have the benefit of considering foreign case law regarding the application of the phrase to ensure that the court's discretion is exercised in line with international standards.

S 9 Reference of interpleader issue to arbitration

3.32 S 7(2) of the 1965 Act, dealing with interpleader proceedings, was based on s 5 of the English Arbitration Act of 1950.111 The Saville Committee, when drafting the English Act of 1996 took the opportunity to make a stay of court proceedings mandatory in line with the New York Convention "as well as trying to express the provision in simpler, clearer terms".112 Although the Draft Bill is intended to apply to domestic arbitrations, the discretion of the court to disallow arbitration in s 9(1) of the Draft Bill has been brought into line with the court's more limited discretion to decline a stay of court proceedings generally, where a dispute is covered by an arbitration agreement, as proposed in s 8(2) of the Draft Bill.

3.33 In s 9(2) of the Draft Bill, "prerequisite" has been substituted for the English term "condition precedent".

---

109 ***Universiteit van Stellenbosch v JA Louw (Edms) Bpk*** 1983 4 SA 321 (A) 329H.

110 See further Mustill MJ & Boyd SC ***Commercial Arbitration*** 2 ed Butterworths London 1989 464-5 and Van den Berg AJ ***The New York Arbitration Convention of 1958*** Kluwer Deventer 1981 154-61 for the meaning of this phrase. Van den Berg 158 states that the word “inoperative” can be deemed to cover those cases where the arbitration agreement has ceased to have effect. He states that the words “incapable of being performed” would seem to apply in cases where the arbitration cannot effectively be set in motion. He gives as examples the case where the arbitral clause is too vaguely worded or the situation where the sole arbitrator named in the agreement refuses to accept the appointment (159).

111 See Butler & Finsen 68.

112 See the 1996 Saville Report para 58.

S 10 Power of court to extend time fixed in arbitration agreement for commencing arbitral proceedings

3.34 This section is based on s 8 of the Arbitration Act, but with amendments to deal with two problems which have been identified in the wording of s 8.113 There is some doubt from the case law as to whether the court may for example under the existing s 8 extend the time limit for commencing conciliation proceedings which are a prerequisite for arbitration. The wording has been broadened to make it clear that the section is intended to cover this sort of situation.

3.35 The second problem was that on a literal interpretation of the term "any claim" in s 8, the concession provided for by the section was only available to the dilatory claimant in arbitration proceedings. However, it has happened that the party who would be the defendant in the arbitration proceedings has let the time limit for referring the dispute to arbitration expire without requiring the dispute to be referred to arbitration.114 The wording has been extended to make it clear that the court may also assist the prospective defendant in arbitration proceedings.

3.36 The standard set by the section for an extension of time is that of "undue hardship" which was also used in the English Arbitration Act of 1950. The term has been applied in South Africa as interpreted by the English courts.115 The way in which the English courts applied the test has given rise to dissatisfaction in England in that the courts were perceived by some to be using the provision to interfere with the bargain that the parties had made and that the interpretation given to the words "undue hardship" arose at a time when the courts "were flirting with the idea that they enjoyed some general power of supervisory jurisdiction over arbitrations".116

3.37 The Saville Committee were of the view that the English courts' interpretation had insufficient regard to party autonomy and therefore decided that the power to extend time limits should be restricted to three cases. The first is where the circumstances were such as were outside the reasonable contemplation of the parties when they agreed the provision and it would be fair to extend the time limit. The second is where the conduct of one party made it unjust to hold the other to the time limit. The third is where the respective bargaining position of the

---

113 See Butler (1994) 27 ***CILSA*** 138-9; Annexure B, Commentary to s8.

114 See ***Administrateur, Kaap v Asla Konstruksie (Edms) Bpk*** 1989 4 SA 458 (C).

115 See Butler & Finsen 117. The leading English case in this regard is ***Moscow V/O Exportkhleb v Helmville Ltd (The Jocelyne)*** [1977] 2 Lloyd's Rep 121 at 129.

116 See the 1996 Saville Report par 67. The same idea seems to have influenced the court in the ***Asla Konstruksie*** case.

parties was such that it would be unfair to hold one of them to the time limit.117 The third case was regarded as a stituation calling for consumer protection which is dealt with elsewhere in the English Arbitration Act of 1996.118

3.38 In s 12 of the English Arbitration Act of 1996, the court may now only extend the time limit in the first two cases referred to in the previous paragraph. The court's power in s 10 of the Draft Bill annexed to this Discussion Paper has been similarly restricted.

S 11 Consolidation

3.39 It is not possible to provide for a statutory court-ordered power of consolidation of arbitration proceedings in the absence of an agreement between all the parties involved, providing for consolidation, without violating the principle of party autonomy. S 11 of the Draft Bill therefore follows s 10 of the Draft International Arbitration Act and s 35 of the English Arbitration Act of 1996 by emphasizing that it is up to the various parties to separate arbitration proceedings arising from separate agreements to make their own arrangements for either consolidated proceedings or for concurrent hearings leading to separate awards. Consolidation or joint hearings could be facilitated in practice where the arbitration agreements are subject to the same institutional rules which make provision for the possibility of consolidated or multi-party arbitrations.119

3.40 This is not the only approach to the problem of consolidation. In the Netherlands, the court has the power to order consolidation.120 In New Zealand, arbitral tribunals have statutory powers to order consolidation, and if a tribunal refuses or fails to exercise that power on the application of a party the power may be exercised by the court.121 It must however be emphasized that these provisions violate the principle of party autonomy and can lead to increased court involvement.

CHAPTER 3

---

117 See the 1996 Saville Report para 71.

118 See ss 89-91.

119 See Diamond A "Multiparty Arbitrations – A Plea for a Pragmatic Piecemeal Solution" (1991) 7 ***Arbitration International*** 403-409 and Bernstein R, Tackaberry J & Marriott AL ***Handbook of Arbitration Practice*** 3 ed Sweet & Maxwell London 1998 322 and 842 regarding the rules of the London Maritime Arbitrators' Association. See further regarding consensual solutions to the problem Hanotiau B "Complex – Multicontract-Multiparty – Arbitrations" (1998)14 ***Arbitration International*** 369-394.

120 See the Netherlands Arbitration Act of 1986 article 1046; See too Annexure B, Commentary Part 3.

121 See the New Zealand Arbitration Act 99 of 1996 sch 2 clause 2. This provision applies to a domestic arbitration unless the parties otherwise agree (s 6(2)).

Conciliation pursuant to an arbitration agreement

3.41 Sections 12-15 of the Draft Bill are based on sections 11-14 of the Draft International Arbitration Act. Because of the consensual basis of conciliation and mediation, there has to date been little support in submissions to the Commission for legislation regulating conciliation and mediation.122 The proposals in the Draft Bill are therefore restricted to dealing with certain problems which may arise regarding conciliation proceedings in the context of an arbitration agreement. These problems were identified during the Commission's investigation into international arbitration and may be summarised as follows:

> "(a) the need for court or other assistance in the appointment of a conciliator where the parties cannot agree on an appointment;
>
> (b) the question whether or not a person who has been involved as conciliator should be able to continue as arbitrator if the conciliation attempt fails;
>
> (c) the effect of conciliation attempts on the running of prescription; and
>
> (d) the enforcement of a settlement reached by conciliation, particularly outside the jurisdiction where the settlement was reached."123

3.42 There are, moreover, two policy arguments in favour of including limited provisions on conciliation in South Africa's proposed new domestic arbitration statute.124 First, it is notorious that commercial arbitrations are often protracted and very expensive. Therefore disputants who are interested in resolving their dispute as opposed to delaying payment should logically consider conciliation as their first option. The inclusion of some provisions on conciliation would indicate an official policy supportive of the cost-effective and expeditious resolution of commercial disputes through conciliation. Secondly, conciliation as a method of dispute resolution is apparently more in keeping with traditional African methods of dispute resolution than the

---

122 This appears from the responses to Discussion Paper 69 ***Arbitration: A Draft International Arbitration Act for South Africa*** and Issue Paper 8 ***Alternative Dispute Resolution***.

123 See the Commission's Report on International Arbitration para 2.78.

124 See the Commission's Report on International Arbitration para 2.79.

adversarial procedure of the (English) common law.125

3.43 Only a brief comments on the conciliation provisions are provided in this Discussion Paper. A more detailed discussion is contained in the Commission's Report on International Arbitration.126 The term "conciliator" in these provisions is defined in s 1 of the Draft Bill to include a "mediator".

S 12 Appointment of conciliator

3.44 S 12(1) of the Draft Bill deals with the situation where there is an agreement between parties to an arbitration agreement providing for conciliation and the parties are unable to agree on a conciliator or their contractual mechanism for the appointment of a conciliator has failed to function. S 12(1) provides for this function to be performed by the chairperson of the specified authority.127 Consideration will need to be given to the desirability of retaining the role of the specified authority in s 12 in the context of domestic conciliation proceedings. If the conciliator is required in a place outside one of the major centres, the specified authority may very well not have a suitable conciliator who is locally available. Nevertheless, it is likely that the High Court would at least be equally reluctant to appoint a conciliator in these circumstances.

3.45 The purpose of s 12(2) is referred to in the commentary on s 13 below.

3.46 The purpose of s 12(3) is to provide a safeguard against conciliation proceedings being used as a delaying tactic by a party who has no intention of agreeing to a settlement. The period for achieving a successful outcome has been shortened form the three-month period in s 11(3) of the Draft International Arbitration Act to four weeks. The latter period appears more appropriate in the context of domestic dispute resolution.

3.47 The indemnity provided by s 24 of the Draft Bill also applies to an arbitrator acting as conciliator and to the specified authority when appointing a conciliator.

S 13 Power of arbitral tribunal to act as conciliator

---

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

126 See paras 2.74-2.94 of the Report.

127 See para 3.13 above regarding the term "specified authority".

3.48 The provisions of ss 13 and 12(2) of the Draft Bill are aimed at addressing some of the problems which may occur where the same person acts as both arbitrator and conciliator in respect of the same dispute. Although objections may be raised on dogmatic grounds128 to what have been referred to as "med-arb" and "arb-med", the same person may only act in both capacities with the consent of the parties. Before giving that consent the parties are taken to have decided that the potential benefits regarding the savings in time and costs outweigh the potential disadvantages.

S 14 Settlement agreement

3.49 An agreement achieved through conciliation can be enforced through the courts as a contractual obligation. The Draft International Arbitration Act incorporates article 30 of the Model Law providing for a settlement agreement concluded after the arbitral tribunal has been appointed to be made an award on agreed terms.129 This enables the settlement to be enforced as an award. There is no equivalent provision in the Draft Bill annexed to this Discussion Paper. Article 30 does not cover a settlement made before the tribunal has been appointed. S 13 of the Draft International Arbitration Act fills this gap by providing that a settlement agreement achieved through conciliation by parties to an arbitration agreement may be enforced as if the settlement were an award on agreed terms.

3.50 S 14 of the Draft Bill annexed to this Discussion Paper is intended to fulfil a similar function. It is necessary to consider whether there is a definite need for such a provision in the context of a domestic arbitration statute. It is also necessary to consider whether the efficacy of s 14 is in any way affected by the absence of an express provision, corresponding to article 30 of the Model Law, for an award on agreed terms.

S 15 Resort to arbitral proceedings

3.51 Where an arbitration agreement expressly provides for conciliation of any dispute covered by that agreement as a prerequisite for the commencement of arbitration, the court may well be prepared to regard submission to conciliation in terms of that provision as sufficient to regard the claim as one which has been subjected to ***arbitration***. This will delay the completion of

128 Turley IF "The Proposed Rationalisation of South African Arbitration Law" 1999 ***TSAR*** 235 at 244 is of the view that despite party autonomy, any clause in an arbitration agreement that contemplates the arbitrator also acting as conciliator should be overridden by legislation. However, in civil-law systems judges are expected to promote and engage in settlement negotiations. Turley's concerns would therefore appear exaggerated to a lawyer from a civil-law procedural tradition.

129 See the Draft International Arbitration Act sch 1 article 30.

prescription under s 13(1)(f) of the Prescription Act 68 of 1969.130 To promote certainty, however, s 15 makes it clear that the party may resort to arbitration, notwithstanding the requirement for conciliation, if this is considered necessary to delay the completion of prescription.

CHAPTER 4

The arbitral tribunal

3.52 The changes recommended by the Association of Arbitrators' 1994 proposal to the equivalent chapter of the current statute were limited to rectifying known defects of a technical nature in the corresponding provisions of the 1965 Act. However, in the light of the recommendation that the UNCITRAL Model Law should be adopted for international arbitrations by South Africa and the substantial differences between the wording of the English Arbitration Act of 1996 (influenced by the Model Law) and the provisions of the former English Arbitration Act of 1950 regarding the arbitral tribunal, the desirability of more drastic changes needs to be considered.

3.53 First, it is necessary to consider the position of the umpire under the current statute: is the umpire sufficiently used in practice to justify the premise of the 1965 Act that, where the parties decide not to use a single arbitrator, their preference is for two arbitrators and an umpire rather than three arbitrators? (The essential difference between an umpire and a third arbitrator is that whereas the third arbitrator is a member of a tribunal of three, the umpire takes no part in the decision-making process until the two arbitrators cannot agree. Then the umpire has sole authority to decide the point, to the exclusion of the two arbitrators.)131 The Saville committee considered "whether the peculiarly English concept of an umpire should be swept away in favour of the more generally used chaired tribunal".132

3.54 In practice, an umpire in a complex arbitration may be asked to attend the hearings to keep him- or herself abreast of evidence and submissions in case the arbitrators should disagree on a procedural issue or their award, making it necessary for the umpire to give a ruling or award. If there is no disagreement between the arbitrators, the expense of the umpire attending the proceedings will have been unnecessary. The umpire will be at least as experienced and

---

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

131 See ***Kannenberg v Gird*** 1966 4 SA 173 (C) 179A-B; Butler & Finsen 91-2.

132 See the 1996 Saville Report para 94.

knowledgeable as the two arbitrators. The logic of keeping the most experienced person in reserve for the situation where the other two cannot agree, is questionable. Where the parties desire that the tribunal should comprise more than one arbitrator, it is greatly preferable to provide for a tribunal of three arbitrators with a majority decision.133 The project committee therefore recommends that statutory provision for an umpire should be abolished and the Draft Bill annexed to this Discussion Paper has been drafted accordingly. The same approach has been followed in New Zealand.134 The parties may still agree to a tribunal of two arbitrators, with provision for an umpire in case of disagreement, if this is what they want. The Commission invites comment on this issue.

3.55 Secondly, the draft legislation on the tribunal and its appointment has been more logically arranged and brought more into line with the provisions of the Model Law.

3.56 Thirdly, the imposition of a statutory duty on the arbitrator (see s 27 of the Draft Bill) implies the existence of the right of an arbitrator to resign, particularly where the parties by their conduct make it objectively impossible for the arbitrator to comply with this statutory duty. It is therefore necessary to regulate the consequences of the resignation between the parties and the arbitrator where this matter is not dealt with by an agreement between the arbitrator and the parties.

---

133 See Butler & Finsen 92.

134 See the New Zealand Arbitration Act 99 of 1996 sch 1 article 10 and sch 2 clause 1; Williams DAR "Arbitration and Dispute Resolution" 1998 ***New Zealand LR*** 1 14; New Zealand Law Commission **Arbitration** NZLC R20 1991 para 320.

S 16 Number of arbitrators

3.57 S 16(1) follows article 10(1) of the Model Law by stating that the parties are free to agree on the number of arbitrators. S 16(2) then re-enacts s 10 of the 1965 Act by providing for one arbitrator where there is no agreement to the contrary.

3.58 S 16(3) amends s 11(1) of the 1965 Act by making provision, in the absence of an express contrary agreement on this point, for an additional arbitrator where the panel consists of an even number and by providing that the third arbitrator will act as chairperson of a tribunal of three, rather than as an umpire. If parties desire an umpire, they must make express provision for this in terms of the proposed amendment.

S 17 Appointment of arbitrators

3.59 This section mainly concerns the appointment of the tribunal where the parties have not provided their own procedure in the arbitration agreement or by reference to institutional rules and is based mainly on s 16 of the English Arbitration Act of 1996. S 17(2) again makes clear that, contrary to the position under the 1965 Act, a provision for a tribunal of three arbitrators will be given its ordinary meaning and not be treated as provision for two arbitrators and an umpire, unless the use of an umpire is specified.

3.60 In the case of multi-party arbitrations, the parties will have to agree on their own procedure for appointing the tribunal or make use of institutional rules for this purpose, failing which it will be necessary to approach the specified authority under s 19 to appoint the tribunal.

S 18 Power to appoint in case of default

3.61 This section replaces s 10(2) and (3) of the 1965 Act. It is a separate section, so that default appointments are clearly separated from the normal procedure dealt with in s 17. The further amendments are mainly of a technical nature. The chairperson of the specified authority135 may set aside an appointment under this section at the request of the party in default, so that that party may be given another opportunity to participate in the appointment of the tribunal notwithstanding the party's default.

---

135 Under s 10(3) of the current statute and s 17(3) of the English Arbitration Act of 1996, this power is vested in the court. See para 3.13 above as to why it is proposed to vest this power in the chairperson of the specified authority.

S 19 Power of specified authority to appoint an arbitrator

3.62 This section replaces s 12 of the 1965 Act, which gave the court the power to appoint an arbitrator where there was a vacancy or failure to appoint in specific cases. It was unclear, on a literal interpretation of s 12, whether it covered the case where an appointing institution or other person agreed to by the parties had failed to function. The new provision clearly covers this situation.136 The reason why it is proposed that the power to make appointments under this section should be vested in the chairperson of the specified authority has been discussed above.137

3.63 Like the corresponding provision of the Model Law (article 11(5)), s 19(4) provides that the decision of the chairperson is final and not subject to appeal. The main justification for this provision is to prevent an appeal against the chairperson's decision being abused as a delaying tactic.

S 20 Revocation of arbitrator's mandate

3.64 S 20 is mainly based on s 23 of the English Arbitration Act of 1996. S 20(2)(a) allows the parties to terminate the arbitrator's appointment by agreement. S 20 (like s 13(1) of the 1965 Act) confirms the usual position that the arbitrator's mandate cannot be terminated without the consent of all the parties to the arbitration. However, it is increasingly common for arbitration rules to provide for a challenge procedure, if a party is dissatisfied with the arbitrator appointed by the other party or by the institution. S20(2)(b) makes it clear that the appointment can therefore be validly revoked by the institution where the parties have agreed to the challenge procedure.

3.65 S 20(3) follows the English statute by requiring the revocation of an arbitrator's mandate by the parties to be in writing, except where the termination results from the termination of that arbitration agreement itself. In the interests of legal certainty, therefore, revocation is normally required to be in writing. However, although an arbitration agreement is required to be in writng, there are no formalities for its cancellation and the Saville Committee regarded it as unrealistic to require a written revocation in such circumstances.138

---

136 See Butler 1994 ***CILSA*** 145.

137 See para 3.13 above.

138 See the 1996 Saville Report para 99.

3.66 S 20(4) provides expressly that s 20 does not detract from the court's statutory powers to terminate the arbitrator's appointment or to remove an arbitrator from office.

S 21 Power of court to remove arbitrator

3.67 S 13(2) of the 1965 Act allows the court to remove an arbitrator "on good cause shown", with delay on the part of the arbitrator being the only specific example given. S 21 follows the example of the Model Law139 in setting out the grounds for removal and restricting applications for removal to those grounds.

3.68 The two grounds in s 21(a) and (b) are those provided for the challenge of an arbitrator under article 12(2) of the Model Law. In the equivalent s 24(1)(a) of the English Act of 1996, the ground for removal is restricted to lack of impartiality. The Saville committee predicted that alleged lack of independence would be a fruitful source of disputes (eg if an arbitrator and a party representative were barristers from the same set of chambers) and concluded that lack of independence was only a problem if it led to justifiable doubts regarding impartiality.140 The proposal of the project committee follows the wording of the Model Law which is also in accordance with the wording of the Constitution.141

3.69 S 20(c) follows s 24(1)(c) of the English Act and attempts to give a more concrete meaning to the term "becomes de jure or de facto unable to perform his duties" in article 14 of the Model Law.

3.70 In line with article 14(1) of the Model Law, there is no right of appeal against a court's decision regarding the removal of an arbitrator.

3.71 S 21(2) is based on s 24(2) of the English Act. It provides that the court may only be approached after any right to a challenge (to an arbitral institution) under the arbitration agreement has first been exercised. S 21(3), based on s 24(3) of the English Act gives the tribunal the discretion to continue with the arbitration and to make an award notwithstanding the fact that the application for removal is pending.

---

139 See articles 12(2) and 14(1) of the Model Law.

140 See the 1996 Saville Report paras 101-104.

141 See s 34 of the Constitution, Act 108 of 1996, which provides for the resolution of disputes which can be resolved by the application of law to be decided by the courts or, where appropriate, by "another *independent and impartial* tribunal".

3.72 These provisions are included to discourage the abuse of an application for removal as a delaying tactic.

S 22 Resignation of arbitrator

3.73 The existing Arbitration Act is silent regarding the possibility of the arbitrator resigning and the understanding in practice is that the arbitrator has no such right.

3.74 S 27 of the Draft Bill, following s 33 of the English Act, imposes a general duty on the tribunal to conduct the arbitration without unnecessary expense and delay. The powers which the tribunal has for this purpose are however subject to the agreement of the parties. Clearly, the parties could not bring a successful application for the arbitrator's removal on the basis of delay, if their own agreed procedure is the cause of that delay. However, the Saville committee was of the opinion that in an extreme case the arbitrator should have the right to resign.142

3.75 Where the parties are not able to agree with the arbitrator what the financial consequences of that resignation should be, it will be necessary for the court to intervene to resolve the matter. This is the purpose of s 22, based on s 25 of the English Act of 1996.

3.76 S 22 needs to read with s 24 of the Draft Bill dealing with the immunity of arbitrators. S 24 protects an arbitrator against liability "for any act or omission in the discharge or purported discharge of that arbitrator's functions". Where the arbitrator resigns just before the hearing, causing financial loss to the parties, such act does not appear to be one in the purported discharge of that arbitrator's functions and appears to fall outside s 24. Thus the court is empowered to exempt the arbitrator who has resigned from liability under appropriate circumstances under s 22(2)(a).

S 23 Filling of vacancy

3.77 The Arbitration Act of 1965 contains several provisions on the filling of vacancies, eg ss 10(1), 11(2) and 12(6). S 23 follows the example of s 27 of the English Arbitration Act of 1996 (see too article 15 of the Model Law) by providing a single provision dealing with the filling of vacancies and the effect of the vacancy being filled on the proceedings to date.

S 24 Immunity of arbitrators and arbitral institutions

142 See the 1996 Saville Report para 115; See also Annexure B, Commentary Part 3.

3.78 This provision follows s 9 of the Draft International Arbitration Act. S 9 was recommended by the Commission because of possible uncertainty regarding the correctness of the traditional view that an arbitrator is not liable for negligence.143 Similar provisions have been included in arbitration statutes in several common-law jurisdictions, including the English Arbitration Act of 1996.144

3.79 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 Limited immunity is also proposed for arbitral institutions.

CHAPTER 5

Conduct of arbitral proceedings

S 25 Competence of tribunal to rule on its own jurisdiction

3.80 This provision is mainly based on article 16 of the Model Law. Unlike article 16 however, s 25(1) of the Draft Bill expressly provides that the tribunal's power to rule on its own jurisdiction is subject to the arbitration agreement. The corresponding provisions of the English Arbitration Act (ss 7 and 30) contain a similar qualification.

3.81 Section 25(2) confirms the principle of the severability of the arbitration clause from the main contract of which that clause forms part, thereby overruling the rejection of the principle in ***Wayland v Everite Group Ltd***.146 Its recognition is consistent with the Draft International Arbitration Act and the position in other jurisdictions.

3.82 S 25(1) of the Draft Bill in effect provides that questions regarding the jurisdiction of the

---

143 See the Commission's Report on International Arbitration paras 2.62-2.67. See also Butler & Finsen 101-2.

144 For a discussion of these provisions and the principle of statutory immunity see Oyre T "Professional Liability and Judicial Immunity" (1998) 64 ***JCI Arb*** 45-50; Yat-Sen Li J "Arbitral Immunity: A Profession Comes of Age" (1998) 64 ***JCI Arb*** 51-57.

145 See the 1996 Saville Report paras 131-136. See also Butler & Finsen 102-3.

146 1993 3 SA 946 (W). The decision dealt with an allegedly void main contract. The principle of severability was recognised in ***Van Heerden v Sentrale Kunsmis Korporasie (Edms) Bpk*** (1973 1 SA 17 (A)).

tribunal should usually be decided by the tribunal, but subject to court control. Where the tribunal rules on jurisdiction as part of an award, a party who contends that the tribunal lacked jurisdiction can challenge the award on that basis.147 The tribunal may however elect to decide the jurisdictional question by way of a preliminary ruling before making any award. If the tribunal makes a ruling that it has jurisdiction, s 25(5) then allows a party dissatisfied with that ruling to take it on review to the court. In exceptional circumstances, s 26 of the Draft Bill allows a jurisdictional issue to be referred straight to the court, without first obtaining a decision on jurisdiction from the tribunal.

3.83 S 25(7) of the Draft Bill provides that a decision by the court under s 25(5) is not subject to appeal. S 25(6) also gives the tribunal the discretion, as in the Model Law, to continue with the arbitration and to make an award. The Association of Arbitrators in 1994 recommended that this discretion should exist, unless the court otherwise directs (see s 5(6) of their Draft Bill). This qualification has been intentionally omitted. As in previous instances, these provisions are aimed at preventing the abuse of applications to court as a delaying tactic.

3.84 The degree of court control provided in s 25 corresponds to that in the Draft International Arbitration Act and the Model Law.

S 26 Determination of preliminary point of jurisdiction by court

3.85 A question as to the jurisdiction of the tribunal may, in certain circumstances, be referred directly to court by virtue of s 8 of the Draft Bill. This will occur if the plaintiff has instituted court proceedings and the defendant wishes to rely on an arbitration agreement. The grounds on which the court can refuse to stay the action to allow the matter to go to arbitration include a void arbitration agreement and an inoperative arbitration agreement. The court can therefore refuse a stay if it is satisfied that the tribunal would lack jurisdiction either because the arbitration agreement is void or because it is inoperative in that it does not cover the dispute which is the subject of the litigation.

3.86 In a different situation, the claimant in an arbitration may be aware that the respondent objects to the jurisdiction of the tribunal, without the respondent taking any part in the arbitration.148 The Saville Committee therefore stated:

---

147 See s 49(2)(a)(iii) of the Draft Bill.

148 In the view of the Saville Committee, the non-participating party cannot in justice be required to take any positive steps to challenge the jurisdiction, for that would make it necessary to assume (before the point has been decided) that the tribunal has jurisdiction. See the 1996 Saville Report para 141.

> "In such circumstances, it might very well be cheaper and quicker for the party wishing to arbitrate to go directly to the Court to seek a favourable ruling on jurisdiction rather than seeking an award [or preliminary ruling on jurisdiction] from the tribunal."149

3.87 The Saville Committee stressed that this approach would be very much the exception, and for this reason, the relevant section of the English Arbitration Act of 1996 is "narrowly drawn".150 One commentator is not persuaded that there is a cogent reason for distinguishing the case referred to by the Saville Committee from the situation where a party willingly participates in the proceedings before the arbitral tribunal for the purpose of disputing the jurisdictional point.151 Stringent conditions are imposed, particularly in section 32(2) of the English Act, to make sure that this method remains the exception and does not become the normal route for challenging jurisdiction.152

3.88 There is no equivalent to s 26 of the Draft Bill in the Model Law or in the Draft International Arbitration Bill. The role of the court is much more limited than that of the court under s 3(2) of the current statute.153 The role of the court under s 26 of the Draft Bill is restricted to deciding whether or not the tribunal has jurisdiction. The Commission invites comment on whether or not there is a need for the provision in a new domestic arbitration statute.

---

149 See the 1996 Saville Report para 141.

150 See the 1996 Saville Report para 141.

151 See Chukwumerije O "Judicial Supervision of Commercial Arbitration: The English Arbitration Act of 1996" (1999) 15 ***Arbitration International*** 171 178.

152 See the 1996 Saville Report para 147. These conditions are contained in s 26(2) and (3) of the Draft Bill annexed to this Discussion Paper.

153 See para 3.27 above.

S 27 General duty of tribunal

3.89 The crucial role of this new provision has been explained above.154 Failure to comply with the duty in s 27(1)(a) to act fairly can clearly lead the tribunal's removal from office under s 21 or to the setting aside of the award under s 49. Unnecessary delay by the tribunal in breach of the duty in s 27(1)(b) is also a ground for removal from office under s 21. A tribunal which is compelled by the parties' agreement to adopt procedures, which objectively speaking do not avoid unnecessary delay and expense, could resign.155 However, to encourage compliance with the duty to avoid unnecessary delay and expense, it may be necessary to make this a specific ground for setting aside the award where the breach of the duty has resulted in substantial injustice to a party.156

S 28 General powers of tribunal

3.90 S 28 of the Draft Bill replaces s 14(1) of the current statute and contains a number of refinements. One of the criticisms directed against s 14(1) of the 1965 Act was that, unlike the Model Law, it contained a list of specific powers, but no general principle as to the tribunal's powers to conduct the arbitral proceedings.157 This omission has been rectified by s 28(2) of the Draft Bill. This general power is subject to the arbitration agreement, and to the other provisions of the Draft Bill, particularly the tribunal's general duty in s 27.

3.91 The tribunal has been given a new power to direct a party to take interim measures for the protection of the subject matter of the dispute. This power is comparable to that enjoyed by the tribunal under the Model Law and the Draft International Arbitration Act.158 The power of the tribunal to grant interim measures is narrower than that conferred on the court by s 38 of the Draft Bill.

3.92 S 28(1)(a)(v) is a new power, based on section 38(6) of the English Arbitration Act of 1996, comparable to the power of the court to grant an Anton Piller order in s 38(1)(b) of the Draft Bill.159 The tribunal's power is more limited in that it can only be applied to a party.160

---

154 See para 2.11 above.

155 See the commentary on s 22 of the Draft Bill above.

156 See s 68(2)(a) of the English Arbitration Act of 1996 and compare the grounds for setting aside in s 49 of the Draft Bill.

157 See Butler 1994 ***CILSA*** 149.

158 Compare s 28(1)(a)(iv) of the Draft Bill with the Draft International Arbitration Act sch 1 article 17.

159 See para 3.119 below.

3.93 The tribunal is also given a new power, on good cause shown, to extend time limits imposed by the Draft Bill or the arbitration agreement on a party for taking any step in relation to the arbitral proceedings, even if the time limit has already expired.161 This power is also conferred on the court by s 58 of the Draft Bill. The main purpose of giving the power to the tribunal is to avoid the delay and expense involved in applications to court.

3.94 In s 28(1)(b)(ii) of the Draft Bill, the reference to "pleadings" in the context of describing the issues in dispute has been deleted. This is to emphasize the desirability of not simply imitating court procedures in an arbitration.

3.95 In s 28(1)(b)(iv) and (v) the reference to "any legal objection" has been replaced with "the defence of privilege". The change has been made to emphasize that a tribunal is not obliged to apply the usual rules of evidence, subject to the restrictions imposed by s 29 of the Draft Bill.

S 29 Power of tribunal to consider evidence

3.96 One purpose of this section of the Draft Bill is to remove any residual uncertainty as to whether the tribunal is obliged to apply the ordinary rules of evidence applicable in civil litigation.162 S 27 makes it clear that there is no such duty, but several safeguards are imposed. The section is subject to the tribunal's general duty in s 27(1)(a) and the requirements of substantive and procedural fairness. Additional restrictions regarding the reception of evidence can be imposed by the arbitration agreement.

3.97 One of the advantages of arbitration as opposed to litigation is the possibility of appointing a tribunal with special expertise concerning the subject matter of the dispute. This implies that the parties expect the tribunal to use this knowledge at least to some extent.163 However, misunderstandings on these matters can easily arise in practice. Therefore, in addition to the general safeguards regarding the reception and evaluation of evidence referred to above, s 29(b) of the Draft Bill obliges the tribunal to inform the parties in advance as to the extent to which it intends relying on its own inquiries and specialised knowledge. This gives the parties the opportunity to respond.

---

160 See the comments in para 201 of the (1996) Saville Report.

161 See s 28(a)(vi) of the Draft Bill.

162 See the discussion of this point in Butler & Finsen 219-222.

163 See Butler & Finsen 243-245.

S 30 Special powers of tribunal

3.98 S 30(1) is based on article 28(3) and (4) of the Model Law, which empower the tribunal to decide *ex aequo et bono* or as *amiable compositeur* if the arbitration agreement so provides. This terminology has been retained in the Draft international Arbitration Act. In the Draft Bill these expressions have been rendered as "the tribunal must determine any matter relating to the substance of the dispute on the basis of general considerations of justice and fairness". Most modern arbitration statutes now contain such a power. It is only available if the arbitration agreement so provides, and the tribunal is still obliged to decide all matters in accordance with the terms of the contract and after taking account of applicable trade usages. Where the tribunal has the power, it is under a duty to exercise it.164 Its use is not merely discretionary. Guidelines exist as to how the power should be exercised165 and it is up to the parties to decide whether or not they wish to confer it on the tribunal. The power is clearly "a far cry from the 'home-made law of the particular arbitrator'".166

3.99 Currently, the tribunal does not have the power to order security for costs unless this power is conferred on it by the parties.167 Following the position in the Draft International Arbitration Act,168 s 38(1)(c) of the Draft Bill, in contrast to s 21(1)(a) of the Arbitration Act of 1965, deprives the court of this power. Therefore, the tribunal, on application by the respondent in the arbitration, is given the power to order the claimant to provide appropriate security for the respondent's costs. As under s 38(3) of the English Arbitration Act of 1996, the tribunal does not have to apply the same criteria as the courts when exercising this power – the tribunal is not expected to be an expert in court practice. If this recommendation is implemented, it is anticipated that arbitration institutions will provide their arbitrators with guidelines as to how the discretion should be exercised.169

3.100 Currently, the tribunal does not have the power to call a witness in arbitral proceedings

---

164 See Christie RH "Amiable Composition in French and English Law" (1992) 58 ***JCI Arb*** 259 264.

165 See the article by Christie in the previous footnote and Butler & Finsen 254-255.

166 See Christie (1992) 58 ***JCI Arb*** 266.

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

168 See the Draft International Arbitration Act sch 1 article 17(2) and the Law Commission's Report on International Arbitration paras 2.152 and 2.187-2.191.

169 See Lew JDM "Introduction to the Work of the Arbitration Practice Sub-Committee" (1997) 63 *JCI Arb* 166-167 for the practice guide made available to its members by the Chartered Institute of Arbitrators in England regarding the tribunal's discretion to order security for costs under s 38 of the English Arbitration Act of 1996.

without the consent of the parties.170 Following the international trend,171 s 30(4) of the Draft Bill gives the tribunal the power to call a witness, including an expert, unless the arbitration agreement provides otherwise. The power is subject to the right of the parties to cross-examine that witness and to lead evidence in rebuttal. In the case on an expert, the power may be used by the tribunal to call a neutral expert, resulting in a considerable saving of time and costs.

S 31 Manner of arriving at decisions where the tribunal consists of two or more arbitrators

3.101 This section of the Draft Bill corresponds to s 14(3) and (4) of the current statute. Where the parties have expressly provided for a tribunal of only two members, thereby excluding the operation of s 16(3) of the Draft Bill regarding the appointment of a third arbitrator, all decisions of the tribunal must be made unanimously. Where the tribunal comprises more than two arbitrators, s 31(2) provides that a majority decision is sufficient. The Model Law (article 29) allows the chairperson to decide *procedural* questions if so authorised by the parties or all the members of the tribunal. Following the example of the LCIA Rules,172 s 31(2) provides that in the absence of a majority decision, the chairperson may decide all matters. This avoids the need to distinguish between procedural and substantive matters and promotes finality. It must be stressed that s 31(2) only applies in the absence of an agreement to the contrary. The power of the chairperson can therefore be excluded or modified in the arbitration agreement.

3.102 S 31(3) of the Draft Bill explains what is meant by a unanimous or majority award. Where the tribunal is required to award an amount of money, for example, the tribunal or a majority must agree on the precise amount and may not award an average or the least amount.173

---

170 See Butler & Finsen 241.

171 Regarding expert witnesses see article 26 of the Model Law.

172 See the 1998 LCIA Rules article 26.3.

173 This provision repeats s 14(4) of the current statute, which altered the common law. Under the common law the least amount would have been awarded. See Voet 4.8.19; Butler & Finsen 264 n 58.

S 32 Notice of proceedings to parties and right to representation

3.103 S 32(1) follows the UNCITRAL Model Law article 24(1) by spelling out that the tribunal is required to hold a hearing unless the parties have agreed on a documents-only arbitration. Seen from a party's perspective, the party is entitled to a hearing unless that party has agreed to a documents-only arbitration. This principle is probably implicit in the wording of s 15(1) of the current Arbitration Act but has now been expressly stated to promote certainty.

3.104 The LCIA Rules for international arbitrations (applying from 1 January 1998), in article 19(1), qualifiy this principle slightly by stating that "[a]ny party which expresses a desire to that effect has the right to be heard orally before the Tribunal on the merits of the dispute". The purpose of this rule is to emphasize that a party cannot remain silent and then exercise its right to an oral hearing at an inappropriately late stage of the proceedings.

3.105 The proposed provision in s 32(1) of the Draft Bill is in line with the internationally accepted standard and with the proposed provision in the Draft International Arbitration Bill sch 1 article 24(1). In the interests of uniformity and fairness the proposal seems preferable to s 34(2)(e) of the English Arbitration Act of 1996 which allows the tribunal to decide whether or not an oral hearing should be held unless the parties agree otherwise.

3.106 S 32(2) and (3) re-enact s 15(1) of the existing Arbitration Act of 1965, with minor refinements. A party is entitled to be represented at an arbitration by any person it deems suitable,174 subject to any restrictions in the arbitration agreement. As arbitration is not privatised litigation, that representative need not be a lawyer. Conversely, a party is entitled to legal representation unless restrictions are imposed in the arbitration agreement.

3.107 The manner of giving notice of the hearing is regulated by s 57 of the Draft Bill, subject to any special provisions in the arbitration agreement. The tribunal's powers if a party fails to attend a hearing, despite having been given due notice, are contained in s 34(3) of the Draft Bill.

174 See however 138(4) of the Labour Relations Act 66 of 1995, which imposes restrictions as to who may represent a party in arbitral proceedings before the CCMA.

S 33 General duty of parties

3.108 The intended function of this new provision, based on s 40 of the English Arbitration Act of 1996, has been discussed above.175

S 34 Powers of tribunal in case of party's default

3.109 The powers of the tribunal in the event of a party's default, contained in s 15(2) of the current statute, have been strengthened on the basis of s 41(1) to (4) of the English Arbitration Act of 1996, particularly where the claimant is the party in default. At present, an award would only be possible in favour of the defendant where the claimant has withdrawn from the proceedings, on the basis of evidence led by the respondent.176 If the proceedings are terminated without an award, the claimant could institute fresh proceedings on the same claim in the future. S 34(2) allows the tribunal to make an award in favour of the respondent dismissing the claim, without hearing evidence, subject to the strict safeguards imposed by the subsection.

S 35 Summoning of witnesses

3.110 The tribunal acquires its jurisdiction from the arbitration agreement. It follows that the tribunal has no powers in relation to persons who are not parties to that agreement. Arbitration statutes therefore customarily provide for court assistance for taking evidence, particularly from non-parties.177 S 35 of the Draft Bill therefore re-enacts s 16 of the current statute for this purpose, with one important change. Under s 35(1), a party may only subpoena a witness with the permission of the tribunal or the agreement of the other parties. This change is consistent with the Draft International Arbitration Act.178 The change represents a move away from party control over the evidence which it presents to support its case, in line with the international practice of giving the tribunal greater control over what evidence is presented.179

S 36 Recording of evidence

---

175 See paras 2.14-2.15 above.

176 See Butler & Finsen 160. See also ***Wilton v Gatonby*** 1994 4 SA 160 (W) for an instance where an arbitrator purported to make an award in favour of the claimant by reason of the respondent's absence without considering evidence.

177 See article 27 of the Model Law.

178 See the Draft International Arbitration Act sch 1 article 27(1).

179 See the Commission's Report on International Arbitration paras 2.214-2.119; the English Arbitration Act of 1996 s 44(4).

3.111 S 36 of the Draft Bill re-enacts s 17 of the Arbitration Act of 1965. It recognises the principle of party autonomy, by allowing the parties to agree on the manner and the extent to which oral evidence should be recorded, having regard to the amount in dispute and the complexity of the dispute. In the absence of an agreement, the tribunal has a duty to decide how the evidence should be recorded, after consultation with the parties.

3.112 The section implies that in the absence of such an agreement or ruling, the tribunal's own notes of the oral evidence will form the official record of that evidence.

3.113 There is no right of appeal against a tribunal's award, unless the parties have provided for such a right in their arbitration agreement. The main functions of the record are therefore to assist the parties in making submissions to the tribunal on the basis of the evidence and to assist the tribunal in making its award.

S 37 Statement of case for opinion of court or counsel during arbitral proceedings

3.114 This section corresponds to section 20 of the existing Arbitration Act. Although the current provision can fulfil a useful role in practice, the danger of it being abused as a delaying tactic has been evident for some time.180 The amendments are designed to prevent this abuse.

3.115 In terms of the proposed amendments, a party can no longer apply to court for the court's consent to refer a question of law to the court. A question of law may only be referred to court or counsel if both parties agree or if the tribunal, on the application of a party, so directs. If the tribunal incorrectly refuses an application, this may in appropriate circumstances constitute a ground for setting aside the award under s 49 of the Draft Bill. The purpose of s 37(3) is to provide a stricter test for referring the question of law to the court than is currently the case.181

3.116 At present, there is some uncertainty as to whether or not parties can validly contract out of s 20 of the existing statute, although it was probably intended to be mandatory.182 S 37(4) of the Draft Bill only allows parties to contract out of s 37 once the dispute has arisen and once the tribunal has been appointed. In England and New Zealand, the right to refer a question of law to the court under their equivalent statutory provisions can be excluded in an agreement to

---

180 See Butler 1994 ***CILSA*** 141; Annexure B, Commentary to s 23.

181 See also the English Arbitration Act of 1996 s 45 and the New Zealand Arbitration Act 99 of 1996 sch 2 clause 4. For the present test see eg ***Administrator, Transvaal v Kildrummy Holdings Ltd*** 1978 2 SA 124 (T) 127H-128A; Butler & Finsen 209.

182 See Butler & Finsen 210-211.

refer future disputes to arbitration. The purpose of s 37(4) of the Draft Bill is to prevent standard-form arbitration agreements providing for the exclusion of section 37. By requiring an agreement to exclude s 37 to be entered into after the appointment of the tribunal, the disputants will then know whether their tribunal is qualified to determine the sort of legal point likely to be raised in the course of their particular arbitration.

S 38 General powers of court

3.117 S 38 of the Draft Bill may be compared with s 21 of the current statute and s 44 of the English Arbitration Act of 1996, which, unlike its South African counterparts, is a contract-out provision.

3.118 In comparison with s 21 of the current statute, the powers of the court to decide procedural matters, which are more properly left to the tribunal, have been restricted. The court's existing power to order discovery has been intentionally omitted183 and the power to order security for costs, in line with the Draft International Arbitration Act (sch 1 article 9(2)(b)), has been expressly excluded. However, the court's powers to grant interim measures to ensure that the arbitral proceedings are ultimately effective have been strengthened. The court may ensure that an award which may ultimately be made is not rendered ineffective by the dissipation of assets.

3.119 S 38(1)(b) empowers the court to order the preservation of evidence. It is based on s 44(1)(b) of the English Arbitration Act of 1996 and enables the court to grant an Anton Piller184 order in arbitration proceedings.185 This power is subject to the safeguards imposed by s 38(2) of the Draft Bill referred to below and must be compared with the tribunal's power in s 28(1)(a)(v), discussed above. There is no equivalent provision in the Draft International Arbitration Act.

3.120 S 38(2) imposes certain conditions before the court can grant an order under s 38(1). This provision is based on the Draft International Arbitration Act sch 1 article 9(2). It is designed to ensure that parties do not unnecessarily involve the court when the matter can be effectively dealt with by the tribunal.186

---

183 This power was included in s 21 of the current statute under influence of s 12(6)(b) of the English Arbitration Act of 1950. This power was repealed in England during 1990, in advance of the 1996 Act. See Butler 1994 ***CILSA*** 142.

184 This remedy derives its name from the English case in which it was first granted, namely ***Anton Piller KG v Manufacturing Processes Ltd*** [1976] 1 All ER 779 (CA).

185 See the 1996 Saville Report para 21.4; Harris B, Planterose R & Tecks J ***The Arbitration Act 1996*** Blackwell Oxford 1996 179.

186 For a detailed discussion, see the Commission's Report on International Arbitration paras 2.140-2.158.

S 39 Offences

3.121 S 39 of the Draft Bill re-enacts s 22 of the current statute with minor amendments of a technical nature.

CHAPTER 6

The award

S 40 Time for making award

3.122 This provision replaces s 23 of the current statute. It appears that the legislature saw the purpose of s 23 as being to encourage the tribunal to proceed to a final award as quickly as circumstances permit.187 The main problem with s 23 is that the period for making the award commences to run at the latest from when the tribunal starts hearing evidence or entertains submissions from the parties as to the conduct of the matter.188 In practice, the tribunal can be prevented from making the award before the expiry of the time limit by delays which are entirely the responsibility of the parties. S 40 of the Draft Bill therefore provides that the period for making the award will only start to run from the conclusion of the hearing, or from receipt of the parties' final submissions in the case of a documents-only arbitration. The period for making the award can be extended by the parties or by the court. The tribunal's power to extend time limits under s 28(1)(a)(vi) of the Draft Bill has no application, as it only applies to steps to be taken by the parties.

187 See Butler 1994 ***CILSA*** 154-156 for a detailed discussion of s 23 and its origins; Annexure B, Commentary on s 26.

188 See ***Van Zijl v Von Haebler*** 1993 3 SA 654 (SE) 664F.

S 41 Award to be in writing

3.123 As under the current statute, an award is required to be in writing and signed by all the members of the tribunal. S 41(2), dealing with the situation where only a majority sign, is wider than s 24(2) of the 1965 Act, which only treats signature by the majority as sufficient in a situation where a minority *refuses* to sign. The wording in s 41(2) of the Draft Bill follows article 31(1) of the Model Law, by treating majority signature as sufficient as long as the reason for the failure of the other member to sign is stated. It will therefore also cover the case where an arbitrator dies or becomes incapacitated after the hearing has been completed.

3.124 Under the present law, the tribunal is not required to furnish reasons for the award.189 Following the internationally accepted standard and the position adopted in the Draft International Arbitration Bill,190 the award is required to state the reasons on which it is based, unless the parties agree that no reasons need be given.

S 42 Delivery of award

3.125 S 25 of the current statute requires the award to be "published" to the parties by the tribunal delivering it in the presence of the parties or after they have been summoned to appear. There is no equivalent provision in arbitration statutes in other jurisdictions. S 25 was apparently introduced into the current statute "to reflect a supposed 'rule of practice' applying to all judicial and quasi-judicial proceedings".191 The moment of publication is of practical importance as it marks the commencement of the six-week period within which court proceedings to review the award must normally be launched.

3.126 The publication ceremony seems to have little real purpose and merely results in additional delay and expense where the parties and the tribunal come from different towns, some distance apart. S 42 of the Draft Bill therefore replaces s 25 of the current statute with a new provision regarding delivery based on s 55 of the English Arbitration Act of 1996. The provisions regarding delivery are subject to the tribunal's lien under s 51(4) for payment of its fees. The parties may agree how the award is to be delivered. Failing such agreement the tribunal must deliver the award by serving copies on the parties in the manner provided by s 57 of the Draft Bill. Service must be effected without delay after the award is made.

---

189 See ***Schoch NO v Bhettay*** 1974 4 SA 860 (A) 865D-E; Butler 1994 ***CILSA*** 157-158.

190 See the Draft International Arbitration Act sch 1 article 31(2).

191 See Butler 1994 ***CILSA*** 158-160; Annexure B, Commentary on s 28.

S 43 Interim or provisional awards

3.127 An interim award deals with only some of the substantive issues in dispute but is final on the issues it decides. The power to make an interim award is a useful one as it may enable the tribunal to deal with the substantive issues in dispute in logical stages. S 43(1) of the Draft Bill therefore retains the provision on interim awards (s 26) of the current statute.

3.128 The English Arbitration Act of 1996 now also makes provision for provisional awards, on a contract-in basis (see s 39). A provisional award is fundamentally different from an interim award in that the former makes "provisional or temporary arrangements, which are subject to reversal when the underlying merits are finally decided by the tribunal".192 A similar power has been included in s 43(2)-((4) of the Draft Bill. There is no equivalent provision in the Model Law.

3.129 In terms of the proposal, the tribunal only has the power to make a provisional award if the parties so agree. This agreement must be drafted with care. The power is also subject to the tribunal's duties in s 27 of the Draft Bill. Subject to these safeguards, the Saville Committee concluded that the power to make a provisional award "could serve a very useful purpose, for example in trades and industries where cash flow is of particular importance".193 The Commission invites comment on this subject.

S 44 Specific performance

3.130 This provision repeats s 27 of the current statute. Regarding the application of s 27 in practice see ***Mervis Brothers v Interior Acoustics***.194

S 45 Award to be binding

3.131 This section restates s 28 of the current statute to remove a potential ambiguity and to reflect the case law. S 28 states that unless the arbitration agreement provides otherwise, an award is final and not subject to appeal. This could create the impression that the parties can create a right of appeal to the courts in their arbitration agreement, an interpretation correctly rejected by the courts.195 S 45 of the Draft Bill makes it clear that the parties by agreement can

192 See the 1996 Saville Report para 202.

193 See the 1996 Saville Report para 203.

194 1999 3 SA 607 (W) at 610G-613E, 614 E-G.

195 See ***Goldschmidt v Folb*** 1974 1 SA 576 (T) 576G-577D and ***Blaas v Athanassiou*** 1991 1 SA 723 (W) 724C-I.

only create a right of appeal to another arbitral tribunal. S 45 is however subject to a court's power to review an award under s 49 of the Draft Bill.

S 46 Interest on amount awarded

3.132 This provision repeats s 29 of the current statute. It is intended to deal with the situation where an amount of money is awarded, without any provision being made in the award for interest. The award will then bear interest at the same rate as a judgment debt *from the date of the award*. The section has no application to an award where interest has been awarded. Problems could arise in applying this section to an award of damages, where no interest is awarded. In terms of s 2A of the Prescribed Rate of Interest Act 55 of 1975, an unliquidated claim, once determined by an arbitrator, bears interest *from the date the claimant commences arbitral proceedings,* unless the parties agree otherwise. S 46 of the Draft Bill appears to need clarification to deal with this.

3.133 Another possible problem is the meaning of the term "date of the award". There is a distinction between the making of the award (see ss 40 and 41) and its delivery to the parties (s 42).196 An award is made when it is signed by the tribunal. The award must normally be delivered to the parties without delay after it has been made (see s 42(b)). However the tribunal has a lien on the award to secure the payment of its fees (s 51(4)), which takes priority over its duty to deliver the award (s 42). The effect appears to be that if there is a delay between the making of an award for a liquidated amount and the delivery of the award, the "date of the award" for purposes of s 46 should be the date on which the award is made. The Commission invites comment on these issues.

S 47 Power of tribunal to correct errors in award and make additional award

3.134 The power of the tribunal in s 30 of the current statute to correct errors of a technical nature in its award is rather narrow by modern standards.197 S 47(1) of the Draft Bill now gives the tribunal the power to correct an arithmetical error, even if the fact that an arithmetical error has occurred does not appear from the award. The tribunal is also given the power to clarify an ambiguity in its award.198 This power to correct genuine ambiguities is not intended to open up

---

196 See the commentary on s 42 above regarding the significance of the date of delivery.

197 See Butler 1994 ***CILSA*** 160-161; Annexure B, Commentary to s 33.

198 The term "clarify an ambiguity" has been taken from s 57(3)(a) of the English Arbitration Act of 1996. This expression is less open to misunderstanding than the corresponding phrase "interpretation" of the award in article 33(1)(b) of the Model Law.

an avenue for disguised appeals on the merits. The power under s 47(1) is limited to situations where the award does not reflect the tribunal's original intention clearly or correctly. The power may be exercised by the tribunal on the application of a party or on its own initiative, but is subject to strict time limits.

3.135 S 47(4) gives the tribunal, on the application of a party, the power to make an additional award in respect of claims presented in the arbitration but omitted from the award. This power, derived from article 33(3) of the Model Law, compensates in part for the reduction in the court's power to order remittal in s 49(3) of the Draft Bill.

S 48 Remittal of award by the parties

3.136 The Draft Bill substantially curtails the power of the court to remit an award to the tribunal compared to the position under s 32 of the current statute.199 The court's power to remit an arbitral award is now contained in s 49(4) of the Draft Bill. S 48(1)-(3) retain the provisions of s 32 of the current statute regarding remittal of the award pursuant to an agreement between the parties. These provisions are retained as they offer, in appropriate circumstances, a way of avoiding a court application for setting aside the award and of eliminating defences to an application for the enforcement of the award.

3.137 Section 48(4) has been added mainly to facilitate the operation of sections 49(1) and 50(4) of the Draft Bill, regarding periods for which certain grounds for attacking awards or resisting enforcement of awards are available.

S 49 Application for setting aside as exclusive recourse against award

3.138 The project committee proposes that the sections of the current statute dealing with the enforcement of the award by the court (s 31) and remittal and setting aside of an award by the court (ss 32 and 33) should be replaced by new provisions based on the Model Law. Following the order of the Model Law, s 49 of the Draft Bill deals with setting aside, and s 50 is the equivalent of articles 35 and 36 of the Model Law, dealing with setting aside and the grounds on which enforcement may be refused.

3.139 The main reason for the project committee's proposal is the following problem with the

---

199 See the commentary on s 49(4) of the Draft Bill below.

1965 Act. S 31 gives the court, on application, the discretionary power to make an award an order of court. The section is however silent as to the grounds on which enforcement may be refused. S 33 empowers the court, on application, to set aside an award on four specified grounds. Applications for setting aside must usually be brought within 6 weeks of the publication of the award, subject to the court's discretion under s 38 of the 1965 Act to extend this period. The losing party in an arbitration presently has a choice between active and passive remedies.200 The active remedy of setting aside is only available on specified grounds and must be resorted to within a specified period. The passive remedy of opposing an application for enforcement is logically not subject to time limits, because the decision to use it depends, in part, on whether or not the successful party seeks to enforce the award.

3.140 The main problem with s 31 is however the lack of clarity regarding the grounds on which enforcement may be opposed, or on which the court could refuse enforcement of its own motion. It is, for example, unclear from the Act whether enforcement may be resisted because of a gross procedural irregularity, not involving corruption, after the six-week period for bringing an application for setting aside has expired.201 (Compare the solution to this problem adopted by the German version of the Model Law, discussed below.) On the one hand, it can be argued that a party wishing to rely on this ground must use the active remedy, and failure to do so will result in abandonment of that ground.

3.141 On the other hand, as part of the price paid for court support the arbitral process, a court should not be required to enforce an award which is clearly tainted by a serious procedural irregularity in the arbitral process. It is also unclear what other grounds are available for resisting enforcement, in addition to those in s 33, to the extent that the latter may be available. This potentially creates additional opportunities for parties to resist enforcement of an award as a delaying tactic. The Model Law, in effect, addresses these problems by as far as possible keeping the grounds for setting aside and the grounds for refusing recognition and enforcement the same. The drafters of the Model Law, while wanting to have one exclusive active remedy for attacking the award (setting aside), were clear that this did not deprive a party from defending enforcement proceedings initiated by the other party.202

3.142 In adapting articles 34 and 36 of the Model Law for use in an arbitration statute to replace

---

200 See Butler & Finsen 274.

201 See the discussion in ***Van Zijl v Von Haebler*** 1993 3 SA 654 (SE) 658J-659J.

202 See the Commission's (UNCITRAL) Report A/40/17 of 21/08/1985 para 274 (in Holtzmann HM & Neuhaus JE in ***A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*** Kluwer Deventer 1989 997).

the 1965 Act, it is necessary to have regard to the spheres of application of the new statute. The new statute will apply to domestic arbitrations, as well as to an international arbitration held in South Africa in a non-commercial matter. Enforcement of an award in an arbitration held outside South Africa, be it in a commercial or a non-commercial matter, would in all likelihood be sought under the provisions of the International Arbitration Act designed to give effect to the New York Convention.203 However, where an international arbitration is held in South Africa in a non-commercial matter, both the enforcement and the setting aside of an award could be sought under the new (domestic) statute.

3.143 S 49 of the Draft Bill follows article 34 of the Model Law, as adapted for the International Arbitration Act, with certain stylistic changes, which attempt to make it more compatible with the language of the draft domestic arbitration statute. In substance, it does not differ appreciably from the grounds for setting aside available under s 33 of the 1965 Act,204 but furthers the goal of parallelism between the domestic and international arbitration statute.205

3.144 The period for bringing applications for setting aside, except in the case of fraud or corruption, has been shortened from three months under the Model Law to six weeks of delivery of the award, following the present statute, as being more appropriate for domestic arbitration. Where an award has been corrected or substituted under s 47 or 48, the six weeks runs from delivery of the corrected or substituted award by virtue of ss 47(5) and 48(4).

3.145 S 49(4) retains the limited role for court-ordered remittal consistent with article 34(4) of the Model Law. It is proposed that remittal should cease to be an independent active remedy available from the court and the court should only be able to grant it on the same grounds which justify setting aside. Under s 32(2) of the current statute, remittal is available "on good cause shown", which includes the grounds for setting aside.206 The English courts extended this concept to include "procedural mishaps" which would not have justified setting aside.207 In such instances, it could not be said that there was a substantial injustice. The court was in effect interfering in the arbitral process agreed to by the parties.208 As a result, under s 68(3) of the English Arbitration Act of 1996 the court may only order remittal where there has been a serious

---

203 See ss 16-20 of the Draft International Arbitration Act.

204 See the Commission's Report on International Arbitration para 2.261.

205 See para 2.24 above.

206 See Butler & Finsen 287-289.

207 See eg ***King v Thomas McKenna Ltd*** [1991] 1 All ER 653 (CA); Butler & Finsen 289.

208 See the 1996 Saville Report paras 281 and 282.

irregularity that would justify setting aside.

3.146 S 49(5) adopts the partial definition of "public policy" inserted in the proposed South African version of the Model Law for international arbitration.

S 50 Enforcement of award by court and refusal of enforcement

3.147 The more fundamental changes to the existing law proposed by the project committee are to be found in s 50 of the Draft Bill, which will replace s 31 of the 1965 Act. S 50(2) of the Draft Bill, unlike s 31 of the existing Act, makes it clear that enforcement of the award must be ordered unless one of the grounds justifying setting aside is present. These are the only defences to enforcement. S 50(3) retains a useful power derived from s 31(2) of the present Act, enabling the court to correct minor and obvious errors of a technical nature in the award, before ordering enforcement.

3.148 S 50(4) is a crucial provision. It is based mainly on article 1060 of the new German Arbitration Act of 1998, the German version of the Model Law for both international and domestic arbitration.209 Two features of the German provision have been adopted. First, parallelism between the grounds for setting aside and the grounds on which enforcement may be refused is achieved by incorporating the grounds for setting aside by reference, rather than repeating them verbatim. As under the Model Law and the New York Convention, the proof of a ground justifying refusal of enforcement gives the court a discretion to refuse enforcement ("*may* be refused"). Dismissal of the application for enforcement is not compulsory.

3.149 Secondly, reference was made above to time limits on the use of grounds for setting aside as defences to an application for enforcement of an award. The German legislature appears to have found a neat solution to this problem in the context of *domestic* arbitral awards,210 by distinguishing between the less serious grounds for setting aside, which a party must prove211 and those grounds which are so serious (non-arbitrability and public policy) that the court may apply them on its own motion without proof being furnished by the applicant for setting aside.212 In the context of the Draft Bill, s 49(5) gives a partial definition of public policy for this purpose,

---

209 See the translation in "The New German Arbitration Law" (1998) 14 ***Arbitration International*** 1 at 15.

210 Article 1060 applies to the enforcement of domestic awards. Compare article 1061 which applies the New York Convention to foreign awards.

211 See s 49(2)(a) of the Draft Bill corresponding to article 34(2)(a) of the Model Law.

212 See s 49(2)(b) of the Draft Bill corresponding to article 34(2)(b) of the Model Law.

to include serious procedural irregularities and fraud and corruption. The less serious grounds are only available, if the application for enforcement is brought within the period allowed for bringing an application for setting aside. This compels the unsuccessful party in an arbitration to make use of the active remedy of setting aside to rely on these defences, unless the successful party applies to enforce the award within the period during which the less serious grounds for the active remedy are still available.

3.150 Unlike article 36(1)(a)(v) of the Model Law, s 50(4) presently makes no reference to the situation where an award has already been set aside under s 49. The reason is that in a domestic context,213 once the award has been set aside there is no award to enforce.

3.151 Section 50(5) is based on article 36(2) of the Model Law, and deals with the problem of an application for enforcement being brought by the successful party in the arbitration while an application for the setting aside of the award is already pending.

CHAPTER 7

Remuneration of tribunal and costs

S 51 Remuneration of arbitrators

3.152 This section is based on s 34 of the current statute with two changes. The section refers to the remuneration of arbitrators, rather than to the remuneration of the tribunal. This is because, in the case of a tribunal with more than one member, the arbitrators will usually contract individually with the parties for their fees. Particularly where members of the tribunal are drawn from different professions, they may have different fee structures.

3.153 S 51(1) makes it clear that an arbitrator can protect his or her fees against taxation by agreeing the amount of those fees with the parties. In practice, the arbitrator will agree an hourly or daily rate. A party, although agreeing to the rate, may be of the view that the amount of time spent by the arbitrator on, for example, preparing for the hearing or preparing the award is excessive. There is at present uncertainty as to whether those fees are taxable under s 34(1) of the existing statute under these circumstances. The first change in s 51 is to make it clear that only the agreed tariff of fees cannot be attacked on taxation. The fees are therefore subject to

213 See the ***Law Commission's Report on International Arbitration*** para 3.9 n 12 regarding the position in an international context.

reduction on taxation where they are excessive.

3.154 In ***Miller v Kirsten*** it was held that the arbitrator's right to sue the parties for payment of his or her fees is governed by the principles of the contract of mandate. Therefore, where two parties jointly give a mandate to the arbitrator they are not jointly and severally liable for the arbitrator's fees.214 The second change in s 51 of the Draft Bill is the insertion of s 51(5) which provides that the parties are jointly and severally liable for payment of the arbitrator's fees. The provision is based on s 28(1) of the English Arbitration Act of 1996, which is a mandatory provision.

S 52 Costs of arbitral proceedings

3.155 This section mainly repeats s 35 of the current statute. There is at present one particular problem regarding costs awards in arbitral proceedings. Our courts will currently interfere with the way in which the tribunal exercises its statutory discretion on costs under s 35 of the 1965 Act, if the tribunal fails to exercise that discretion in the same way as a court.215

3.156 A ***bona fide*** mistake of law by the tribunal in making an award of costs will lead to that award being set aside or remitted, whereas a ***bona fide*** mistake of law is no basis for a court to interfere with an award on the merits of the dispute. This distinction in the case of costs has been strongly criticised.216 In line with the position in the Draft International Arbitration Act (sch 1 article 31(6), s 52(1) of the Draft Bill provides that a court may only remit or set aside a tribunal's award of costs on grounds that would justify the setting aside of an award on the merits.

3.157 S 52(4) makes it clear that unless the arbitration agreement provides for a different solution, the taxing master is obliged to tax the costs in the circumstances referred to in the provision and has no discretion in this regard.

---

214 1917 TPD 489 at 491. See also Butler & Finsen 90.

215 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); ***Joubert t/a Wilcon v Beacham*** 1996 1 SA 500 (C) 502D; ***Benab Properties CC v Sportshoe (Pty) Ltd*** 1998 2 SA 1045 (C) 1049A-F. The ***Harlin*** case, which was followed in later decisions, relied on English authority and ignored earlier South African cases where the court was not prepared to interfere with an arbitrator's award of costs in the absence of one of the usual grounds for interfering with an award (see ***Wynberg Municipality v Town Council of Cape Town*** (1892) 9 SC 412 414; ***Middleton v The Water Chute Co Ltd*** (1905) 22 SC 155 157; ***Tucker v FB Smith & Co*** (1908) 25 SC 12 14; ***Austen v Joubert*** 1910 TS 1095 1096-7.

216 See especially Christie (1994) 367; Butler 143; Butler & Finsen 278 n 160. Compare however Annexure B, Commentary Part 3.

3.158 S 52(7) provides that any provision in an arbitration agreement to refer future disputes to arbitration to the effect that any party shall in any event pay that party's costs shall be void. This provision re-enacts s 35(6) of the present statute. It particularly protects the interests of the financially weaker party who may be deterred by such an agreement from pursuing a good claim. A similar provision has been retained in the English Arbitration Act of 1996 on the basis of public policy.217

S 53 Power to limit recoverable costs

3.159 S 53 is based on s 65 of the English Arbitration Act. The important role envisaged for this provision in curbing the excessive costs of arbitral proceedings has been discussed above.218 The potential benefits of the section have been described as follows:219

> "A direction by the arbitrator capping recoverable costs will be in the interests of the financially weaker party or one which suspects that it may be the net loser in the arbitration. It will, however, be in the interests of the financially stronger party, or one which has supreme confidence in its case, to oppose the imposition of a limit on recoverable costs. If properly used, the new power will redress the balance 'which is now tilted in favour of the party with a deeper pocket'. It should also enable arbitrators to introduce some discipline in expenditure in arbitration proceedings: arbitration is brought into disrepute where the costs of the proceedings are eventually more than the amount in dispute."

3.160 The equivalent provision in England has already resulted in at least one promising initiative to ensure that arbitration is cost-effective. The Chartered Institute of Arbitrators in England has introduced the "London Scheme Arbitration" which limits the total costs of an arbitration under the scheme, including the fees and disbursements of the arbitrator, to 20% of the sums in dispute.220

S 54 Costs of legal proceedings

---

217 See s 60 and the 1996 Saville Report para 267.

218 See para 2.13 above. See also Butler (1998) 17-19 for a more detailed discussion of s 65 of the English Act.

219 See Butler (1998) 18-19 (footnotes omitted).

220 See Freeman R, Edwards JM & Cox A ***London Arbitration Scheme*** Chartered Institute of Arbitrators London 1998.

3.161 This section re-enacts s 36 of the current statute.

CHAPTER 8

Consumer arbitration agreements

S 55 Consumer arbitration agreements

3.162 The Arbitration Act of 1965 contains no provisions which were expressly aimed at protecting consumers from the possible adverse effects of an arbitration agreement, although two provisions of the Act provide a measure of consumer protection. These are (a) the court's discretionary power not to enforce the arbitration agreement and (b) the prohibition on a provision in an agreement to refer future disputes to arbitration that each party should bear that party's own costs (s 35(6)).

3.163 Earlier in this Discussion Paper, it is proposed that the discretionary power of the court not to enforce the arbitration agreement should be omitted from the new Act.221 The discretionary power undermined the principle of party autonomy, was inconsistent with the proposed International Arbitration Bill and is out of line with the position in modern arbitration legislation in other jurisdictions. A possible justification for the retention of the power is that it enables the court to provide a degree of consumer protection where a consumer has signed a standard-form consumer contract containing an arbitration clause. The fact that there is no reported case of the power being used for this purpose is possibly because consumers could easily be deterred by the high costs of litigating in the High Court and the absence of a precedent from bringing the application.

3.164 The desirability of providing consumers a degree of protection is indicated by the fact that a number of jurisdictions which have recently revised their arbitration legislation have included such protection. However, instead of giving the court a discretionary power not to enforce the arbitration agreement, they have mostly sought to deal with the problem by stipulating additional formal requirements for the arbitration agreement before it can be enforced by the other party against the consumer.222 Section 55 of the Draft Bill is modeled on these provisions. A difficult

---

221 See the commentary on s 8 above.

222 See the New Zealand Arbitration Act 99 of 1996 s 11, the German Arbitration Act of 1998 article 1031(5) and the Zimbabwe Arbitration Act of 1996 s 4(2)(f).

issue is the question as to who qualifies as a consumer. The definition of consumer in s 55(2) is based on s 11(2) of the New Zealand Arbitration Act.

3.165 The restrictions on the contents of arbitration agreements to refer future agreements to arbitration in s 37(4) and 52(7) provide additional protection to consumers against the dangers of arbitration clauses in standard-form contracts. The separate agreement envisaged by s 55(1) of the Draft Bill would only be effective for purposes of ss 37(4) and 52(7) if it was concluded after the dispute had arisen.

CHAPTER 9

Miscellaneous provisions

S 56 Waiver of right to object

3.166 This is a new provision based on article 4 of the Model Law and the Draft International Arbitration Act. The provision aims at removing reliance by parties on procedural objections of a technical nature. A party who knows that a non-mandatory provision of the arbitration statute 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 section.

S 57 Service of notices

3.167 This section replaces s 37 of the current statute. The most important changes are those in s 57(5), (6) and (7) which are aimed at avoiding expense and delay resulting from unnecessary court applications.

S 58 Extension of periods fixed by or under this Act

3.168 This section of the Draft Bill is based on s 79 of the English Arbitration Act of 1979 and replaces s 41 of the current statute.

3.169 It is a non-mandatory provision which may be excluded in the arbitration agreement. The

general power in s 58 of the Draft Bill has no application to the specific power of the court to extend the time for commencing arbitral proceedings which is regulated by s 10. The power may only be exercised by the court if any arbitral process223 for extending the time limit has been exhausted and if a substantial injustice will otherwise occur. The Saville Committee envisage that in view of the limitations, the power will rarely be exercised. They therefore conclude that the power can properly be described as supporting the arbitral process.224

S 59 Repeal of Arbitration Act of 1965 and transitional provisions

3.170 The proposed transitional arrangements are contained in s 59(2) –(4) of the Draft Bill. The effect of the provisions is as follows. The legislation will apply retrospectively to existing arbitration agreements and to an arbitration under those agreements, unless the arbitration has already commenced when the new legislation takes effect.

3.171 It may be necessary to consider applying the new legislation regarding the enforcement or setting aside of to existing awards or awards made after the legislation takes effect but in arbitration proceedings still subject to the existing law. Compare s 26(4) of the Draft International Arbitration Act, which will not however 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 60(2) 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, under the current statute will still have the opportunity of commencing proceedings to attack the award before the new legislation takes effect.

S 60 Short title and commencement

3.172 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 arbitrators, arbitration users and their advisers an opportunity to become familiar with the new statute before it takes effect. South African arbitral institutions will also probably need time to adapt their rules to make sure that they comply with the new legislation.

---

223 See the tribunal's power under s 28(1)(a)(vi) of the Draft Bill. An arbitral institution may have the power in terms of the agreed rules applying to the arbitration.

224 See the 1996 Saville Report para 309.

ANNEXURE A

BILL

To restate and improve the law relating to the settlement of disputes by arbitration in terms of written arbitration agreements and the enforcement of arbitral awards.

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 4

The arbitral tribunal

CHAPTER 5

Conduct of arbitral proceedings

CHAPTER 6

The award

CHAPTER 7

Remuneration of tribunal and costs

CHAPTER 8

Consumer arbitration agreements

CHAPTER 9

Miscellaneous provisions

CHAPTER 1

General Provisions

General Principles

1. The provisions of this Act are founded on the following principles, and must be construed accordingly -

(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial **tribunal** without unnecessary delay or expense;

(b) the **parties** to an **arbitration agreement** should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;

(c) in matters governed by this Act the **court** should not intervene except as provided by this Act.

[New provision based on the English Arbitration Act 1996 s 1.]

Definitions

2.(1) In this Act, unless the context otherwise indicates -

(i) "**arbitral proceedings**" means proceedings conducted by a tribunal for the settlement by arbitration of a dispute which has been referred to arbitration in terms of an arbitration agreement;

(ii) "**arbitration agreement**" means an agreement in writing between 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 and includes -

(a) an arbitration clause contained in or incorporated by reference in a bill of lading; and

(b) an agreement between the parties otherwise than in writing by referring to terms that are in writing;

(iii) "**award**" includes an interim award;

(iv) "**conciliation**" includes mediation and "**conciliator**" includes a mediator;

(v) "**court**" means any High Court [~~of a provincial or local division of the Supreme Court of South Africa~~] having jurisdiction;

(vi) "**party**", in relation to an arbitration agreement or a reference, means a party to the agreement or reference, a successor in title or assign of such a party and a representative recognized by law of such a party, successor in title or assign.

(vii) "**specified authority**" means the authority specified in terms schedule 1 article 6(2) of the International Arbitration Act of 1999;

(viii) "**tribunal**" means an arbitral tribunal comprising the arbitrator or arbitrators, who are natural adult persons, [~~or umpire~~] acting as such under an arbitration agreement;

(2) An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telexes, telegrams or other means of telecommunication which provide a

record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another, provided that the reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that clause part of the contract.

(3) For purposes of section 7(2) and (3), a dispute is deemed to have been referred to arbitration if any party to the dispute has served on the other party or parties thereto a written notice requiring that party or parties to appoint or to agree to the appointment of an arbitrator or, where the arbitrator is named or designated in the arbitration agreement, requiring the dispute to be referred to the arbitrator so named or designated.

[This section replaces s 1 of the Arbitration Act 42 of 1965. The definition of an arbitration agreement in s 2(1) and (2) is based on that in the Draft International Arbitration Bill s 2(1) and sch 1 article 7. S 2(3) is based on s (1)(2) of the Draft Bill submitted by the Association of Arbitrators in 1994.]

Application of Act

3. (1) Subject to subsection (2), this Act applies to every arbitration under any law passed before or after the commencement of this Act, as if the arbitration were pursuant to an **arbitration agreement** and as if that other law were an **arbitration agreement**, but if that other law is an Act of Parliament, this Act does not apply to any such arbitration in so far as this Act is excluded by or is inconsistent with that other law or is inconsistent with the regulations or procedure authorized or recognized by that other law.

(2) This Act does not apply to an **arbitration agreement**, **arbitral proceedings** or **award** which is subject to the International Arbitration Act, 1999 (no ? of 1999).

[Provision based on s 40 of the Arbitration Act 42 of 1965; regarding the additions compare the Draft International Arbitration Bill s 3.]

This Act binds the State

4. This Act applies to any arbitration in terms of an **arbitration agreement** to which the State is a **party**, other than an arbitration in terms of an **arbitration agreement** between the State and the government of a foreign country or any undertaking which is wholly owned and controlled by such a government.

[This provision corresponds to s 39 of the Arbitration Act 42 of 1965; compare s 4 of the Draft International Arbitration Bill.]

Matters subject to arbitration

5. (1) Arbitration is not permissible in respect of any matrimonial cause or any matter incidental to any such cause, except for a property dispute not affecting the rights or interests of any child of the marriage;

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

(3) If an enactment confers jurisdiction on a **court** or other tribunal to determine any matter that fact alone shall not exclude determination of the matter by arbitration.

[S 5(1) is based on s 2(a) of the Arbitration Act 42 of 1965 with an added qualification. S 5(2)and (3) follow s 7 of the Draft International Arbitration Bill, which replaces s 2(b) of the Arbitration Act 42 of 1965 for international arbitrations.]

CHAPTER 2
The Arbitration Agreement

Binding effect of arbitration agreement

6. An **arbitration agreement** is not capable of being terminated except by the consent of all the **parties**, unless the **arbitration agreement** otherwise provides, and subject to the provisions of section 8.

[S 6 re-enacts s 3(1) of the Arbitration Act 42 of 1965.]

Effect of death or insolvency of a party

7.(1) Unless the agreement otherwise provides, an **arbitration agreement** or any appointment of an arbitrator thereunder is not terminated by the death or sequestration of the estate of any **party** thereto, or, if such **party** be a body corporate, by the winding-up of the body corporate or the placing of the body corporate under judicial management.

(2) If any **party** to a reference under an **arbitration agreement** dies or vacates or is removed from office after any dispute has been referred to arbitration, all steps and proceedings in connection with the reference must be stayed, subject to any order that the **court** may make, until an executor or other proper representative has been appointed in the estate of the **party** who has died or, as the case may be, until an executor, administrator, curator, trustee, liquidator or judicial manager has, where necessary, been appointed in the place of the bearer of such office who in that person's capacity as such was a **party** to the reference and who has died or has vacated or has been removed from office.

(3) If the estate of any **party** to an **arbitration agreement** is sequestrated or if, in the case of a body corporate which is a **party** to such agreement, an application for the winding-up or placing under judicial management of the body corporate is made or an order for the winding-up or placing under judicial management of a body corporate is made, the provisions of any law relating to the sequestration of insolvent estates or, as the case may be, any law relating to the winding-up or judicial management of the body corporate concerned, applies in the same manner as if a reference of a dispute to arbitration under the **arbitration agreement** were an action or proceeding or civil legal proceedings within the meaning of any such law.

(4) A reference of a dispute to arbitration is deemed an action or proceeding which is being or is about to be instituted against a body corporate, if any **party** to the dispute is taking steps to serve or is about to serve on the body corporate a written notice such as is referred to in section 2(2).

(5) Any period of time fixed by or under this Act which is interrupted by any stay, suspension or restraint resulting from the application of any law referred to in subsections (2) and (3) must be extended by a period equal to the period of such interruption.

(6) Nothing in this section contained affects the operation of any law or rule of law by virtue of which any right of action is extinguished by the death of any person.

[This provision follows s 4 of the Draft Bill submitted by the Association of Arbitrators in 1994 and replaces ss 4 and 5 of the Arbitration Act 42 of 1965.]

Stay of legal proceedings where there is an arbitration agreement

8. (1) If any **party** to an **arbitration agreement** commences any legal proceedings in any **court** (including any lower court) against any other **party** to the agreement in respect of any matter agreed to be referred to arbitration, any party to such legal proceedings may at any time after entering appearance but before delivering any pleadings or taking any other steps in the proceedings, apply to that **court** for a stay of the proceedings on that ground.

(2) On any application under this section, [~~If on any such application the court is satisfied that there is no sufficient reason why the dispute should not be referred to arbitration in accordance with the agreement,~~] the court must [~~may~~] make an order staying the proceedings subject to such terms and conditions as it may consider just, unless the **court** is satisfied that the **arbitration agreement** is null and void, inoperative, or incapable of being performed.

[This provision amends s 6 of the Arbitration Act 42 of 1965 in line with the Draft International Arbitration Bill sch 1 article 8 and s 18(2); see also s 9 of the English Arbitration Act 1996, which now applies to both international and domestic arbitrations in England.]

Reference of interpleader issue to arbitration

9. (1) Where in legal proceedings relief by way of interpleader is granted and any issue between the claimants is one in respect of which there is an **arbitration agreement** between them, the **court** granting the relief must direct that the issue be determined in accordance with the agreement unless the circumstances are such that legal proceedings brought by a claimant in respect of the matter would not be stayed.

(2 Where subsection (1) applies but the **court** does not direct that the issue be determined in accordance with the arbitration agreement, any provision that an award is a prerequisite to the bringing of legal proceedings in respect of any matter will not affect the determination of that issue by the court.

[Provision based on s 10 of the English Arbitration Act 1996; compare the Arbitration Act 42 of 1965 s 7 and the repealed English Arbitration Act 1950 s 5.]

Power of court to extend time fixed in arbitration agreement for commencing arbitral proceedings

10. (1) Where an **arbitration agreement** to refer future disputes to arbitration provides that any claim to which the agreement applies or any defence to such claim shall be barred unless some step is taken within a time fixed by the agreement to commence arbitration or other proceedings which are a prerequisite thereto [~~to commence arbitration proceedings is taken within a time fixed by the agreement~~], and a dispute arises to which the agreement applies, the **court** [~~, if it is of the opinion that in the circumstances of the case undue hardship would otherwise be caused,~~] may, subject to subsection (2), extend the time for such period as it considers appropriate, whether the time so fixed has expired or not, on such terms and conditions as it may consider just but subject to the provisions of any law limiting the time for commencing **arbitral proceedings**.

(2) The **court** may only grant an application under subsection (1) if the **court** is satisfied

(a) that the applicant has exhausted any available arbitral process for obtaining an

extension of time; and

(b) that the circumstances are such as were outside the reasonable contemplation of the **parties** when they agreed to the provision in question, and that it would be just to extend the time; or

(c) that the conduct of one **party** makes it unjust to hold the other **party** to the strict terms of the provision in question.

(3) A decision by the **court** to grant an application under this section is final and not subject to appeal.

[S 10 amends s 8 of the Arbitration Act 42 of 1965, following recommendations by the Association of Arbitrators in s 8 of their Draft Arbitration Bill of 1994 and s 12 of the English Arbitration Act of 1996.]

Consolidation

11. (1) The **parties** to an **arbitration agreement** may agree -

(a) that the **arbitral proceedings** shall be consolidated with other **arbitral proceedings**, or

(b) that concurrent hearings shall be held,

on such terms as may be agreed.

(2) Unless the parties agree to confer such power on the tribunal, it has no power to order consolidation of **arbitral proceedings** or concurrent hearings.

[New provision, following s 10 of the Draft International Arbitration Act.]

CHAPTER 3

Conciliation pursuant to an arbitration agreement

Appointment of conciliator

12. (1) In any case where an **arbitration agreement** provides for the appointment of a **conciliator** -

(a) by the **parties**, and the **parties** are unable to agree on a **conciliator**; or

(b) by a person other than the **parties** and that person has refused or failed to make the appointment within the time specified in the agreement, or if no time is so specified, within a reasonable time of being requested by any **party** to the agreement to make the appointment;

the chairperson for the time being of the **specified authority** must, on the application of any **party** to the agreement, appoint a **conciliator** with the same powers as if that **conciliator** had been appointed in terms of the agreement.

(2) Where an **arbitration agreement** provides for the appointment of a **conciliator** and further provides that the person so appointed must act as arbitrator if the **conciliation** proceedings fail to produce a settlement acceptable to the parties -

(a) no objection can be taken to the appointment of such person as an arbitrator, or

to that person's conduct of the **arbitral proceedings**, solely on the ground that that person has previously acted as a **conciliator** in connection with some or all of the matters referred to arbitration;

(b) where confidential information has been obtained by a **conciliator** from a party during **conciliation** proceedings, the **conciliator**, before proceeding to act as arbitrator, must disclose to all other parties to the **arbitral proceedings** as much of that information as the **conciliator** considers material to the **arbitral proceedings**;

(c) if such person declines to act as an arbitrator, any other person appointed as an arbitrator is not required to act as a **conciliator** unless a contrary intention appears in the **arbitration agreement**.

(3) Unless it reflects a contrary intention, an **arbitration agreement** providing for the appointment of a **conciliator** is deemed to contain a provision that in the event of the **conciliation** proceedings failing to produce a settlement acceptable to the **parties** within four weeks, or such other period to which the parties may agree, of the date of the appointment of the **conciliator**, or where the **conciliator** is appointed by name in the agreement, of the receipt by the **conciliator** of written notification of the existence of the dispute, the conciliation proceedings will thereupon terminate.

(4) The provisions of section 24 apply *mutatis mutandis* to –

(a) an arbitrator acting as **conciliator**, or the employee of such arbitrator; and
(b) the **specified authority** and its officers and employees.

[New provision based on s 11 of the Draft International Arbitration Bill.]

Power of arbitrator to act as conciliator

13. (1) If all **parties** to any **arbitral proceedings** consent in writing and for so long as no **party** withdraws that **party's** consent in writing, an arbitrator may act as **conciliator**.

(2) An arbitrator acting as **conciliator** -

(a) may communicate with the **parties** to the **arbitral proceedings** collectively or separately; and

(b) must, subject to subsection (3), treat information obtained as **conciliator** from a **party** to the **arbitral proceedings** as confidential unless that **party** otherwise agrees.

(3) The provisions of section 12(2)(b) apply *mutatis mutandis* to an arbitrator resuming **arbitral proceedings** after acting as **conciliator** under this section.

(4) No objection shall be taken to the conduct of arbitral proceedings by an arbitrator solely on the ground that that person has previously acted as a **conciliator** in accordance with this section.

[New provision based on s 12 of the Draft International Arbitration Bill.]

Settlement agreement

14. If the **parties** to an **arbitration agreement** settle their dispute by means of **conciliation** or otherwise prior to the appointment of the **tribunal** and enter into a settlement agreement in writing containing the terms of the settlement, that agreement may be enforced as an **award** in accordance with section 50, which applies *mutatis mutandis* to the enforcement of the settlement agreement.

[New provision based on s 13 of the Draft International Arbitration Bill.]

Resort to arbitral proceedings

15. Notwithstanding any agreement to the contrary, a **party** to an **arbitration agreement** who is engaged in **conciliation** proceedings to settle a dispute covered by the **arbitration agreement** is not precluded from commencing **arbitral proceedings** if that **party** is of the opinion that such step is necessary for the preservation of that **party's** rights.

[New provision based on s 14 of the Draft International Arbitration Bill.]

CHAPTER 4
The arbitral tribunal

Number of arbitrators

16. (1) The number of arbitrators to form the **tribunal** may be agreed by the **parties**.

(2) Failing such agreement, the **tribunal** shall consist of one arbitrator.

(3) Unless otherwise expressly agreed, an agreement that the number of arbitrators must be two or any even number must be understood as requiring the appointment of an additional arbitrator as chairperson of the **tribunal**.

[S 16 is based on the Draft International Arbitration Bill sch 1 article 10 and the English Arbitration Act of 1996 s 15. Compare s 10 of the Arbitration Act 42 of 1965.]

Appointment of arbitrators

17. (1) The **parties** may agree the procedure for appointing the arbitrator or arbitrators, including the procedure for appointing a chairperson.

(2) Failing such agreement, if the **tribunal** is to comprise:

(a) one arbitrator, the **parties** must jointly appoint the arbitrator not later than 21 days after service of a request in writing by either **party** to do so;

(b) two arbitrators, each **party** must appoint one arbitrator not later than 14 days after service of a request in writing by either **party** to do so;

(c) three arbitrators, each **party** must appoint one arbitrator not later than 14 days after service of a request in writing by either **party** to do so, and the two so appointed must forthwith appoint a third arbitrator as the chairperson of the **tribunal**.

(3) In any other case (in particular, if there are more than two **parties**) and the **parties** are unable to agree on the appointment procedure or the agreed appointment procedure fails to operate, the appointment must be made under section 19.

[This section, based largely on s 16 of the English Arbitration Act of 1996, replaces s 11(1) of the Arbitration Act 42 of 1965.]

Power to appoint in case of default

18. (1) Where an **arbitration agreement** provides for a **tribunal** of [~~that the reference shall be to~~] two or more arbitrators, one to be appointed by each **party**, and any **party** fails to appoint an arbitrator in terms of the agreement [~~, or by way of substitution in the circumstances described in subsection (1)~~], then, unless the **arbitration agreement** expresses a contrary intention, the other **party**, having appointed an arbitrator, or the other **parties** each having appointed an arbitrator, may serve the **party** in default with a written notice requiring that **party** to appoint an arbitrator within seven days of receipt of the notice.

(2) If the **party** in default does not appoint an arbitrator within the period referred to in the notice served upon that **party** in terms of subsection (1), the other **party** who has appointed an arbitrator or the other **parties** who have each appointed an arbitrator may, subject to subsection (3), appoint that arbitrator or those arbitrators, as the case may be, to act as the **tribunal** in the reference, and the **award** of that **tribunal** shall be binding on all **parties** as if it had been appointed by agreement.

(3) The [~~court~~] chairperson of the **specified authority** may, on the application of the party in default, on good cause shown, set aside the appointment of the **tribunal** referred to in subsection 2 and grant the party in default an extension of time to appoint an arbitrator.

[Re-enacts s 10(2) and (3) of the Arbitration Act 42 of 1965 with minor amendments; compare the English Arbitration Act of 1996 s 17.]

Power of specified authority to appoint an arbitrator

19. (1) Where there is a vacancy in the office of arbitrator (whether or not an appointment has previously been made to that office) and

(a) neither the provisions of the **arbitration agreement** nor the other provisions of this Act provide a method for filling the vacancy; or

(b) the method provided by the **arbitration agreement** or another provision of this Act for filling the vacancy fails; or

(c) the parties to the **arbitration agreement** agree that notwithstanding the provisions of that agreement, the vacancy should be filled by the **specified authority**; or

(d) the vacancy has arisen through the termination or setting aside of the arbitrator's appointment by the **court** and the **arbitration agreement** does not provide otherwise;

the chairperson of the **specified authority** may, subject to the provisions of subsection (2), on the application of a **party** to the **arbitration agreement** make an appointment to fill the vacancy.

(2) If an application is made in terms of subsection (1)(b) because a person has failed to appoint an arbitrator when required to do so, the chairperson of the **specified authority** shall only make the appointment if the applicant has first given the person seven days' written notice to make the appointment and the person concerned has failed to do so.

..(3) The chairperson of the **specified authority**, in appointing an arbitrator, shall have due

regard to any qualifications required of the arbitrator by the **arbitration agreement** and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator.

(4) A decision by the chairperson of the **specified authority** under this section or under section 18(2) shall be subject to no appeal.

(5) An arbitrator appointed by the chairperson of the **specified authority** shall have the same powers as if such arbitrator had been appointed in accordance with the terms of the **arbitration agreement**.

(6) If the chairperson of the **specified authority** fails to perform a function in terms of this section or sections 12(1) and 18(2), and the Chief Justice considers it necessary, the Chief Justice may, by notice in the *Gazette*, appoint any other appropriate person to exercise those functions of the chairperson of the **specified authority**.

(7) Pending the designation of a **specified authority**, the functions referred to in sections 12(1), 18(2) and 19(1) must be performed by the Chief Justice, or such other member of the Supreme Court of Appeal as may be nominated by him or her.

[This provision replaces s 12 of the Arbitration Act 42 of 1965. Compare s 12(1)-(3) and (5) of the Draft Bill submitted by the Association of Arbitrators and ss 18 and 19 of the English Arbitration Act of 1996 and the Draft International Arbitration Bill sch 1 articles 6(2)-(4) and 11.]

Revocation of arbitrator's mandate

20. (1) The **parties** may agree the circumstances in which the mandate of an arbitrator may be revoked.

(2) Unless the **arbitration agreement** provides otherwise, the mandate of an arbitrator may not be revoked except:

(a) by the **parties** acting jointly; or

(b) by an arbitral or other institution or person vested by the parties with the power of revocation.

(3) Except where the mandate of an arbitrator is revoked by the **parties** terminating their **arbitration agreement**, revocation of the mandate of an arbitrator by the **parties** acting jointly must be agreed in writing.

(4) Nothing in this section affects the power of the chairperson of the **specified authority** to terminate an arbitrator's appointment under section 18(2) or the power of the **court** to remove an arbitrator from office under section 21.

[New provision based on s 23 of the English Arbitration Act of 1996 replacing s 13(1) of the Arbitration Act 42 of 1965. Compare the Draft International Arbitration Bill sch 1 article 14(1).]

Power of court to remove arbitrator

21. A **party** to **arbitral proceedings** may (upon notice to the other **parties**, to the arbitrator concerned and, where applicable, to any other member of the **tribunal**) apply to the **court** to remove an arbitrator from office in any of the following instances-

(a) that reasonable grounds exist to doubt the arbitrator's independence or impartiality;

(b) that the arbitrator does not possess the qualifications required by the arbitration agreement;

(c) that the arbitrator is physically or mentally incapable of conducting the proceedings or there are reasonable grounds to doubt the arbitrator's capacity to do so;

(d) that the arbitrator has refused or failed properly to conduct the reference or to use all reasonable dispatch in conducting the proceedings or making an award and that substantial injustice has been or will be caused to the applicant.

(2) If there is an arbitral or other institution or person vested by the parties with power to remove the arbitrator, the **court** must not exercise its power of removal unless satisfied that the applicant has first exhausted any available recourse to that institution or person.

(3) The **tribunal** may continue the **arbitral proceedings** and make an **award** while an application to the **court** under this section is pending.

(4) Where the **court** removes an arbitrator, the **court** may, apart from any order for costs which may be awarded against the arbitrator personally, make such order as it deems fit with respect to the arbitrator's entitlement (if any) to fees or expenses, or the repayment of any fees or expenses already paid.

(5) The arbitrator concerned is entitled to appear and be heard by the **court** before it makes any order under this section.

(6) A decision by the **court** under this section shall not be subject to appeal.

[This section is based on s 24 of the English Arbitration Act of 1996 and replaces s 13(2) and (3) of the Arbitration Act 42 of 1965.]

Resignation of arbitrator

22. (1) The **parties** may agree with an arbitrator as to the consequences of that arbitrator's resignation as regards-

(a) that arbitrator's entitlement (if any) to fees or expenses, and

(b) any liability thereby incurred by that arbitrator.

(2) To the extent that there is no agreement referred to in subsection (1), an arbitrator who has resigned may (upon notice to the parties) apply to **court**-

(a) to be relieved of any liability thereby incurred, and

(b) to make such order as the **court** deems fit with respect to that arbitrator's entitlement (if any) to fees and expenses or the repayment of any fees or expenses already paid.

(3) If the **court** is satisfied that in all the circumstances it was reasonable for the arbitrator to

resign, it may grant such relief referred to in subsection (2)(a) on such terms as the court deems fit.

[New provision based on s 25 of the English Arbitration Act of 1996.]

Filling of vacancy

23. (1) Where an arbitrator ceases to hold office other than by delivering a final **award**, the **parties** may agree-

(a) whether and if so how the vacancy is to be filled;

(b) whether and if so to what extent the previous proceedings should stand, and what effect (if any) the arbitrator's ceasing to hold office has on an appointment made by that arbitrator (alone or jointly).

(2) To the extent there is no agreement referred to in subsection (1), the following provisions apply:

(a) the provisions of sections 17 and 19 apply in relation to the filling of the vacancy as in relation to the original appointment;

(b) the **tribunal** (when reconstituted) must determine whether and if so to what extent the previous proceedings should stand, without prejudice to the right of a **party** to challenge those proceedings on any ground which had arisen before the arbitrator ceased to hold office; and

(c) the arbitrator ceasing to hold office does not affect the validity of any appointment made by that arbitrator (alone or jointly) of another arbitrator, in particular any appointment of a chairperson.

[S 23 is based on s 27 of the English Arbitration Act of 1996. Compare ss 10(1), 11(2) and 12(6) of the Arbitration Act 42 of 1965 and the Draft International Arbitration Bill sch 1 article 15.]

Immunity of arbitrators and arbitral institutions

24. (1) An arbitrator is not liable for any act or omission in the discharge or purported discharge of that arbitrator's functions as arbitrator unless the act or omission is shown to have been in bad faith.

(2) An arbitral or other institution or person designated or requested by the parties, the **court** or another arbitral institution to appoint an arbitrator is not liable for any act or omission in the discharge of that function or any other function in relation to the arbitration unless the act or omission is shown to have been in bad faith.

(3) An institution or person referred to in subsection (2) by whom an arbitrator is appointed or nominated is not liable, by reason of having appointed or nominated such arbitrator, for any act or omission of such arbitrator in the discharge or purported discharge of that arbitrator's functions.

(4) The provisions of this section apply *mutatis mutandis* to the employee of an arbitrator, arbitral or other institution or person referred to in this section.

[New provision, following s 9 of the Draft International Arbitration Act.]

CHAPTER 5

Conduct of arbitral proceedings

Competence of tribunal to rule on its own jurisdiction

25. (1) Unless the **arbitration agreement** otherwise provides, a **tribunal** may at the instance of a party to a reference or on its own initiative rule on its own jurisdiction, including any objections with respect to the existence or validity of the **arbitration agreement**.

(2) For purposes of subsection (1) an **arbitration agreement** forming part of a contract shall be treated as an agreement independent of and severable from the other terms of that contract and a decision by the **tribunal** that the contract is null and void does not by itself entail the invalidity of the **arbitration agreement**.

(3) Subject to section 28(1)(a)(vi), a plea that the **tribunal** has no jurisdiction must be raised not later than the submission of a statement of defence, provided that a **party** is not precluded from raising such plea by reason of its participation in the appointment of the **tribunal**.

(4) For purposes of subsection (2), a **party** to a reference who avers that the **tribunal** is exceeding its jurisdiction shall make such averment, subject to section 28(1)(a)(vi), as soon as the matter alleged to be beyond the **tribunal's** jurisdiction is raised in the **arbitral proceedings**.

(5) A **tribunal** may rule on a matter referred to in subsection (2) either as a preliminary point or as part of its **award**, provided that if the **tribunal** makes a preliminary ruling that it has jurisdiction, a party opposed to such ruling may within thirty days apply to **court** on notice to the **tribunal** and the other **party** to review such ruling.

(6) The **tribunal** may, pending the decision of the **court** in review proceedings under subsection (5), continue with the **arbitral proceedings** and make an **award**.

(7) A decision by a **court** under subsection (5) is not subject to appeal.

[New provision, based on the Draft International Arbitration Bill sch 1 article 16 and s 5(2)-(6) of the Draft Bill submitted by the Association of Arbitrators in 1994.]

Determination of preliminary point of jurisdiction by court

26. (1) The **court** may on the application of a **party** determine any question as to the substantive jurisdiction of the **tribunal**.

(2) The **court** must not consider an application under this section unless:

(a) it is made with the agreement in writing of all the other **parties** to the **arbitral proceedings**; or

(b) it is made with the consent of the **tribunal** and the **court** is satisfied that –

(i) the determination of the question is likely to produce substantial savings in costs,
(ii) the application was made without delay; and
(iii) there is good reason why the matter should be heard by the **court**.

(3) An application under this section, unless made with the agreement of all the other **parties**

to the **arbitral proceedings**, shall state the grounds on which it is said that the matter should be decided by the **court**.

(4) Unless otherwise agreed by the **parties**, the **tribunal** may, pending the decision of the **court** on the application, continue with the **arbitral proceedings** and make an **award**.

(5) A decision by the **court** under this section is final and not subject to appeal.

[New provision based on s 32 of the English Arbitration Act of 1996.]

General duty of tribunal

27. (1) The **tribunal** must -

(a) act fairly and impartially as between the **parties**, giving each **party** a reasonable opportunity to put that **party's** case and to deal with that of the opposing **party**, and

(b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

(2) The **tribunal** must comply with the general duty imposed by subsection (1) in conducting the **arbitral proceedings**, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it.

[New provision based on the English Arbitration Act 1996 s 33; compare the UNCITRAL Model Law articles 18 and 19(2).]

General powers of tribunal

28. (1) The **tribunal** may -

(a) on the application of any **party** to a reference, unless the **arbitration agreement** otherwise provides -

(i) require any **party** to the reference, subject to any legal objection, to make discovery of documents by way of affidavit or by answering interrogatories on oath and to produce such documents for inspection;

(ii) require any **party** to the reference to allow inspection of any goods or property involved in the reference, which is in that **party's** possession or under that **party's** control; [~~and~~]

(iii) appoint a commissioner to take the evidence of any person in the South Africa or abroad and to forward such evidence to the **tribunal** in the same way as if the commissioner were appointed by the **court**;

(iv) order any **party** to take such interim measures as the **tribunal** may consider necessary for the protection of the subject matter of the dispute;

(v) order any **party** to preserve for purposes of the **arbitral proceedings** any evidence which is in that **party's** possession or under that **party's** control; and

(vi) on good cause shown, grant an extension of time fixed in terms of this Act or the **arbitration agreement** for the taking of any step by a **party**, whether such period has expired or not, provided that this power shall not apply to time limits in respect of **court** proceedings;

(b) unless the **arbitration agreement** otherwise provides -

(i) from time to time determine the time when and the place where the **arbitral proceedings** shall be held or be proceeded with;

(ii) decide how the issues in dispute are to be defined and for this purpose to require the **parties** to the reference to deliver [~~pleadings or~~] statements of claim and defence or require any **party** to give particulars of that **party's** claim or counterclaim, and allow any **party** to amend [~~his pleadings or statements of claim or defence~~] such statements or particulars;

(iii) administer oaths to, or take the affirmations of, the **parties** and witnesses appearing to give evidence;

(iv) subject to [~~any legal objection~~] the defence of privilege, examine the **parties** appearing to give evidence in relation to the matters in dispute and require them to produce before the **tribunal** all books, documents or things within their possession or power which may be required or called for and the production of which could be compelled on the trial of an action;

(v) subject to [~~any legal objection~~] the defence of privilege, examine any person who has been summoned to give evidence and require the production of any book, document or thing which such person has been summoned to produce;

(vi) [~~with the consent of the parties or on an order of court,~~] receive evidence given by affidavit; [~~and~~]

(vii) receive evidence given through an interpreter; and

(viii) inspect any goods or property involved in the reference.

(2) Subject to the provisions of this Act and the **arbitration agreement**, the **tribunal** may conduct the arbitration in such manner as it deems fit.

(3) Where a **tribunal** consists of two or more arbitrators, any oath or affirmation may be administered by any member of the **tribunal** designated by it for the purpose.

[This section replaces s 14(1) and (2) of the Arbitration Act 42 of 1965.]

Power of tribunal to consider evidence

29. Unless the **arbitration agreement** otherwise provides, the **tribunal** may, subject to the provisions of section 27(1) and the requirements of substantive and procedural fairness-

(a) attribute such weight to the evidence as it deems appropriate, whether or not that evidence is given under oath, and whether or not that evidence is admissible in civil proceedings in a **court**; and

(b) only on notice to the parties:

(i) have regard to matters which are within its own knowledge; and

(ii) rely upon its expert knowledge and experience.

[This section is a new provision based on s 15 of the Draft Arbitration Bill submitted by the Association of Arbitrators in 1994; compare the Draft International Arbitration Bill sch 1 article 19(1) and the English Arbitration Act of 1996 s 34(1)(f) and (g).]

Special powers of tribunal

30. (1) If the **arbitration agreement** so provides, the **tribunal** must determine any matter relating to the substance of the dispute on the basis of general considerations of justice and fairness, provided that the **tribunal** must decide all matters in accordance with the terms of the contract and must take into account the usages of the trade applicable to the transaction;

(2) Unless the **arbitration agreement** provides otherwise, the **tribunal** may, on the application of the defendant, order a claimant to provide appropriate security for costs (including additional security) and may stay the arbitration proceedings pending compliance with such order.

(3) Unless the **arbitration agreement** provides otherwise, where the amount and method of providing security are not determined by the **tribunal** when exercising its power under subsection (2) above, these matters must be determined by the taxing master of the **court** and section 52(6) shall apply *mutatis mutandis*.

(4) Unless the **arbitration agreement** provides otherwise, the **tribunal** may call a witness, including an expert, on its own motion, subject to the right of all **parties** to the reference to cross-examine that witness and to lead evidence in rebuttal.

(5) Where the **tribunal** calls an expert witness in terms of subsection (4), it may require a party to give the expert witness any relevant information, or to produce or to provide access to any relevant documents, goods or other property for inspection by the expert.

[This section is a new provision based on ss 16 and s 14(1)(a)(v) and (4) of the Draft Bill submitted by the Association of Arbitrators in 1994, the Draft International Arbitration Bill sch 1 articles 28(3)-(4) and 26 and the English Arbitration Act of 1996 ss 37 and 38(3).]

Manner of arriving at decisions where the tribunal consists of two or more arbitrators

31. (1) Where a **tribunal** comprises two arbitrators, their unanimous decision[~~, and where it consists of more than two arbitrators, the decision of the majority of the arbitrators,~~] shall be the decision of the **tribunal**.

(2) Unless the **arbitration agreement** provides otherwise, where a **tribunal** comprises more than two arbitrators, any decision to be made in the course of the reference may be made by a majority of them and, failing a majority, the decision of the arbitrator appointed by the arbitrators

as chairperson shall be the decision of the tribunal.

(3) Unless the **arbitration agreement** otherwise provides, for purposes of subsections (1) and (2), where the arbitrators, or a majority of them, do not agree in their **award**, their decision shall not be taken to be either the least amount or least right of relief awarded by them, or the average of what has been awarded by them. [~~but the matter shall thereupon become referable to the umpire, unless the arbitration agreement otherwise provides~~].

[This section amends s 14(3) and (4) of the Arbitration Act 42 of 1965: compare s 17 of the Draft Arbitration Bill submitted by the Association of Arbitrators in 1994.]

Notice of proceedings to parties and right to representation

32. (1) Unless the **arbitration agreement** provides otherwise, the **tribunal** must decide whether to hold oral hearings for the presentation of evidence or for oral argument or whether the proceedings are to be conducted on the basis of documents only, provided that unless the **parties** have agreed that no hearings need be held, the **tribunal** must hold such hearings at an appropriate stage of the proceedings if so requested by a **party**.

(2) Subject to subsection (1), the **tribunal** must give to every **party** to the reference, written notice of the time when and place where the **arbitral proceedings** will be held, and every such **party** is entitled to [~~be present~~] appear before the **tribunal** personally or, subject to any restrictions in the **arbitration agreement**, by any representative chosen by that **party** and to be heard at such proceedings.

(3) The representative referred to in subsection (2) need not be a legal practitioner.

[S 32(1) is based on the Draft International Arbitration Bill sch 1 article 24(1). S 32(2) and (3) are based on s 15(1) of the Arbitration Act 42 of 1965 with amendments proposed in s 18(1) and (2) of the Draft Bill submitted by the Association of Arbitrators in 1994.]

General duty of parties

33. The **parties** must do all things necessary for the proper and expeditious conduct of the **arbitral proceedings**, including -

(a) compliance without delay with any determination by the **tribunal** as to procedural or evidential matters, or with any order or directions of the **tribunal**, and

(b) where appropriate, by taking without delay any necessary steps to obtain a decision of the **court** on a preliminary issue of jurisdiction or on a question of law.

[New provision based on the English Arbitration Act 1996 s 40.]

Powers of tribunal in case of party's default

34. (1) The **parties** may agree on the powers of the **tribunal** in case of a **party's** failure to do something necessary for the proper and expeditious conduct of the arbitration.

(2) Unless the **arbitration agreement** otherwise provides, if the **tribunal** is satisfied that there has been unreasonable and inexcusable delay on the part of the claimant in pursuing its claim and that the delay -

(a) gives rise, or is likely to give rise, to a substantial risk that it is not possible to have

a fair resolution of the issues in that claim, or

(b) has caused, or is likely to cause, serious prejudice to the defendant,

the **tribunal** may make an award dismissing the claim.

(3) Unless the **arbitration agreement** provides otherwise, if without showing sufficient cause a **party** -

(a) fails to attend or be represented at an oral hearing of which due notice was given, or

(b) where matters are to be dealt with in writing, fails after due notice to submit written evidence or make written submissions,

the **tribunal** may continue the proceedings in the absence of that **party** or, as the case may be, without any written evidence or submissions on that **party's** behalf, and may make an award on the basis of the evidence before the **tribunal**.

[This section is based on s 41(1)-(4) of the English Arbitration Act of 1996 and replaces s 15(2) of Act 42 of 1965. Compare the Draft International Arbitration Bill sch 1 article 25.]

Summoning of witnesses

35. (1) Subject to the provisions of this section, the issue of a summons to compel any person to attend before a tribunal to give evidence and to produce books, documents or things to a tribunal, may be procured by any party to a reference in the same manner and subject to the same conditions as if the reference were a civil action pending in the court having jurisdiction in the area in which the arbitration proceedings are being or are about to be held.

(2) A **party** may only procure the issue of a summons referred to in subsection (1) with the permission of the **tribunal** or the agreement of the other **parties**.

(3) No person shall be compelled by a summons referred to in subsection (1) to produce any book, document or thing the production of which would not be compellable on trial of an action.

(4) The clerk of the magistrate's court having jurisdiction in the said area, may issue a summons referred to in subsection (1) upon payment of the same fees as are chargeable for the issue of a subpoena in a civil case pending in the magistrate's court.

(5) Any summons issued out of any court in terms of subsection (1) shall be served in the same manner as a subpoena issued out of that court in a civil action pending in that court.

(6) The provisions of subsections (3) and (4) of section eighty-seven of the Prisons Act, 1959 (Act No. 8 of 1959), relating to the service of a subpoena upon any prisoner to give evidence in civil proceedings in any court, shall mutatis mutandis apply with reference to the service of a summons upon any prisoner required to give evidence before a **tribunal** as if the proceedings before the **tribunal** were civil proceedings pending in a court.

(7) On the application of any **party** to a reference and with the consent of the **tribunal** or the

agreement of the other **parties**, the **court** may order the process of the **court** to issue to compel the attendance of a witness before the **tribunal** or may order any prisoner to be brought before the **tribunal** for examination.

[S 35 re-enacts s 16 of the Arbitration Act 42 of 1965; with a new provision in subsection (2) and a similar addition to subsection (7) based on the English Arbitration Act 1996 s 43(2). Compare the Draft International Arbitration Bill sch 1 article 27.]

Recording of evidence

36. If not recorded by the **tribunal** itself, the oral evidence of witnesses must be recorded in such manner and to such extent as the parties to the reference may agree or, failing such agreement, as the **tribunal** may from time to time direct after consultation with the parties.

[S 36 re-enacts s 17 of the Arbitration Act 42 of 1965.]

Statement of case for opinion of court or counsel during arbitral proceedings

37. (1) A **tribunal** may, on the application of any **party** to the reference, and must, [~~if the court on the application of any such party so directs, or~~] if the **parties** to the reference so agree, at any stage before making a final **award** state any question of law arising in the course of the reference in the form of a special case for the opinion of the **court** or for the opinion of counsel.

(2) An opinion referred to in subsection (1) shall be final and binding on the **tribunal** and on the **parties** to the reference.

(3) The **tribunal** in exercising its discretion under subsection (1) must not grant an application for a question of law to be referred to the **court** –

(a) unless it considers that, having regard to all the circumstances, the determination of the question of law concerned substantially affects the rights of one or more of the **parties** to the **arbitration agreement**; or

(b) if it considers that the application is not in good faith or is made to cause delay.

(4) The **parties** to an arbitration can exclude that arbitration from the provisions of subsection (1) by means of an agreement in writing entered into after the dispute has arisen and the appointment of the **tribunal**.

[Changes to s 20 of the Arbitration Act 42 of 1965 are based on those recommended in s 23 of the Draft Bill submitted by the Association of Arbitrators in 1994; compare the English Arbitration Act 1996 s 45.]

General powers of court

38. (1) The **court** has 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) the preservation of evidence; or

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

(d) an order appointing a receiver; or

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

(f) an interim interdict or other interim order; or

(g) the examination of any witness before a commissioner outside South Africa and the issue of a commission or request for such examination.

(2) The **court** must not grant an order in terms of subsection (1) unless -

(a) the **tribunal** has not yet been appointed and the matter is urgent; or

(b) the **tribunal** is not competent to grant the order; or

(c) the urgency of the matter makes it impractical to seek such order from the **tribunal**;

and the **court** must not grant any such order where the **tribunal**, being competent to grant the order, has already determined the matter.

(3) The decision of the **court** upon any application made in terms of subsection (1) shall not be subject to appeal.

(4) The **court** has no powers to grant interim measures other than those contained in this section.

[S 38 follows sch 1 articles 9(2)-(5) and 27(b)(i) of the Draft International Arbitration Bill and replaces s 21 of the Arbitration Act 42 of 1965. Compare s 44 of the English Arbitration Act of 1996 and s 24 of the Draft Arbitration Bill submitted by the Association of Arbitrators in 1994.]

Offences

39. (1) Any person who

(a) without good cause, fails to appear in answer to a summons to give evidence before a **tribunal**; or

(b) having so appeared, fails to remain in attendance until excused from further attendance by the **tribunal**; or

(c) upon being required by a **tribunal** to be sworn or to affirm as a witness, refuses to do so; or

(d) refuses to answer fully and to the best of that person's knowledge and belief any question lawfully put to such person during any arbitration proceedings; or

(e) without good cause, fails to produce before a **tribunal** any book, document or thing specified in a summons requiring that person to produce it; or

(f) while arbitration proceedings are in progress, wilfully insults any arbitrator conducting such proceedings, or wilfully interrupts such proceedings or otherwise misbehaves in the place where such proceedings are being conducted,

is, subject to subsection (2), guilty of an offence and liable on conviction to [~~a fine not exceeding one hundred rand or to imprisonment for a period not exceeding three months~~] the penalties imposed by section 30(4) of the High Court Act 59 of 1959.

(2) The law relating to privilege as applicable to a witness subpoenaed to give evidence or to produce any book, document or thing before a **court** of law applies to the interrogation of any

person or the production of any book, document or thing referred to in subsection (1).

(3) Any person who, having been sworn or having made an affirmation, knowingly gives false evidence before a **tribunal**, is guilty of an offence and liable on conviction to the penalties prescribed by law for perjury.

[This provision re-enacts s 22 of the Arbitration Act 42 of 1965 with a minor amendment recommended in s 25 of the Draft Bill submitted by the Association of Arbitrators in 1994.]

CHAPTER 6
The award

Time for making award

40. The **tribunal** must, unless the **arbitration agreement** otherwise provides, make its **award**

[~~(a) in the case of an award by an arbitrator or arbitrators, within four months after the date on which such arbitrator or arbitrators entered on the reference or the date on which such arbitrator was or such arbitrators were called on to act by notice in writing from any party to the reference, whichever date be the earlier date~~] within two months after either the completion of the hearing or receipt of all the **parties'** submissions by the **tribunal**, as the case may be [~~and~~

~~(b) in the case of an award by an umpire, within three months after the date on which such umpire entered on the reference or the date on which such umpire was called on to act by notice in writing from the arbitrators or any party to the reference, whichever date be the earlier date,~~

~~or in either case on~~] or before any later date to which the **parties** by any writing signed by them may from time to time extend the time for making the **award**, provided that the **court** may, on good cause shown, from time to time extend the time for making any **award**, whether that time has expired or not.

[Changes to s 23 of the Arbitration Act 42 of 1965 are those recommended in s 26 of the Draft Bill submitted by the Association of Arbitrators in 1994.]

Award to be in writing

41.(1) The **award** must be in writing and signed by all the members of the **tribunal**.

(2) If the **tribunal** comprises more than one arbitrator, the signatures of the majority of the members of the **tribunal** is sufficient, provided that the reason for any omitted signature is stated.

(3) Unless the arbitration agreement otherwise provides, the **award** shall state the reasons on which it is based.

[Amendment to s 24 of the Arbitration Act 42 of 1965 recommended in s 27 of the Draft Bill submitted by the Association of Arbitrators in 1994; see also the Draft International Arbitration Bill sch 1 article 31(1) and (2).]

Delivery of award

42. Subject to section 51(4) –

(a) the **parties** may agree on the method to be used by the **tribunal** for delivering the

award to the **parties**;

(b) unless the **arbitration agreement** provides otherwise, the **award** shall delivered to the **parties** by service on them of copies of the **award**, which must be done without delay after the **award** is made.

[S 42 replaces s 25 of the Arbitration Act 42 of 1965 and is based on s 55 of the English Arbitration Act 1996. Compare s 28 of the Draft Bill submitted by the Association of Arbitrators in 1994.]

Interim or provisional awards

43. (1) Unless the arbitration agreement provides otherwise, a **tribunal** may make an interim **award** at any time within the period allowed for making an **award**.

(2) The **arbitration agreement** may provide that the **tribunal** has the power to order on a provisional basis any relief which it would have the power to grant in a final **award**, including -

(a) a provisional order for the payment of money or the disposition of property between the **parties**, or
(b) an order to make an interim payment on account of the costs of the arbitration.

(3) Any order under subsection (2) is subject to the **tribunal**'s final adjudication; and the **tribunal**'s final **award**, on the merits or as to costs, must take account of any such order.

(4) The **tribunal** has no power to grant an order under subsection (2) unless that power is conferred on it by the **arbitration agreement**.

[S 43(1) repeats s 26 of the Arbitration Act 42 of 1965; s 43(2)-(4) is based on s 39 of the English Arbitration Act 1996.]

Specific performance

44. Unless the **arbitration agreement** provides otherwise, a **tribunal** may order specific performance of any contract in any circumstances in which the **court** would have power to do so.

[This provision repeats s 27 of the Arbitration Act 42 of 1965; compare s 48 of the English Arbitration Act 1996.]

Award to be binding

45. [~~Unless the arbitration agreement provides otherwise, an award shall,~~] Subject to the provisions of this Act, an **award** shall be final and not subject to appeal and each **party** to the reference must abide by and comply with the **award** in accordance with its terms, unless the **arbitration agreement** provides for a right of appeal to another **tribunal**.

[Changes to s 28 of the Arbitration Act 42 of 1965 recommended in s 31 of the Draft Bill submitted by the Association of Arbitrators in 1994; compare s 58 of the English Arbitration Act 1996.]

Interest on amount awarded

46. Where an **award** orders the payment of a sum of money, such sum must, unless the **award** provides otherwise, carry interest as from the date of the **award** and at the same rate as a judgment debt.

[Repeats s 29 of the Arbitration Act 42 of 1965; compare the Draft International Arbitration Bill sch 1 article 31(5) and the English Arbitration Act 1996 s 49.]

Power of tribunal to correct errors in award

47. (1) Unless otherwise agreed by the **parties**, a **tribunal**, whether on the application of a **party** or on its own initiative, may correct in any **award** any clerical mistake or any [~~patent~~] error arising from any accidental slip or omission or may clarify an ambiguity or uncertainty in the **award**.

(2) An application made by a **party** under subsection (1) must be made within 15 days after the **award** has been delivered.

(3) A correction or clarification under subsection (1) must, except with the consent of all the **parties**, be made within 30 days after the delivery of the **award**.

(4) Unless otherwise agreed by the **parties**, a **party** may, within 30 days after the **award** has been delivered to that **party**, apply to the **tribunal** to make an additional **award** with respect to claims presented in the proceedings but omitted from the **award**, provided that before granting the application the **tribunal** must first give the other parties to the reference the opportunity to make representations.

(5) A corrected, clarified or additional **award** under this section must comply with sections 41 and 42.

[S 47 amends s 30 of the Arbitration Act 42 of 1965 following the recommendations in s 33 of the Draft Arbitration Bill submitted by the Association of Arbitrators in 1994; compare article 33 of the UNCITRAL Model Law and s 57 of the English Arbitration Act 1996.]

Remittal of award by the parties

48. (1) The **parties** to a reference may within six weeks after the [~~publication~~] delivery of the **award** [~~to them~~], by any writing signed by them remit any matter which was referred to arbitration, to the **tribunal** for reconsideration and for the making of a further **award** or a fresh **award** or for such other purpose as the **parties** may specify.

(2) When a matter is remitted under subsection (1) the **tribunal** must, unless the writing signed by the parties otherwise directs, dispose of the matter within three months after the date of the said writing.

(3) Where in any case referred to in subsection (1) the arbitrator has died after making the **award**, the **award** may be remitted to a new arbitrator appointed by the parties.

(4) A further or fresh award under this section must comply with the provisions of sections 41 and 42.

[S 48 replaces s 32 of the Arbitration Act 42 of 1965. Compare s 35 of the Draft Arbitration Bill submitted by the Association of Arbitrators in 1994, the UNCITRAL Model Law article 34(4) and

the English Arbitration Act 1996 s 68(1)-(3).]

Application for setting aside as exclusive recourse against award

49. (1) Recourse to a **court** against an **award** may be made only by an application for setting aside in accordance with subsections (2) and (3).

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

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

(i) a party to the **arbitration agreement** was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of South Africa; or

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

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

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

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of South Africa; or

(ii) the award is in conflict with the public policy of South Africa.

(3) An application for setting aside an **award** must be made within six weeks of the date on which the **award** was delivered to the **party** making the application, unless that **party** did not know and could not within that period by exercising reasonable care have acquired knowledge by virtue of which an **award** is liable to be set aside under subsection (2)(5)(b), in which event the period will commence on the date when such knowledge could have been acquired by exercising reasonable care.

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

(5) For the avoidance of doubt, and without limiting the generality of subsection(2)(b)(ii), it is declared that an **award** is in conflict with the public policy of South Africa if -

(a) a breach of the **tribunal's** duty to act fairly occurred in connection with the

making of the **award** which has caused or will cause substantial injustice to the applicant; or

(b) the making of the **award** was induced or affected by fraud or corruption.

[S 49 replaces s 33 of the Arbitration Act 42 of 1965 and is based on the Draft International Arbitration Bill sch 1 article 34.]

Enforcement of award by court and refusal of enforcement

50. (1) Any **party** may apply to a court of competent jurisdiction after due notice to the other **party** or parties for an **award** to be made an order of court.

(2) Subject to subsections (3), (4) and (5), the **award** must be made an order of court and may then be enforced in the same manner as any judgment or order to the same effect.

(3) The **court** to which application is so made, may, before making the **award** an order of court, correct in the **award** any clerical mistake or any patent error arising from any accidental slip or omission.

(4) An application under subsection (1) may be refused on a ground referred to in subsection 49(2), provided that a ground referred to in subsection 49(2)(a) must not be taken into account if the party opposing the enforcement of the **award** has allowed the six-week period referred to in section 49(3) to expire without bringing an application for the setting aside of the **award**.

(5) If an application for setting aside has been made under section 49, a court to which an application has been made for enforcement of an **award** under this section may adjourn its decision pending the outcome of the application under section 49 and may also, on the application of the **party** claiming enforcement of the **award**, order the other **party** to provide appropriate security.

[S 50(1)-(3) are based on s 18(2) of the Draft International Arbitration Bill and s 31(2) of the Arbitration Act 42 of 1965. S 50(4) is based on the German Arbitration Act of 1998 article 1060(2), pertaining to domestic awards. S 50(5) follows the Draft International Arbitration Bill sch 1 article 36(2).]

CHAPTER 7
Remuneration of tribunal and costs

Remuneration of arbitrators

51. (1) [~~Where the fees of the arbitrator or arbitrators or umpire have not been fixed by an agreement between him or them and the parties to the reference,~~] Any **party** to the reference may, notwithstanding that the fees of an arbitrator may already have been paid by the parties, or any of them, require such fees to be taxed, and thereupon such fees shall be taxed by the taxing master of the **court**, provided that if the tariff of such fees has previously been fixed by agreement between the arbitrator and the parties to the reference, that tariff shall not be subject to reduction on taxation.

(2) Any taxation of fees under this section may be reviewed by the **court** in the same manner as a taxation of costs.

(3) The arbitrator [~~or arbitrators or umpire~~] shall be entitled to appear and be heard at any taxation or review of taxation under this section.

(4) The **tribunal** may withhold its **award** pending payment its fees and of any expenses incurred by a member of the **tribunal** in connection with the arbitration with the consent of the **parties**, or pending the giving of security for the payment thereof.

(5) The **parties** are jointly and severally liable to arbitrators for the fees and expenses recoverable under this section.

[S 51(1)-(4) amends s 34 of the Arbitration Act 42 of 1965 as recommended by the Association of Arbitrators in s 37 of their Draft Arbitration Bill of 1994. S 51(5) is a new provision based on s 28(1) of the English Arbitration Act of 1996.]

Costs of arbitral proceedings

52. (1) Unless the arbitration agreement otherwise provides, the **award** of costs in connection with the reference and **award** is in the discretion of the **tribunal**, which must, if it **award**s costs, give directions as to the scale on which the costs are to be taxed and may direct to and by whom and in what manner the costs or any part thereof must be paid and may tax or settle the amount of the costs or any part thereof, and may **award** costs as between attorney and client.

(2) If no provision is made in an **award** with regard to costs, or if no directions have been given therein as to the scale on which the costs must be taxed, any **party** to the reference may within fourteen days of the delivery of the **award** to that **party**, make application to the **tribunal** for an order directing by and to whom the costs must be paid or giving directions as to the scale on which the costs must be taxed, and thereupon the **tribunal** must, after hearing any **party** who may desire to be heard, amend the **award** by adding such directions as it may think appropriate with regard to the payment of costs and the scale on which such costs must be taxed.

(3) The **court** must only set aside or remit a tribunal's **award** of costs on grounds that would justify the setting aside of an **award** on the merits under section 50.

(4) If the **tribunal** has no discretion as to costs or if the **tribunal** has such a discretion and has directed any **party** to pay costs but does not forthwith tax or settle the costs, or if the arbitrators or a majority of them cannot agree in their taxation, then, unless the **arbitration agreement** otherwise provides, the taxing master of the **court** [~~may~~] must tax them.

(5) If the **tribunal** has directed any **party** to pay costs but has not taxed or settled the costs, then, unless the **arbitration agreement** provides otherwise, the **court** may, on making the **award** an order of **court**, order the costs to be taxed by the taxing master of the **court** and, if the **tribunal** has given no directions as to the scale on which the costs shall be taxed, fix the scale of the taxation.

(6) Any taxation of costs by the taxing master of the **court** may be reviewed by the **court**.

(7) Any provision contained in an **arbitration agreement** to refer future disputes to arbitration to the effect that any **party** [~~or the parties thereto~~] shall in any event pay [~~his or their~~] that **party**'s own costs or any part thereof, shall be void.

[This section re-enacts s 35 of the Arbitration Act 42 of 1965 with minor amendments. S 52(3) is consistent with the Draft International Arbitration Bill sch 1 article 30(6).]

Power to limit recoverable costs

53. (1) Unless otherwise agreed by the parties, the **tribunal** may direct that recoverable costs of the arbitration, or any part of the **arbitral proceedings**, shall be limited to a specified amount.

(2) Any direction made by the **tribunal** under subsection (1) may be made or varied at any stage, provided that a direction for the limitation of costs or any variation thereof must be made sufficiently in advance of the incurring of costs or the taking of steps to which it relates for the limitation to be taken into account.

[New provision based on the English Arbitration Act of 1996 s 65.]

Costs of legal proceedings

54. An order made or opinion given by the **court** under this Act may be made or given on such terms as to costs, including costs against an arbitrator, as the **court** considers just.

[This section re-enacts s 36 of the Arbitration Act 42 of 1965.]

CHAPTER 8
Consumer arbitration agreements

Consumer arbitration agreements

55. (1) Where a contract contains an **arbitration agreement** as a clause in that contract and a person enters into that contract as a consumer, the **arbitration agreement** is only enforceable against the consumer if the consumer, by separate written agreement signed by the consumer, certifies that, having read and understood the **arbitration agreement**, the consumer agrees to be bound by it.

(2) For purposes of subsection (1), a person enters into a contract as a consumer if that person enters the contract otherwise than in the course of business and the other **party** enters into the contract in the course of business.

(3) Subsection (1) applies to every contract containing an **arbitration agreement** entered into in South Africa notwithstanding a provision in the contract to the effect that the contract is governed by a law other than South African law.

(4) For purposes of subsection (3), a contract is deemed to be entered into in South Africa, if the consumer is in South Africa at the time when the contract is entered into.

(5) Unless the consumer has waived compliance with subsection (1) after the dispute arose, an **arbitration agreement** which is not enforceable by reason of non-compliance with subsection (1) must be treated as inoperative for purposes of section 8.

[New provision based on s 11 of the New Zealand Arbitration Act 99 of 1996. Compare the German Arbitration Law of 1998 article 1031(5).]]

CHAPTER 9
Miscellaneous provisions

Waiver of right to object

56. A **party** who knows that any provision of this Act from which the **parties** may derogate

or any requirement under the **arbitration agreement** has not been complied with and yet proceeds with the arbitration without stating that **party's** objection to such non-compliance without undue delay, or if a time-limit is provided therefor, within such period of time, shall be deemed to have waived that **party's** right to object.

[New provision based on the Draft International Arbitration Bill sch 1 article 4. Compare the English Arbitration Act of 1996 s 73.]

Service of notices

57. (1) Unless the **arbitration agreement** provides otherwise, any notice or document required to be served on any person, may be served either -

(a) by delivering it to the person on whom it is to be served; or

(b) by leaving it at the usual or last known place of residence or business of that person in South Africa; or

(c) by sending it to the usual or last known place of residence or business of that person in South Africa by registered letter or any other means which provides a record of the attempt to deliver it.

(2) A document served under subsection (1) is deemed to be received on the day it is so delivered.

(4) The provisions of this section do not apply to the service of documents in **court** proceedings.

(5) Where the method agreed on by the parties or provided by subsection (1) is not reasonably practicable, the **court** may on application make such order as it deems fit for the service of the document or dispensing with the service of the document.

(6) A **party** to the **arbitration agreement** may only apply to **court** under subsection (5) above after exhausting any available arbitral process for dealing with the matter.

(7) An order by the **court** under subsection (5) above shall not be subject to appeal.

[Compare the Draft International Arbitration Bill sch 1 article 3; the Arbitration Act 42 of 1965 s 37 and the English Arbitration Act of 1996 ss 76-78.]

Extension of periods fixed by or under this Act

58. (1) Subject to section 10, unless the **parties** otherwise agree, the **court** may on application extend any time limit agreed by the **parties** in connection with any matter relating to the **arbitral proceedings** or fixed under this Act, whether such period has expired or not.

(2) The application referred to in subsection (1) above may be brought by any **party** to the **arbitral proceedings** or by the **tribunal**.

(3) The **court** must not exercise its power to extend a time limit unless it is satisfied that

(a) any available recourse to the **tribunal** or to any arbitral or other institution or person vested by the parties with the requisite power, has first been exhausted, and

(b) that a substantial injustice would otherwise occur.

[This section is based on s 79 of the English Arbitration Act of 1996 and replaces s 41 of the Arbitration Act 42 of 1965.]

Repeal of Arbitration Act of 1965 and transitional provisions

59. (1) The Arbitration Act, 1965 (Act 42 of 1965) is hereby repealed.

(2) Subject to section 3 and to subsection (3) below, this Act applies in relation to an **arbitration agreement** whether entered into before or after the date when this Act comes into force, and to every arbitration under that agreement.

(3) Notwithstanding subsection (2) above, this Act does not apply with respect to any **arbitration proceedings** which have commenced but have not been concluded on the date when this Act comes into force.

(4) For purposes of subsection (4) above, **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.

[Subsections (2)-(4) are based on the Draft International Arbitration Bill s 26(1)-(3).]

Short title and commencement

60. (1) This Act shall be called the Arbitration Act, 1999.

(2) This Act will come into force on a date fixed by the President by Proclamation in the *Gazette*.

ANNEXURE B

(DRAFT D4)
(11/04/1994)

ASSOCIATION OF ARBITRATORS

DRAFT ACT

To provide for the settlement of disputes by arbitration tribunals in terms of written arbitration agreements and for the enforcement of the awards of such arbitration tribunals.

BE IT ENACTED by the State President and the Parliament of the Republic of South Africa as follows:

DEFINITIONS

1. Definitions
(Amends s 1 of the existing Act.)

(1) In this Act, unless the context otherwise indicates -

(i) **"arbitration agreement"** means a written agreement providing for the reference to arbitration of any existing or any future dispute relating to a matter specified in the agreement, whether an arbitrator is named or designated therein or not;

(ii) **"arbitration proceedings"** means proceedings conducted by an arbitration tribunal for the settlement by arbitration of a dispute which has been referred to arbitration in terms of an arbitration agreement;

(iii) **"arbitration tribunal"** means the arbitrator, arbitrators or umpire acting as such under an arbitration agreement;

(iv) **"award"** includes an interim award;

(v) **"court"** means any court of a provincial or local division of the Supreme Court of South Africa having jurisdiction;

(vi) **"party",** in relation to an arbitration agreement or a reference, means a party to the agreement or reference, a successor in title or assign of such a party and a representative recognized by law of such a party, successor in title or assign.

[definition of "territory" deleted]

(2) <u>For purposes of section 4(2) and (3), a dispute shall be deemed to have been referred to arbitration if any party to the dispute has served on the other party or parties thereto a written notice requiring him or them to appoint or to agree to the appointment of an arbitrator or, where the arbitrator is named or designated in the arbitration agreement, requiring the dispute to be referred to the arbitrator so named or designated.</u>

MATTERS NOT SUBJECT TO ARBITRATION

2. Matters not subject to arbitration
(S 2 of the existing Act with one minor amendment.)

[~~A reference to~~] Arbitration shall not be permissible in respect of -

(a) any matrimonial cause or any matter incidental to any such cause; or

(b) any matter relating to status.

EFFECT OF ARBITRATION AGREEMENTS

3. Binding effect of arbitration agreement and power of court in relation thereto
(Amends s 3 of the existing Act.)

(1) Unless the agreement otherwise provides, but subject to the provisions of subsections (2) and (3), an arbitration agreement shall not be capable of being terminated except by consent of all the parties thereto.

(2) The court may at any time on the application of any party to an arbitration agreement, on good cause shown -

(a) set aside the arbitration agreement; or

(b) order that any particular dispute referred to in the arbitration agreement shall not be referred to arbitration; or

(c) order that the arbitration agreement shall cease to have effect with reference to any dispute referred.

(3) Where there has been undue delay by a claimant in instituting or prosecuting his claim pursuant to an arbitration agreement, the court may, on the application of any party to the arbitration agreement, order the termination of the arbitration proceedings and prohibit the claimant from commencing further arbitration or other proceedings in respect of any matter which was the subject of the terminated proceedings.

(4) The court shall not make an order under subsection (3) unless it is satisfied -
(a) that the delay has been intentional and constitutes either a repudiation of the arbitration agreement or a wilful disregard of a lawful direction by the arbitrator, or
(b) that there has been excessive and inexcusable delay on the part of the claimant or his advisers which will either give rise to a substantial risk of it not being possible to have a fair trial of the issues in the arbitration proceedings or which is likely to cause or has caused serious prejudice to another party to the arbitration proceedings.

4 Death or insolvency of a party

(New provision, combining ss 4 and 5 of the existing Act.)

(1) Unless the agreement otherwise provides, an arbitration agreement or any appointment of an arbitrator or umpire thereunder shall not be terminated by the death or sequestration of the estate of any party thereto, or, if such party be a body corporate, by the winding-up of the body corporate or the placing of the body corporate under judicial management.

(2) If any party to a reference under an arbitration agreement dies or vacates or is removed from office after any dispute has been referred to arbitration, all steps and proceedings in connection with the reference shall be stayed, subject to any order that the court may make, until an executor or other proper representative has been appointed in the estate of the party who has died or, as the case may be, until an executor, administrator, curator, trustee, liquidator or judicial manager has, where necessary, been appointed in the place of the bearer of such office who in his capacity as such was a party to the reference and who has died or has vacated or has been removed from his office.

(3) If the estate of any party to an arbitration agreement is sequestrated or if, in the case of a body corporate which is a party to such agreement, an application for the winding-up or placing under judicial management of the body corporate is made or an order for the winding-up or placing under judicial management of a body corporate is made, the provisions of any law relating to the sequestration of insolvent estates or, as the case may be, any law relating to the winding-up or judicial management of the body corporate concerned, shall apply in the same manner as if a reference of a dispute to arbitration under the arbitration agreement were an action or proceeding or civil legal proceedings within the meaning of any such law.

(4) A reference of a dispute to arbitration shall be deemed to be an action or proceeding which is being or is about to be instituted against a body corporate, if any party to the dispute is taking steps to serve or is about to serve on the body corporate a written notice such as is referred to in section 1(2).

(5) Any period of time fixed by or under this Act which is interrupted by any stay, suspension or restraint resulting from the application of any law referred to in subsections (2) and (3) shall be extended by a period equal to the period of such interruption.

(6) Nothing in this section contained shall affect the operation of any law or rule of law by virtue of which any right of action is extinguished by the death of any person.

5. Power of arbitration tribunal to grant rectification and declaratory orders and to rule on own jurisdiction

(New provision)

(1) Unless the arbitration agreement otherwise provides, an arbitration tribunal may at the instance of any party to a reference -

(a) order rectification of a contract, including one incorporating the arbitration agreement; and

(b) enquire into and determine any existing, future or contingent right or obligation, notwithstanding that no party can claim any relief consequential on such determination.

(2) Unless the arbitration agreement otherwise provides, an arbitration tribunal may at the

instance of a party to a reference or on its own initiative rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.

(3) For purposes of subsection (2) an arbitration agreement forming part of a contract shall be treated as an agreement independent of and severable from the other terms of that contract.

(4) Subject to section 14(1)(a)(vii), a plea that the arbitration tribunal has no jurisdiction shall be raised not later than the submission of a statement of defence, provided that a party is not precluded from raising such plea by reason of his participation in the appointment of the arbitration tribunal.

(5) For purposes of subsection (2), a party to a reference who avers that the arbitration tribunal is exceeding its jurisdiction shall make such averment, subject to section 14(1)(a)(vii), as soon as the matter alleged to be beyond the tribunal's jurisdiction is raised in the arbitration proceedings.

(6) An arbitration tribunal may rule on a matter referred to in subsection (2) either as a preliminary point or as part of its award, provided that if the tribunal makes a preliminary ruling that it has jurisdiction, a party opposed to such ruling may within thirty days apply to court on notice to the arbitration tribunal and the other party to review such ruling, providing further that unless the court otherwise directs, the arbitration tribunal may, pending the decision of the court in the review proceedings, continue with the arbitration proceedings and make an award.

6. Stay of legal proceedings where there is an arbitration agreement

(S 6 of the existing Act)

(1) If any party to an arbitration agreement commences any legal proceedings in any court (including any inferior court) against any other party to the agreement in respect of any matter agreed to be referred to arbitration, any party to such legal proceedings may at any time after entering appearance but before delivering any pleadings or taking any other steps in the proceedings, apply to that court for a stay of such proceedings.

(2) If on any such application the court is satisfied that there is no sufficient reason why the dispute should not be referred to arbitration in accordance with the agreement, the court may make an order staying such proceedings subject to such terms and conditions as it may consider just.

7. Power of court to order that dispute be determined by interpleader proceedings or that interpleader issues be determined by arbitration

(S 7 of the existing Act)

(1) The court may order that the dispute between parties to an arbitration agreement be determined by way of interpleader proceedings for the relief of any person desiring so to interplead.

(2) Where in any interpleader proceedings it is proved that the claims in question are matters to which an arbitration agreement, to which the claimants are parties, relates, the court may order that the issues between the claimants be determined in accordance with the arbitration agreement.

8. Power of court to extend time fixed in arbitration agreement for commencing arbitration proceedings

(S 8 of the existing Act with minor amendments.)

Where an arbitration agreement to refer future disputes to arbitration provides that any claim to which the agreement applies or any defence to such claim shall be barred unless some step is taken within a time fixed by the agreement to commence arbitration or other proceedings which are a prerequisite thereto [~~to commence arbitration proceedings is taken within a time fixed by the agreement~~], and a dispute arises to which the agreement applies, the court, if it is of the opinion that in the circumstances of the case undue hardship would otherwise be caused, may extend the time for such period as it considers proper, whether the time so fixed has expired or not, on such terms and conditions as it may consider just but subject to the provisions of any law limiting the time for commencing arbitration proceedings.

ARBITRATORS AND UMPIRES

9. Reference to a single arbitrator

(S 9 of the existing Act)

Unless a contrary intention is expressed in the arbitration agreement, the reference shall be to a single arbitrator.

10. Power [~~of parties~~] to appoint arbitrators to fill vacancies

(S 10 of the existing Act, with minor amendments)

(1) Where an appointed arbitrator refuses to act or is or becomes incapable of acting or dies or is removed from office or his appointment is terminated[,] or is set aside, and a contrary intention is not expressed in the arbitration agreement, the party or [~~parties~~] other person or persons who appointed him may appoint another arbitrator in his place.

(2) Where an arbitration agreement provides that the reference shall be to two or more arbitrators, one to be appointed by each party, and any party fails to appoint an arbitrator in terms of the agreement, or by way of substitution in the circumstances described in subsection (1), then, unless the arbitration agreement expresses a contrary intention, the other party, having appointed an arbitrator, or the other parties each having appointed an arbitrator, may serve the party in default with a written notice requiring him to appoint an arbitrator within seven days after receipt of the notice.

(3) If the party in default does not appoint an arbitrator within the period referred to in the notice served upon him in terms of subsection (2), the other party who has appointed an arbitrator or the other parties who have each appointed an arbitrator may appoint that arbitrator or those arbitrators, as the case may be, to act as sole arbitrator or arbitrators in the reference, and his or their award shall be binding on all parties as if he or they had been appointed by consent of all parties: Provided that the court may, on the application of the party in default, on good cause shown, set aside such appointment and grant the party in default an extension of time to appoint an arbitrator.

11. Power of parties or arbitrators to appoint umpire or chairman and to fill vacancy

(S 11 of the existing Act, with minor amendments)

(1) If an arbitration agreement provides for a reference

(a) to an even number of arbitrators, then, unless a contrary intention is expressed therein, the arbitrators may at any time appoint an umpire and shall do so forthwith if they fail to agree on a matter arising for determination; or

(b) to three arbitrators, of whom one is to be appointed by the other two, [~~such agreement~~] they shall, unless a contrary intention is expressed [~~there~~]in the agreement, [~~be construed as providing for the appointment of an umpire by the other two arbitrators~~] appoint a chairman immediately after they are themselves appointed.

(2) Where an appointed umpire or chairman refuses to act or is or becomes incapable of acting or dies or is removed from office or his appointment is terminated[,] or is set aside, and a contrary intention is not expressed in the arbitration agreement, the parties or arbitrators who appointed him may appoint another umpire or chairman in his place.

12. Power of court to appoint an arbitrator or umpire
(Completely redrafted version of existing s 12)

(1) Where there is a vacancy in the office of arbitrator or umpire (whether or not an appointment has previously been made to that office) and

(a) neither the provisions of the arbitration agreement nor the other provisions of this Act provide a method for filling the vacancy; or

(b) the method provided by the arbitration agreement or another provision of this Act for filling the vacancy fails or cannot reasonably be followed; or

(c) the parties to the arbitration agreement agree that notwithstanding the provisions of that agreement, the vacancy should be filled by the court; or

(d) the vacancy has arisen through the termination or setting aside of the arbitrator's appointment by the court and the arbitration agreement does not provide otherwise;

the court may, subject to the provisions of subsection (2), on the application of a party to the arbitration agreement make an appointment to fill the vacancy.

(2) If an application is made in terms of subsection (1)(b) because a person has failed to appoint an arbitrator when required to do so, the court shall only grant such application if the applicant has first given the person seven days' written notice to make the appointment and the person concerned has failed to do so.

(3) An arbitrator or umpire appointed by the court shall have the same powers to act in the reference and to make an award as if he had been appointed in accordance with the terms of the arbitration agreement.

(4) An arbitrator or umpire appointed under section 10(1) or section 11(2) or subsection (1) of this section or an arbitrator appointed after the court has granted an extension of time under section 10(3), may avail himself of the evidence recorded in the arbitration proceedings before his appointment and may, if he thinks fit, recall for further examination any person who has given such evidence.

(5) A decision by the court under subsection (1) shall be final and not subject to appeal.

13. Termination or setting aside of appointment of arbitrator or umpire
(S 13 of the existing Act)

(1) Subject to the provisions of subsection (2), the appointment of an arbitrator or umpire,

unless a contrary intention is expressed in the arbitration agreement, shall not be capable of being terminated except by consent of all the parties to the reference.

(2) (a) The court may at any time on the application of any party to the reference, on good cause shown, set aside the appointment of an arbitrator or umpire or remove him from office.

(b) For the purposes of this subsection, the expression "good cause", includes failure on the part of the arbitrator or umpire to use all reasonable dispatch in entering on and proceeding with the reference and making an award or, in a case where two arbitrators are unable to agree, in giving notice of that fact to the parties or to the umpire.

(3) Where the appointment of an arbitrator or umpire is so set aside, or where an arbitrator or umpire is so removed from office, the court may, apart from any order for costs which may be awarded against such arbitrator or umpire personally, order that such arbitrator or umpire shall not be entitled to any remuneration for his services.

PROVISIONS AS TO ARBITRATION PROCEEDINGS

14. General powers of arbitration tribunal

(Amends s 14(1) of the existing Act and repeals s 14(2))

(1) An arbitration tribunal may -

(a) on the application of any party to a reference, unless the arbitration agreement otherwise provides -

(i) require any party to the reference, subject to any legal objection, to make discovery of documents by way of affidavit or by answering interrogatories on oath and to produce such documents for inspection;

(ii) require the parties to the reference to deliver pleadings or statements of claim and defence or require any party to give particulars of his claim or counterclaim, and allow any party to amend his pleadings or statements of claim or defence;

(iii) require any party to the reference to allow inspection of any goods or property involved in the reference, which is in his possession or under his control; [~~and~~]

(iv) appoint a commissioner to take the evidence of any person in the Republic [~~or in the territory~~] or abroad and to forward such evidence to the tribunal in the same way as if he were a commissioner appointed by the court;

(v) order security for costs (including additional security) in circumstances where the court may order security in a similar matter before the court and may stay the arbitration proceedings pending compliance with such order;

(vi) order any party to take such interim measures as the arbitration tribunal may consider necessary for the protection of the subject matter of the dispute; and

(vii) grant an extension of time fixed in terms of this Act or the arbitration agreement for the taking of any step by a party, whether such period has

expired or not, provided that this power shall not apply to time limits in respect of court proceedings;

(b) unless the arbitration agreement otherwise provides -

(i) from time to time determine the time when and the place where the arbitration proceedings shall be held or be proceeded with;

(ii) administer oaths to, or take the affirmations of, the parties and witnesses appearing to give evidence;

(iii) subject to [~~any legal objection~~] the defence of privilege, examine the parties appearing to give evidence in relation to the matters in dispute and require them to produce before the tribunal all books, documents or things within their possession or power which may be required or called for and the production of which could be compelled on the trial of an action;

(iv) subject to [~~any legal objection~~] the defence of privilege, examine any person who has been summoned to give evidence and require the production of any book, document or thing which such person has been summoned to produce;

(v) [~~with the consent of the parties or on an order of court~~,] receive evidence given by affidavit; [~~and~~]

(vi) receive evidence given through an interpreter; and

(vii) inspect any goods or property involved in the reference.

(2) Subject to the provisions of this Act and the arbitration agreement, the arbitration tribunal may conduct the arbitration in such manner as it deems fit.

(3) Where an arbitration tribunal consists of two or more arbitrators, any oath or affirmation may be administered by any member of the tribunal designated by it for the purpose.

(4) Where the amount and method of providing security are not determined by the arbitrator when exercising his power under subsection (1)(a)(v), these matters shall be determined by the taxing master of the court and section 38(5) shall apply *mutatis mutandis*.

15. Power of arbitration tribunal to consider evidence

(New provision)

Unless the arbitration agreement otherwise provides, the arbitration tribunal may, subject to the rules of natural justice -

(a) have regard to matters which are within its own knowledge;

(b) rely upon its expert knowledge and experience; and

(c) have regard to all of the evidence and attribute such weight to the evidence as it shall deem appropriate, whether or not that evidence is given under oath, and whether or not that evidence is admissible in civil proceedings in a court.

16. Special powers of arbitration tribunal

(New provision)

If the arbitration agreement so provides, the arbitration tribunal may:

(a) determine any question that arises in the course of the reference on the basis of general considerations of justice and fairness; and

(b) call a witness, including an expert, on its own motion, subject to the right of all parties to the reference to cross-examine that witness and to lead evidence in rebuttal.

17. Manner of arriving at decisions where the arbitration tribunal consists of two or more arbitrators

(Amends s14(3) and (4) of the existing Act)

(1) Where an arbitration tribunal consists of two arbitrators, their unanimous decision, [~~and where it consists of more than two arbitrators, the decision of the majority of the arbitrators,~~] shall be the decision of the arbitration tribunal.

(2) Unless the arbitration agreement provides otherwise, where an arbitration tribunal consists of more than two arbitrators, any decision to be made in the course of the reference may be made by a majority of them and, failing a majority, the decision of the arbitrator appointed by the arbitrators as chairman shall be the decision of the arbitration tribunal.

(3) Unless the arbitration agreement otherwise provides, for purposes of subsections (1) and (2), where the arbitrators, or a majority of them, do not agree in their award, their decision shall not be taken to be either the least amount or least right of relief awarded by them, or the average of what has been awarded by them, but the matter shall, except where it falls in terms of subsection 2 to be decided by the chairman, thereupon become referable to the umpire[~~, unless the arbitration agreement otherwise provides~~].

18. Notice of proceedings to parties and right to representation

(Amends s 15 of the existing Act)

(1) An arbitration tribunal shall give to every party to the reference, written notice of the time when and place where the arbitration proceedings will be held, and every such party shall be entitled to [~~be present~~] appear before the arbitration tribunal personally or, subject to any restrictions in the arbitration agreement, by any representative chosen by that party and to be heard at such proceedings.

(2) The representative referred to in subsection (1) need not be a legal practitioner.

(3) If any party to the reference at any time fails, after having received reasonable notice of the time when and place where the arbitration proceedings will be held, to attend such proceedings without having shown previously to the arbitration tribunal good and sufficient cause for such failure, the arbitration tribunal may proceed in the absence of such party.

19. Summoning of witnesses
(S 16 of the existing Act)

(1) The issue of a summons to compel any person to attend before an arbitration tribunal to give evidence and to produce books, documents or things to an arbitration tribunal, may be procured by any party to a reference in the same manner and subject to the same conditions as if the reference were a civil action pending in the court having jurisdiction in the area in which the arbitration proceedings are being or are about to be held: Provided that -

(a) no person shall be compelled by such a summons to produce any book, document or thing the production of which would not be compellable on trial of an action; and

(b) the clerk of the magistrate's court having jurisdiction in the said area, may issue such summons upon payment of the same fees as are chargeable for the issue of a subpoena in a civil case pending in the magistrate's court.

(2) Any summons issued out of any court in terms of subsection (1) shall be served in the same manner as a subpoena issued out of that court in a civil action pending in that court.

(3) The provisions of subsections (3) and (4) of section eighty-seven of the Prisons Act, 1959 (Act No. 8 of 1959), relating to the service of a subpoena upon any prisoner to give evidence in civil proceedings in any court, shall *mutatis mutandis* apply with reference to the service of a summons upon any prisoner required to give evidence before an arbitration tribunal as if the proceedings before such tribunal were civil proceedings pending in a court.

(4) On the application of any party to a reference, the court may order the process of the court to issue to compel the attendance of a witness before the arbitration tribunal or may order any prisoner to be brought before such arbitration tribunal for examination.

20. Recording of evidence
(S 17 of the existing Act)

If not recorded by the arbitration tribunal itself, the oral evidence of witnesses shall be recorded in such manner and to such extent as the parties to the reference may agree or, failing such agreement, as the arbitration tribunal may from time to time direct after consultation with the parties.

21. Reference of particular points to umpire
(Amends s 18 of the existing Act.)

Unless the arbitration agreement provides otherwise, where an umpire has been appointed in terms of this Act or an arbitration agreement and the arbitrators or [~~a~~] the required majority of them are unable to agree as to any matter of procedure, or any interlocutory question, they [~~may~~] shall refer that matter or question forthwith to the umpire for decision.

22. Powers of umpire
(S 19 of the existing Act)

Unless the arbitration agreement otherwise provides -

(a) the umpire may sit together with the arbitrators and hear the evidence given from time to time and may then and there decide any matter of procedure or any interlocutory question upon which the arbitrators disagree and which is referred by them to him for decision;

(b) an umpire shall not be entitled to any remuneration from the parties in respect of his attendance at any arbitration proceedings conducted by the arbitrators unless the parties have requested him so to attend or unless he is called upon to decide any matter of procedure or any interlocutory question at the request of the arbitrators or is required to enter on the reference and to give an award;

(c) if the arbitrators have by notice in writing advised the parties to the reference, or the umpire, that they are unable to agree, or if the arbitrators have allowed the time or extended time for making their award to expire without making an award, and the parties have not advised the umpire that they intend to grant an extension or further extension of the said period or to apply to the court therefor, the umpire shall forthwith enter on the reference in lieu of the arbitrators;

(d) an umpire who enters on a reference as provided in paragraph (c), shall have the same powers as if he had been appointed as sole arbitrator, and may for that purpose unless he is required by the parties to hear the evidence of the parties and their witnesses, or, whenever he is called upon by the arbitrators to decide any matter of procedure or any interlocutory question, act upon the evidence recorded in the proceedings before the arbitrators, and may, if he thinks fit, recall for further examination any person who has given such evidence.

23. Statement of case for opinion of court or counsel during arbitration proceedings
(Amends s 20 of the existing Act.)

(1) An arbitration tribunal may, on the application of any party to the reference and shall, if the court, on the application of any such party, so directs, or if the parties to the reference so agree, at any stage before making a final award state any question of law arising in the course of the reference in the form of a special case for the opinion of the court or for the opinion of counsel.

(2) An opinion referred to in subsection (1) shall be final and not subject to appeal and shall be binding on the arbitration tribunal and on the parties to the reference.

(3) <u>The court or arbitration tribunal in exercising its discretion under subsection (1) shall not grant an application for a question of law to be referred to the court unless it considers that, having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more of the parties to the arbitration agreement or if it considers that the application is not bona fide or is made with a view to causing delay.</u>

(4) <u>The parties to a reference can exclude that reference from the provisions of subsection (1) by means of an agreement in writing entered into after the dispute has arisen and the appointment of the arbitration tribunal.</u>

24. General powers of the court
(Amends s 21 of the existing Act.)

(1) For the purposes of and in relation to a reference under an arbitration agreement, the court shall have the same power of making orders in respect of -

(a) security for costs;

[~~(b) discovery of documents and interrogatories;~~

(~~c~~) ~~the examination of any witness before a commissioner in the Republic or in the territory or abroad and the issue of a commission or a request for such examination;~~

~~(d) the giving of evidence by affidavit;~~]

(b) [~~the inspection or~~] the interim custody or the preservation or the sale of goods or property;

(c) an interim interdict or similar relief;

(d) securing the amount in dispute in the reference; and

(e) substituted service of notices required by this Act or of summonses; [~~and~~]

[~~(i) the appointment of a receiver,~~]

as it has for the purposes of and in relation to any action or matter in that court.

(2) The provisions of subsection (1) shall not be construed so as to derogate from any power which may be vested in an arbitration tribunal of making orders with reference to any of the matters referred to in the said subsection.

(3) Notwithstanding anything to the contrary in the arbitration agreement, the court may at any time, on the application of any party to the reference, order that the umpire shall enter upon the reference in lieu of the arbitrators in all respects as if he were a sole arbitrator.

25. Offences
(Amends s 22 of the existing Act.)

(1) Any person who

(a) without good cause, fails to appear in answer to a summons to give evidence before an arbitration tribunal; or

(b) having so appeared, fails to remain in attendance until excused from further attendance by the arbitration tribunal; or

(c) upon being required by an arbitration tribunal to be sworn or to affirm as a witness, refuses to do so; or

(d) refuses to answer fully and to the best of his knowledge and belief any question lawfully put to him during any arbitration proceedings; or

(e) without good cause, fails to produce before an arbitration tribunal any book, document or thing specified in a summons requiring him so to produce it; or

(f) while arbitration proceedings are in progress, wilfully insults any arbitrator or umpire conducting such proceedings, or wilfully interrupts such proceedings or otherwise misbehaves himself in the place where such proceedings are being conducted,

shall be guilty of an offence and liable on conviction to [~~a fine not exceeding one hundred rand or to imprisonment for a period not exceeding three months~~] the penalties imposed by section 30(4) of the Supreme Court Act 59 of 1959: Provided that in connection with the interrogation of any such person or the production of any such book, document or thing the law relating to privilege as applicable to a witness subpoenaed to give evidence or to produce any book, document or thing before a court of law shall apply.

(2) Any person who, having been sworn or having made an affirmation, knowingly gives false evidence before an arbitration tribunal, shall be guilty of an offence and liable on conviction to the penalties prescribed by law for perjury.

PROVISIONS AS TO AWARDS

26. Time for making award
(Amends s 23 of the existing Act)

The arbitration tribunal shall, unless the arbitration agreement otherwise provides, make its award -

(a) in the case of an award by an arbitrator or arbitrators[~~, within four months after the date on which such arbitrator or arbitrators entered on the reference or the date on which such arbitrator was or such arbitrators were called on to act by notice in writing from any party to the reference, whichever date be the earlier date~~] within two months after either the completion of the hearing or receipt of all the parties' submissions by the arbitration tribunal, as the case may be; and

(b) in the case of an award by an umpire, within three months after the date on which such umpire entered on the reference or the date on which such umpire was called on to act by notice in writing from the arbitrators or any party to the reference, whichever date be the earlier date,

or in either case on or before any later date to which the parties by any writing signed by them may from time to time extend the time for making the award: Provided that the court may, on good cause shown, from time to time extend the time for making any award, whether that time has expired or not.

27. Award to be in writing
(Amends s 24 of the existing Act.)

(1) The award shall be in writing and shall be signed by all the members of the arbitration tribunal.

(2) If a minority of the members of the arbitration tribunal refuse to sign the award, such refusal shall be mentioned in the award but shall not invalidate it.

(3) Unless the arbitration agreement otherwise provides, the award shall state the reasons on which it is based.

28. [Publication] Delivery of award.
(Amends s 25 of the existing Act.)

(1) Subject to section 37(4) the award shall be delivered by the arbitration tribunal[,] to the

parties or their representatives. [~~being present or having been summoned to appear.~~]

(2) Unless the arbitration agreement provides otherwise, the award shall be deemed to have been [~~published to the parties on the date on which it was so delivered~~] delivered to a party on the date when he is advised in writing that the award is ready to be uplifted.

29. Interim award
(S 26 of the existing Act)

Unless the arbitration agreement provides otherwise, an arbitration tribunal may make an interim award at any time within the period allowed for making an award.

30. Specific performance
(S 27 of the existing Act)

Unless the arbitration agreement provides otherwise, an arbitration tribunal may order specific performance of any contract in any circumstances in which the court would have power to do so.

31. Award to be binding
(Amends s 28 of the existing Act)

[~~Unless the arbitration agreement provides otherwise, an award shall,~~] Subject to the provisions of this Act, an award shall be final and not subject to appeal and each party to the reference shall abide by and comply with the award in accordance with its terms, unless the arbitration agreement provides for a right of appeal to another arbitration tribunal.

32. Interest on amount awarded
(S 29 of the existing Act)

Where an award orders the payment of a sum of money, such sum shall, unless the award provides otherwise, carry interest as from the date of the award and at the same rate as a judgment debt.

33. Power of arbitration tribunal to correct errors in award
(Amends s 30 of the existing Act.)

(1) An arbitration tribunal, whether on the application of a party or on its own initiative, may correct in any award any clerical mistake or any [~~patent~~] error arising from any accidental slip or omission or may clarify the award.

(2) An application made by a party under subsection (1) shall be made within 15 days after the award has been delivered.

(3) A correction or clarification under subsection (1) shall, except with the consent of all the parties, be made within 30 days after the delivery of the award.

(4) Unless otherwise agreed by the parties, a party may, within 30 days after the award has been delivered to him, apply to the arbitration tribunal to make an additional award with respect to claims presented in the proceedings but omitted from the award, provided that before granting the application the arbitration tribunal shall first give the other parties to the reference the opportunity to make representations.

(5) A corrected, clarified or additional award under this section shall comply with sections 27

and 28.

34. Award may be made an order of court
(S 31 of the existing Act)

(1) Any award may, on the application to a court of competent jurisdiction by any party to the reference after due notice to the other party or parties, be made an order of court.

(2) The court to which application is so made, may, before making the award an order of court, correct in the award any clerical mistake or any patent error arising from any accidental slip or omission.

(3) An award which has been made an order of court may be enforced in the same manner as any judgment or order to the same effect.

35. Remittal of award

(Amends s 32 of the existing Act.)

(1) The parties to a reference may within six weeks after the [~~publication~~] delivery of the award [~~to them~~], by any writing signed by them remit any matter which was referred to arbitration, to the arbitration tribunal for reconsideration and for the making of a further award or a fresh award or for such other purpose as the parties may specify in the said writing.

(2) The court may, on the application of any party to the reference after due notice to the other party or parties made within six weeks after the [~~publication~~] delivery of the award [~~to the parties~~], on good cause shown, remit any matter which was referred to arbitration, to the arbitration tribunal for reconsideration and for the making of a further award or a fresh award or for such other purpose as the court may direct.

(3) When a matter is remitted under subsection (1) or (2) the arbitration tribunal shall, unless the writing signed by the parties or the order of remittal otherwise directs, dispose of such matter within three months after the date of the said writing or order.

(4) Where in any case referred to in subsection (1) or (2) the arbitrator has died after making his award, the award may be remitted to a new arbitrator appointed, in the case of a remittal under subsection (1), by the parties or, in the case of a remittal under subsection (2), by the court.

36. Setting aside of award

(Amends s 33 of the existing Act.)

(1) Where -

[~~(a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or~~]

(a) an arbitration tribunal or any member thereof

(i) has committed any gross irregularity in the conduct of the arbitration proceedings; or

(ii) has exceeded its or his powers; or

(b) an award has been improperly obtained,

the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.

(2) An application pursuant to this section shall be made within six weeks after the delivery [~~publication~~] of the award [~~to the parties~~]: Provided that when the setting aside of the award is requested on the ground of corruption, such application shall be made within six weeks after the discovery of the corruption and in any case not later than three years after the date on which the award was so published.

(3) The court may, if it considers that the circumstances so require, stay enforcement of the award pending its decision.

(4) If the award is set aside the dispute shall, at the request of either party, be submitted to a new arbitration tribunal constituted in the manner directed by the court.

REMUNERATION OF ARBITRATORS AND UMPIRE AND COSTS

37. Remuneration of arbitrators and umpire
(Amends s 34 of the existing Act.)

(1) [~~Where the fees of the arbitrator or arbitrators or umpire have not been fixed by an agreement between him or them and the parties to the reference~~], Any party to the reference may, notwithstanding that the fees of the arbitrator or arbitrators or umpire may already have been paid by the parties, or any of them, require such fees to be taxed, and thereupon such fees shall be taxed by the taxing master of the court, provided that if the tariff of such fees has previously been fixed by agreement between the arbitrator or arbitrators or umpire and the parties to the reference, that tariff shall not be subject to reduction on taxation.

(2) Any taxation of fees under this section may be reviewed by the court in the same manner as a taxation of costs.

(3) The arbitrator or arbitrators or umpire shall be entitled to appear and be heard at any taxation or review of taxation under this section.

(4) The arbitrator or arbitrators or an umpire may withhold his or their award pending payment of his or their fees and of any expenses incurred by him or them in connection with the arbitration with the consent of the parties, or pending the giving of security for the payment thereof.

38. Costs of arbitration proceedings
(S 35 of the existing Act with one minor amendment)

(1) Unless the arbitration agreement otherwise provides, the award of costs in connection with the reference and award shall be in the discretion of the arbitration tribunal, which shall, if it awards costs, give directions as to the scale on which such costs are to be taxed and may direct to and by whom and in what manner such costs or any part thereof shall be paid and may tax or settle the amount of such costs or any part thereof, and may award costs as between attorney and client.

(2) If no provision is made in an award with regard to costs, or if no directions have been given therein as to the scale on which such costs shall be taxed, any party to the reference may within fourteen days of the publication of the award, make application to the arbitration tribunal for an order directing by and to whom such costs shall be paid or giving directions as to the scale on which such costs shall be taxed, and thereupon the arbitration tribunal shall, after hearing any party who may desire to be heard, amend the award by adding thereto such directions as it may think proper with regard to the payment of costs of the scale on which such costs shall be taxed.

(3) If the arbitration tribunal has no discretion as to costs or if the arbitration tribunal has such a discretion and has directed any party to pay costs but does not forthwith tax or settle such costs, or if the arbitrators or a majority of them cannot agree in their taxation, then, unless the agreement otherwise provides, the taxing master of the court [~~may~~] shall tax them.

(4) If an arbitration tribunal has directed any party to pay costs but has not taxed or settled such costs, then, unless the arbitration agreement provides otherwise, the court may, on making the award an order of court, order the costs to be taxed by the taxing master of

the court and, if the arbitration tribunal has given no directions as to the scale on which such costs shall be taxed, fix the scale of such taxation.

(5) Any taxation of costs by the taxing master of the court may be reviewed by the court.

(6) Any provision contained in an arbitration agreement to refer future disputes to arbitration to the effect that any party or the parties thereto shall in any event pay his or their own costs or any part thereof, shall be void.

39. Costs of legal proceedings
(S 36 of the existing Act)

An order made or opinion given by the court under this Act may be made or given on such terms as to costs, including costs against an arbitrator or umpire, as the court considers just.

MISCELLANEOUS PROVISIONS

40. Service of notices
(Amends s 37 of the existing Act.)

Unless the arbitration agreement provides otherwise, any notice required by any provision of this Act to be served on any person, may be served either -

(a) by delivering it to the person on whom it is to be served; or

(b) by leaving it at the usual or last known place of residence of that person in the Republic [~~or the territory~~]; or

(c) by sending it by post to that person at his usual or last known place of residence in the Republic [~~or the territory~~]; or

(d) in any other manner authorized by the court.

41. Extension of periods fixed by or under this Act
(S 38 of the existing Act)

This court may, on good cause shown, extend any period of time fixed by or under this Act, whether such period has expired or not.

42. This Act binds the State
(S 39 of the existing Act)

This Act shall apply to any arbitration in terms of an arbitration agreement to which the State is a party, other than an arbitration in terms of an arbitration agreement between the State and the Government of a foreign country or any undertaking which is wholly owned and controlled by such a Government.

43. Application of this Act to arbitrations under special laws
(S 40 of the existing Act)

This Act shall apply to every arbitration under any law passed before or after the commencement of this Act, as if the arbitration were pursuant to an arbitration agreement and as if that other law were an arbitration agreement: Provided that if that other law is

an Act of Parliament, this Act shall not apply to any such arbitration in so far as this Act is excluded by or is inconsistent with that other law or is inconsistent with the regulations or procedure authorized or recognized by that other law.

~~41. Application to South-West Africa~~

~~This Act and any amendment thereof shall apply also in the territory.~~

44. Repeal of laws and transitional provisions

(Amends s 42 of the existing Act.)

(1) The Arbitration Act 42 of 1965 is hereby repealed.

(2) Any arbitration, enquiry or trial commenced prior to the commencement of this Act in terms of [~~any~~] the law repealed by subsection (1) shall be proceeded with in all respects as if such repeal had not been effected.

(3) Any arbitration commenced after the commencement of this Act under any arbitration agreement entered into before such commencement, shall be dealt with under this Act in all respects as if such agreement had been entered into after such commencement.

45. Short title

This Act shall be called the Arbitration Act, 199*.

Db/actd4

ASSOCIATION OF ARBITRATORS

AMENDMENTS TO ARBITRATION ACT 42 OF 1965

COMMENTARY ON PROPOSED AMENDMENTS

Part 1: Introduction

The purpose of this introduction is to set out briefly the principles considered and applied by the drafting committee of the Association of Arbitrators in preparing the amended draft Arbitration Act (Draft D4) which is the subject of this commentary. The reasons for changes to individual sections are discussed separately in Part 2 of this commentary. The introduction also outlines the reasons why the Executive Committee of the Association of Arbitrators supports the view that South Africa should adopt the UNCITRAL Model Law on International Commercial Arbitration for international arbitrations only, while retaining separate legislation for domestic arbitration.

1.1 The work of the Association of Arbitrators on reviewing arbitration legislation

As long ago as June 1984, a member of the Executive Committee of the Association of Arbitrators, the late Mr D J Rouse, wrote to the chairman of the Association, Mr E N Finsen, suggesting that the time had come for the Association to make representations to the appropriate authorities for amendments to the Arbitration Act 42 of 1965. One of the initial proposals, put forward by Mr A Hyman, was that the arbitration legislation should be completely rearranged and divided into three parts, namely

(a) non-variable provisions which may not be deleted or varied by the parties to the arbitration;
(b) provisions which apply unless the parties otherwise agree ("contract out"); and
(c) provisions which only apply if the parties so agree ("contract in").

A draft was prepared along these lines. However in 1988, some doubts were expressed about the wisdom of making such radical changes and another draft was prepared, arranged in the same way as the present Act. Responsibility for proceeding with the work was entrusted to a committee of the Association in Natal under the energetic and able chairmanship of the late A A T Wilson, then chairman of the Natal Branch of the Association. This committee consisted of lawyers and experienced arbitrators from the construction industry. During the early part of 1990, Prof D W Butler of the Law Faculty of the University of Stellenbosch was invited to join the committee. Prof Butler was then working on a project to recommend changes to the Arbitration Act in the light of recent changes to legislation in other jurisdictions. This research was undertaken with the financial assistance of the Centre for Science Development (HRSC South Africa) which enabled him to spend several months in London doing library research during 1989. (The results of this and subsequent research are due to be published in an article: David Butler "South African Arbitration Legislation - the need for reform" in the July 1994 issue of *The Comparative and International Law Journal of South Africa (CILSA)*.) The committee held several further meetings during 1990 and 1991, but certain factors, inter alia the illness and death of Alec Wilson in November 1992 and the publication of the report of the New Zealand Law Commission *Arbitration* which was received at the end of 1992 meant that the drafting committee's recommendations were only submitted to the Executive Committee of the Association during January 1994. The main sources considered by the drafting committee appear from para 1.4 below and the schedule to this commentary. At a meeting of the Executive Committee in February 1994, it was agreed to accept the Draft Act (with supporting commentary) tabled by the drafting committee as a discussion document, to be circulated to interested parties and submitted to the Department of Justice, once certain minor changes had been made. These changes have now been incorporated in the Draft Act and Commentary.

The Draft Act and commentary were also discussed at a seminar organised by the Association for a small number of invited lawyers and other interested parties, including representatives of ADRASA, at Johannesburg in May 1994. The comments were generally favourable. Because the Draft Act and commentary are intended as discussion documents for consideration by interested parties in general, no changes have been made to the Draft Act at this stage as a result of the seminar, but references to the comments of one of those attending, namely Prof Richard Christie QC, who has published several recent articles on South African arbitration law, have been incorporated in this commentary.

Before deciding to proceed with the Draft Act, the Executive Committee had to take a policy decision as to what it thought South Africa's response should be to the UNCITRAL Model Law on International Commercial Arbitration.

1.2 Suggested response to the UNCITRAL Model Law

By way of introduction, it is clear from a perusal of international literature on the reform of a country's arbitration legislation that the discussion is dominated by two issues, namely (i) the powers of the courts in relation to arbitration agreements, proceedings and awards and (ii) how a particular country should respond to the UNCITRAL Model Law. The drafting committee's views on the first issue appear from para 1.3 below.

In considering whether or not South Africa should adopt the UNCITRAL Model Law and the arbitrations to which the Model Law should apply, if adopted, it is important to bear in mind that the UNCITRAL Model Law was prepared on the basis that it would apply to "international commercial arbitration" (see Redfern & Hunter 2 ed 510). Although Redfern & Hunter suggest that there is nothing to stop a national legislature from giving the UNCITRAL Model Law a wider application so as to apply to domestic arbitration as well, this approach seems inappropriate in the case of South Africa. (For a more detailed discussion of South Africa's potential responses to the UNCITRAL Model Law see Butler 1994 *CILSA* under the heading ~Should South Africa adopt the UNCITRAL Model Law?"). If one compares the UNCITRAL Model Law with our existing Arbitration Act 42 of 1965, the UNCITRAL Model Law is clearly less comprehensive: for example, it makes no reference to the award of costs and the taxation thereof, there is no provision regarding interest on the amount of an award; there is no specific reference to discovery; there is no provision corresponding to s 8 of our Act and the court's power of remittal under article 34(4) of the Model Law is much narrower than that contained in s 32 of our Act (see e g paras 12 and 87 of the Mustill report of 1989, published as "The response of the Departmental Advisory Committee to the UNCITRAL Model Law" in (1990) *Arbitration International* 3). Therefore, before the UNCITRAL Model Law could be applied as a substitute to the existing Act, the former's provisions would require adaptations and amplification.

It is implicit in the question posed by Adv Pat Lane at the August 1993 conference of the Association of Arbitrators on *International Dispute Resolution: the Future for South Africa*, namely "Should we distinguish between domestic and international arbitrations and adopt the UNCITRAL model law?" (see p 10 para 44.9 of the transcript) that there are three basic responses to the UNCITRAL Model Law.

The first response would be to reject it for both international and domestic arbitrations. As pointed out by Prof Richard Christie at the same conference (see p 10 of his paper), the countries which have not adopted the UNCITRAL Model Law, namely England, France, Switzerland, Holland and Sweden, are all established and flourishing international arbitration centres. They are able to attract arbitrations on the basis of their existing laws which are known and understood by users of international arbitration. It is significant that Germany is considering adopting the UNCITRAL Model Law to enhance its present lowly status as a centre for international arbitration (see Berger *International Economic Arbitration* 43-4 and 48). Moreover, although the compilers of the new Dutch Arbitration Act of 1986 decided not to adopt the UNCITRAL Model Law, they

were certainly influenced by some of its provisions. Similarly, the drafters of a new Arbitration Act for England, presently under consideration, while not adopting the UNCITRAL Model Law for international arbitration, have followed its basic structure and used its provisions as a yardstick to assess the quality of existing English legislation (see the Department of Trade and Industry (DTI*) A Consultation Paper on Draft Clauses and Schedules of an Arbitration Bill* (February 1994) part III para 1).

The second response is to adopt the UNCITRAL Model Law for both international and domestic arbitrations. This has been done by Nigeria (see Ezejiofor 1993 *Journal of Business Law* 82), New Zealand (see the Report of the New Zealand Law Commission *Arbitration* NZLCR 20 ix) and in Canada at federal level for certain matters and at provincial level in Quebec (see Brierly 1988 *Maine Law Review* 288-294). In the case of New Zealand, the text of the UNCITRAL Model Law is contained in schedule 1 of the draft Act proposed by the Law Commission, with some changes for both international and domestic arbitrations. In the case of Nigeria, the Arbitration and Conciliation Act of 1988 is based on the UNCITRAL Model Law as well as the UNCITRAL Arbitration and Conciliation Rules. Ezejiofor 82 is critical of the way in which the Nigerian Act is drafted and doubts whether the draftsmen had the insight or competence to be aware of the effects of the departures from the UNCITRAL Model Law. The monistic approach is also currently favoured by the working group of the Federal Ministry of Justice in Germany (see Berger 52-3 and 746-748, although Berger (748 and 755) favours the third approach discussed below

As pointed out above, the UNCITRAL Model Law is not sufficiently comprehensive for use as a statute for domestic arbitration without changes (see also Berger 753). Although the compilers of the UNCITRAL Model Law anticipated that state legislatures would make changes to meet their particular needs, such changes undermine the goal of global harmonisation of international arbitration legislation and will tend to diminish the attractions of that state as a venue for international arbitration (see also Berger 748 and 755). The New Zealand Law Commission was aware of this problem and therefore kept those provisions based on the UNCITRAL Model Law together in sch 1 and even when making necessary modifications, tried to follow the language of the UNCITRAL Model Law as far as possible (see para 182 of the report on p 123). Unrelated provisions are in the Act itself and the second schedule contains a number of additional optional provisions on a contract in or contract out basis.

In both Nigeria and New Zealand, the result has been a new arbitration statute which differs drastically from the legislation which it replaced. The previous New Zealand arbitration statute on the English model was originally enacted in 1908, although it had been amended during the 1930's. The previous Nigerian statute of 1958 was based on the English Arbitration Act of 1889 as opposed to the 1950 Act (see Ezejiofor 91). It should be noted that in both jurisdictions, the previous arbitration legislation was obsolete and, one gathers, little used. In Canada it was seriously doubted for many years whether the federal parliament had constitutional authority to enact legislation on the topic of arbitration (see Brierly 290). Quebec differs from the other provinces in having a civil law code and prior to 1986 its arbitration legislation was based on somewhat restrictive and antiquated provisions of French law, which were modified in France itself in 1981.

The third response is to adopt the UNCITRAL Model Law for international arbitration, while retaining a separate statute for domestic arbitration. This dualistic approach has been adopted in Hong Kong, Australia and most provinces of Canada. Prior to the adoption of the UNCITRAL Model Law, these jurisdictions also made substantial improvements to their legislation for domestic arbitration. The UNCITRAL Model Law has also been adopted for international arbitrations in Scotland, following the recommendations of a committee chaired by Lord Dervaird. The committee made this recommendation with a view to getting the UNCITRAL Model Law adopted as soon as possible and before tackling the second part of its mandate which is to consider improvements to Scottish arbitration law in general. Because of considerable opposition to such a move, it appears unlikely that the committee will recommend the adoption of the

UNCITRAL Model Law for Scottish domestic arbitration as well.

Which of these approaches should South Africa adopt? In the light of the changed political situation since 1990, it is obviously important that the country should do everything possible to establish itself as a regional centre for international arbitration. In view of the number of countries which have adopted or are considering the adoption of the UNCITRAL Model Law for international arbitration, the Executive Committee of the Association agrees with Prof Christie (op cit p 10) that it would be wise to adopt the UNCITRAL Model Law for international arbitration as soon as possible (see also Christie (1993) 9 *Arbitration International* 153 165). Notwithstanding the attractions of a uniform arbitration statute for domestic and international arbitrations (the Dutch Act of 1986 is the best example of what can be achieved in this regard, but then the Dutch rejected the UNCITRAL Model Law to be able to achieve their aim), the Executive Committee is of the view that South Africa should adopt the third approach and retain either a separate Act or a separate chapter of a consolidated Arbitration Act for domestic arbitrations.

The following reasons can be advanced in support of this approach (see also Butler 1994 *CILSA* under the heading "Should South Africa adopt the UNCITRAL Model Law?" Berger 748). The current South African Arbitration Act 42 of 1965 at the time of its commencement was in advance of legislation in other jurisdictions (see Butler & Finsen 6) and it has worked well in practice. It was the view of the Association's own drafting committee (see para 1.4 below) that the existing Act was basically sound but needed certain improvements to strengthen the position of the arbitrator and to clarify the powers of the court. These changes could be done without a radical departure from the structure of the present Act and many of its provisions are retained. The present Act has been interpreted and applied by the courts on numerous occasions, and the results have usually been satisfactory. To adopt a completely new Act based on the UNCITRAL Model Law for domestic arbitration would therefore undermine legal certainty (see the Mustill report para 41). Initially at least, the number of South African parties, lawyers and arbitrators who would regularly be involved in international arbitrations would be comparatively small in relation to those involved in domestic arbitrations (consider not only domestic building disputes but also private arbitrations in labour disputes). The current state of South African arbitration law differs considerably from that which previously pertained in Nigeria and New Zealand, being two of the few jurisdictions which have adopted the UNCITRAL Model Law for domestic arbitration. It is also probably fair to say that our arbitration law for domestic arbitrations is better developed than that of Scotland, Canada or Australia, until new legislation was recently adopted in the last-mentioned two countries. It must nevertheless be conceded that having two systems of arbitration law side by side (one for international and one for domestic arbitrations) will also cause certain difficulties, particularly until certain ambiguities in e g articles 1 and 5 of the UNCITRAL Model Law regarding the extent of its application and the extent of the courts' powers have been clarified by the courts (see the Mustill Report paras 69-73). These difficulties can be partially overcome by including a provision in the Arbitration Act 42 of 1965, or its successor excluding its application to international arbitrations as defined in article 1 of the UNCITRAL Model Law. (Prof Richard Christie initially favoured the second approach above, but after perusing a previous version of this commentary is now emphatically in favour of the third approach.)

The Executive Committee has therefore appointed a committee, whose members include Professors Butler and Christie, with the task of carefully considering the text of the UNCITRAL Model Law in the light of modifications made in other jurisdictions, and to recommend what changes are essential for the successful implementation of the UNCITRAL Model Law for international arbitration in South Africa. (As pointed out above departures from the wording of the UNCITRAL Model Law which are not essential defeat the goal of harmonisation of international legislation and would therefore make this country a less attractive venue.)

1.3 Powers of the court

As stated above, one of the two most important issues to have been discussed during the last

fifteen years in relation to the reform of arbitration legislation (particularly in those jurisdictions with arbitration statutes based on English legislation) is the supervisory powers of the court regarding the arbitration process, particularly in relation to arbitration awards. (See Butler 1994 *CILSA* under the heading "The role of the courts in relation to arbitration" for a more detailed discussion of this subject.)

The importance attached in some quarters to the role of the courts in arbitration law is illustrated by the following statement in Mustill & Boyd (2 ed 1989 at p 3), namely:

> "The law of private arbitration is concerned with the relationship between the courts and the arbitral process."

Although a perusal of the contents of the existing Arbitration Act 42 of 1965 suggests that the above quotation overstates the position, it cannot be denied that many of the provisions of the Act are concerned with the powers of the court. For present purposes, it is convenient to distinguish between the court's powers of assistance and support for the arbitral process (e g ss 6, 8, 12, 20, 21(1), 23, and 38) and the court's powers of supervision and intervention (e g ss 3(2), 13(2), 32 and 33) (compare Kerr 1984 (50) *Arbitration* 3 at 5-6).

The primary need to reassess the supervisory and interventionist powers of the court in jurisdictions with arbitration law derived from that of England arose from a rule of the common law (outside the arbitration statutes) which was never applied in South Africa, namely the rule whereby a court could set aside an arbitrator's decision by reason of an error on the face of the award. (As to the rule not applying in South Africa, see *Dickenson & Brown v Fisher's Executors* 1915 AD 166 at 177-81 especially 180; Butler & Finsen 293). The rule gave rise to a perception that it was too easy for English courts to interfere with an arbitrator's award, thereby undermining the finality of the award. The (English) Arbitration Act 1979 abolished this rule in England and replaced it with a limited right of appeal to the court on a point of law, a power which has moreover been restrictively applied by the courts. Similar legislation has been adopted in Australia, Canada and Hong Kong, and recommended for adoption in New Zealand. Because the rule which led to the creation of the right of appeal to the courts never applied in South Africa and because the trend internationally is to decrease the power of the court to interfere with an arbitrator's decisions, the drafting committee was of the view that there is no need to consider creating further or alternative supervisory powers for the court in respect of the arbitrator's award. However, the committee was of the opinion that there is a need to reassess the court's statutory powers, especially its interlocutory powers (i e powers exercised prior to the award) and powers of assistance, matters which have also received the attention of the legislature and commentators in other jurisdictions. It appears that some of these existing powers are excessive and unduly undermine the authority of the arbitrator.

Professor Richard Christie favours a more drastic reform by removing the court's discretionary powers in ss 3(2) and 6 whereby it can decline to enforce the arbitration agreement. While these powers need to be restricted in the context of international commercial arbitration, the powers could however be used beneficially in the context of domestic arbitrations, for example, until South Africa has comprehensive consumer protection legislation, to protect a consumer from the harsh operation of an arbitration clause in a standard-form contract. Prof Christie is also in favour of amending s 31 of the existing Arbitration Act to specify the grounds on which a court may refuse to enforce a domestic arbitration award. In his view the grounds should be restricted to those on which the enforcement of a foreign arbitral award may be refused by a South African court under s 4 of the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977. These grounds should also correspond as closely as possible to those on which an award may be set aside (compare articles 34 and 36 of the UNCITRAL Model Law). His object is to apply the same criteria for the non-enforcement and setting aside of domestic, international and foreign awards. (These ideas are developed in two articles "Arbitration: party autonomy or curial intervention II: international commercial arbitrations" and "Arbitration: party autonomy or curial

intervention III: domestic arbitrations" to be published in forthcoming issues of the 1994 *South African Law Journal*.) In considering these proposals, two points must be borne in mind: First, South African law presently distinguishes between passive and active remedies for challenging an award. If the party alleges that the award is void, he need not take any active steps but may merely defend any attempt to enforce the award on the basis that it is void. Where there is a valid award which is voidable because of misconduct or a gross procedural irregularity it is necessary for the party wishing to challenge the award to apply to court for its setting aside under s 33 with six weeks (subject to s 38) of the publication of the award (see Butler & Finsen 273-4; *Van Zijl v Von Haebler* 1993 3 SA 654 (SE) 658J-659J). Secondly, there is also a second active remedy for challenging an award, namely remittal under s 32 and the grounds for remittal are wider than those for setting aside (see Butler & Finsen 287-9). A comprehensive review of legislation on enforcing and setting aside an award would also have to consider the ambit of remittal.

1.4 Basic approach and legislation consulted

The existing Arbitration Act 42 of 1965 is logically arranged, following a chronological approach: it starts by dealing with matters not subject to arbitration and the effect of an arbitration agreement, before proceeding to deal with the composition of the arbitration tribunal and its appointment, the arbitration process and the award. The drafters of the existing Act moved away from the English model to some extent and produced a statute which was both more logically arranged, and, at the time of its enactment, in advance of legislation in other jurisdictions (see further Butler & Finsen 5-6). The existing Act has, on the whole, worked well in practice.

The drafting committee of the Association of Arbitrators therefore proceeded from the premise that the existing South African Arbitration Act is not in need of drastic or fundamental reform, but requires modernisation to keep abreast of trends in other jurisdictions. The amendments proposed by the committee and the reasons for the changes are discussed in Part 2 of this commentary, which should be read in conjunction with the text of the proposals contained in "Draft D4". In the course of the discussion, reference will be made*, inter alia*, to the English Arbitration Act of 1979, the Hong Kong Arbitration Ordinance (as amended), the British Columbia Commercial Arbitration Act 1986 (as an example of Canadian provincial legislation on domestic arbitration) and the Victoria Commercial Arbitration Act 1984 (which is typical of Australian state legislation on domestic arbitration). Reference is also made to the Netherlands Arbitration Act 1986 as an example of a modern codification of arbitration law in the civil tradition. Reference was also made to the Quebec arbitration legislation of 1986, which is a code for both domestic and international arbitration, based on the UNCITRAL Model Law. The committee also considered the UNCITRAL Model Law itself in making certain proposals. Finally, there are occasional references to the draft Arbitration Act proposed by the New Zealand Law Commission, which departs from the example of the other Commonwealth countries referred to above, by basically following the UNCITRAL Model Act, while making certain additions, some of which are derived from the English Arbitration Act of 1979. The DTI's draft bill of February 1994, consolidating with amendments, England's arbitration legislation, was received too late to be considered by the Association's drafting committee. Several references to the bill have nevertheless been incorporated in this commentary. The bill follows the monistic approach, in that part 1 of the bill, comprising 43 clauses, with certain exceptions, applies to both domestic and international arbitrations. (The bill and its commentary have been published in (1994) 10 *Arbitration International* 189-251. Pages 163-187 contain a critical assessment of the proposals by various commentators.)

The committee's draft for a new Arbitration Act, like the existing Act, is not an attempt to codify our arbitration law. Nevertheless, certain amendments state or clarify the existing legal position, for the benefit of arbitrators or users of arbitration who may not be familiar with these points. (See for example the court's power to dismiss the claimant's claim for want of prosecution (s 3(3)), the arbitrator's power to order rectification of a contract or to make a declaratory order (s

5(1)), the arbitrator's power to rule on his own jurisdiction (s5(2)-(6)), the court's power to extend the time for commencing arbitration proceedings (s 8), the application of the rules of evidence in arbitration proceedings (s 15(c)) and certain special powers of the arbitrator on a "contract in" basis (s 16).) Nevertheless, following the pattern of the existing Act, no reference has been made to certain fundamental principles of our arbitration law. (In contrast, for example, to article 18 of the UNCITRAL Model Law, which provides that the parties "shall be treated with equality and each party shall be given a full opportunity of presenting his case".)

1.5 Underlying principles

(See further Butler 1994 *CILSA* under the heading "Basic principles pertaining to arbitration legislation".)

The proposed changes suggested by the drafting committee try to give effect to the following three principles:

(a) the restriction of the court's interlocutory powers, where these are regarded as excessive;

(b) pursuant to the consensual basis of arbitration, the provisions not concerned with the powers of the courts (particularly those relating to the appointment of the arbitrator and the arbitral process) are of a regulatory nature, which the parties are free to vary in the arbitration agreement; and

(c) particularly where the arbitration agreement is silent, to ensure that the arbitration tribunal has adequate and clearly defined powers to determine the parties' dispute in a swift and cost-effective manner, while still doing justice between the parties (see especially ss 14 to 16).

Certain additional topics which were considered by the committee, but which did not, in the committee's view merit inclusion in a new Arbitration Act at this stage, are briefly referred to in Part 3 of this commentary.

1.6 Format of Draft D4

Although the drafting committee attempted to keep changes to the existing Arbitration Act to those it regarded as necessary for the continued effective operation of the Act, the proposed changes are nevertheless substantial. The committee's proposals are therefore submitted (in Draft D4) in the form of a new arbitration statute. It would however be technically possible to recast the proposals in the form of legislation to amend the existing Act but without repealing it.

Part 2: Commentary on sections of Draft D4 which involve changes from the existing Act

Note: the references to sections in the headings in the commentary are to the sections in Draft D4, with the section numbers of the present Act being included in square brackets [] where they differ from those of Draft D4.

Section 1 (Definitions)

1) Definition of "territory" deleted.
2) Insertion of subsection 2 with a definition of when a dispute is deemed to have been referred to arbitration for purposes of the new consolidated section 4.
3) The existing definition of "arbitration agreement" as a written agreement is retained, with the result that an oral submission to arbitration in terms of an oral agreement will still fall under the common law (see Butler & Finsen 38). This is the most usual definition, midway between the extremes in other legislation. This approach is also retained in clause 1(1) of the English DTI's draft bill of February 1994. However, both the British Columbian statute (s 1 ("commercial arbitration agreement") and the New Zealand draft

Act (s 4) include oral agreements. Prof Christie advocates giving further consideration to extending the ambit of the South African Arbitration Act to apply to oral arbitration agreements. In contrast, the UNCITRAL Model Law article 7(2), requires an arbitration agreement to be signed by the parties, which can create difficulties regarding arbitration clauses in certain documents used for international trade, which are only signed by one of the parties.

Section 2 (Matters not subject to arbitration)

1) Only a minor improvement in the wording is recommended. This makes clear that it is not only the act of referring a dispute concerning the matters referred to in the section to arbitration which is prohibited but the arbitration proceedings themselves and an arbitration agreement in respect of those matters.

2) The committee also considered the word "status" in s 2. Arbitration in relation to matters concerning "status" was also prohibited under the common law (Voet 4.8.10). It seems that the word should be restrictively interpreted to matters of status which the parties could not determine themselves by agreement (see Butler & Finsen 53-4). Such an interpretation is in line with the position in the Dutch Arbitration Act article 1020(3) (excluding arbitration to determine "legal consequences of which the parties cannot freely dispose") and s 3 of the Israeli Arbitration Law of 1968.

Section 3 (Binding effect of arbitration agreement and power of court in relation thereto)

1) The change in the wording of subsection 1 is to promote clarity.

2) Subsections 3 and 4 confer an express statutory power on the court to prevent a claimant who has been guilty of an undue delay in prosecuting his claim in arbitration proceedings from proceeding with that claim. The court is also empowered to bar the claimant from proceeding with the claim by means of court proceedings. These amendments are intended to deal with the problem which arose in the English case of *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd* [1981] AC 909. The House of Lords adopted the view that as both the claimant and the defendant are under a reciprocal duty to keep the arbitration proceedings moving, the defendant cannot respond to the claimant's inactivity by trying to get the claim dismissed for want of prosecution. Therefore, neither the court nor the arbitrator has the power to dismiss a claim in arbitration proceedings for want of prosecution. See further Butler & Finsen 161-3, who suggest that a defendant could deal with the problem on the different wording of the South African statute, either by allowing the arbitrator's jurisdiction to expire under s 23 or by bringing an application under s 3(2). It will be seen from the discussion below that the wording of s 3(2) may not be sufficiently wide to deal with the problem entirely. The problem posed by the *Bremer Vulkan* case has been dealt with in England by giving a statutory power to the *arbitrator* to dismiss a claimant's claim in arbitration proceedings for want of prosecution (see s 102 of the Legal Services Act 1990 which inserted s 13A in the Arbitration Act of 1950 for this purpose). Similarly, the draft Act of the New Zealand Law Commission amplified the UNCITRAL Model Law by giving the arbitrator this power in sch 1 article 25(d). However, the Hong Kong Ordinance (s 29A) and Victoria statute (s 46) preferred to give the power to the court.

3) During their discussion of the issue, the drafting committee agreed that the *court* should be given a statutory power to terminate arbitration proceedings where there has been undue delay by the claimant in prosecuting his claim. It was agreed that the power should be vested in the court, rather than the arbitrator, because of the drastic effect of the order, which would not only preclude the claimant from continuing the arbitration but also from seeking to pursue his claim in the courts. (A working group on the UNCITRAL Model Law raised an additional dogmatic objection: namely the arbitrator is appointed pursuant to the arbitration agreement to decide the dispute; it is therefore illogical that he

should be able to dismiss it without deciding its merits (see Butler & Finsen 162 n 309.) It was also decided that the power should be contained in a separate subsection and that the grounds on which the power could be exercised should be spelt out in some detail on the lines of s 46 of the Victorian Commercial Arbitration Act 1984, which is based on s 29A of the Hong Kong Arbitration Ordinance (inserted in 1982).

4) Draft D4 empowers any party to the arbitration to apply to court for dismissal of the claim. The Hong Kong and Victorian legislation also provide that the arbitrator or umpire may bring the application. Bearing in mind that the arbitrator will incur legal costs, all of which may not be recoverable, and that the delay *primarily* prejudices the other party to the arbitration agreement rather than the arbitrator, the question arises whether the arbitrator really needs this power.

5) The Hong Kong and Victorian legislation limit the prohibition on the claimant pursuing his claim to further arbitration proceedings. As the parties originally agreed to settle their dispute by arbitration, it seems logical that the court should also have the express statutory power to prevent the dilatory claimant from subsequently pursuing his claim in court. A similar problem is inherent in s 3(2) of the existing Act. The court may direct that the arbitration agreement should cease to have effect, but such an order would not prevent the claimant from pursuing his claim in court.

6) The Hong Kong and Victorian statutes refer to a delay which has been "intentional and contumelious". The wording refers to the analogous power of a court in English law to strike out a claim where there has been disobedience to a peremptory order of the court (see Report of the Law Reform Commission of Hong Kong on Commercial Arbitration 1981 par 10.14). The wording in Draft D4 attempts to adapt the phraseology of English law to the context of South African arbitration.

7) One may argue that the reference in the Hong Kong and Victorian legislation to a delay on the part of the claimant's advisers is unnecessary as it appears self-evident that the claimant is liable in law for the acts and omissions of his agents and can seek his remedy against them in appropriate circumstances. However in this situation, the court could be faced when exercising a discretionary power with deciding whether or not to hold a party responsible for delays by advisers which he may not find it easy to prevent. It therefore seems desirable to make it abundantly clear that the court ought to exercise its power whether the excessive and inexcusable delay is the fault of the claimant or his advisers.

8) The court's new power will not derogate from the arbitrator's existing power to proceed in the absence of a party (Act 42 of 1965 s 15(2); see par 10.15 of the report of the Hong Kong LRC).

Section 4 [4 and 5] (Death or insolvency of a party)

1) The existing sections 4 and 5 are consolidated in a single section to avoid unnecessary repetition. To facilitate concise draftsmanship a definition of when a dispute is deemed to have been referred to arbitration is included in s 1(2) (compare ss 4(3) and 5(3)(a) of the existing Act).

2) There is no equivalent provision in the UNCITRAL Model Law, with the result that the New Zealand draft Act had to include an additional provision to deal with this omission (see sch 1 article 32(4)and (5)).

Section 5 [No equivalent] (Power of arbitration tribunal to grant rectification and declaratory orders and to rule on own jurisdiction)

1) This is a new provision empowering the arbitrator, unless the arbitration agreement otherwise provides, to order rectification of a contract, to grant a declaratory order and to rule on his own jurisdiction. There is no doubt that an arbitrator can be empowered by

the parties to grant rectification of a contract (see Butler & Finsen 60) but disputes of interpretation may arise in practice as to whether a particular arbitration agreement has that effect. The same may be said in respect of a declaratory order.

2) The issue as to whether an arbitrator should be able to rule on his own jurisdiction is a matter of some controversy in legal systems based on English law. Moreover, a recent South African decision *Wayland v Everite Group Ltd* 1993 3 SA 946 (W) at 951H-I held that the parties cannot make an arbitration clause severable from the main contract of which it forms a part to allow the arbitrator to rule on the validity of the main contract (but compare Butler & Finsen 57 n 160 and see *Harbour Assurance Co (UK) Ltd v Kansa General International Assurance Co Ltd* [1993] 3 All ER 897 (CA), [1993] QB 701 regarding the latest position in England). This finding was unnecessary on the facts as the main contract was attacked on the basis that the directors had no authority to enter into the main contract. If this was the case they also had no authority to enter into the arbitration clause, as the court indeed recognised (951I-952B; Butler 1994 *CILSA* under the heading "Power to rule on own jurisdiction").

There is therefore a need for a statutory provision to clarify the present uncertainty. The proposal in subsections (2)-(6) is based on the UNCITRAL Model Law article 16 and can also be compared with the Dutch Arbitration Act articles 1052-1053. In terms of the proposal, it is clear from subsection (6) that an arbitrator's interim ruling on jurisdiction is not final and may be challenged in court. Even if the arbitrator only rules on his jurisdiction in his final award, a party could still challenge that award in certain circumstances on the basis that the arbitrator had exceeded his jurisdiction. The advantage of giving the arbitrator a statutory power to rule on his own jurisdiction is that it makes it more difficult for a party trying to delay the arbitration proceedings by any means possible to stop the arbitration while the question of jurisdiction is decided by the court.

Section 8 (Power of court to extend time fixed in arbitration agreement for commencing arbitration proceedings)

1) Two minor changes have been proposed to deal with difficulties inherent in the present wording. The first difficulty is where a *defendant* loses the right to raise a defence in arbitration proceedings through failing to take steps to commence arbitration proceedings timeously. On a literal interpretation of the existing wording ("any claim") the court may only remove a time-bar at the instance of the *claimant.* This problem occurred in *Administrateur, Kaap v Asla Konstruksie (Edms) Bpk* 1989 4 SA 458 (C) at 470C-E. The court's attempt to deal with it was not entirely satisfactory (see Butler & Finsen 115-6). The second problem relates to clauses which require the dispute to be referred to a quasi-arbitrator or mediator as a prerequisite to arbitration (compare Butler & Finsen 115). In terms of the second amendment, a court may also remove a time-bar resulting from a failure to refer the dispute timeously to the quasi-arbitrator or mediator.

Section 10 (Power to appoint arbitrators to fill vacancies)

1) Subsection 1 is amended (loosely following the Commercial Arbitration Act (Victoria) s 9) to give a person other than a party with the power to appoint an arbitrator (e g where the Chairman of the Association of Arbitrators is designated as the appointing authority in the arbitration agreement) the power to appoint a substitute arbitrator if necessary. The amended wording is wide enough to give arbitrators who have appointed a third arbitrator as chairman the power to appoint a substitute where necessary, which probably makes s 11(2) of draft D4 superfluous.

Section 11 (Power of parties or arbitrators to appoint umpire and to fill vacancy)

Two amendments are proposed:

1) Subsection 1(a) has been amplified to make it clear that an even number of arbitrators are obliged to appoint an umpire forthwith in the event of deadlock on a particular point (compare the comment on s 21 of Draft D4 below). A similar addition has been included in the Victorian Act s 12(1); the English Act of 1950 s 8 (as amended by s 6(2) of the 1979 Act) and the Hong Kong Ordinance s 10(1) (as amended in 1982).

2) S 11(1)(b) of the existing Act which states that unless the arbitration agreement provides otherwise, a reference to three arbitrators shall be deemed to be a reference to two arbitrators and an umpire has been amended, so that such provision will be regarded as bearing its literal meaning of providing for a reference to three arbitrators, with the first two being required to appoint a third arbitrator as chairman (see *Kannenberg v Gird* 1966 4 SA 173 (C) 179A-B and Butler & Finsen 91-2 for the distinction between an umpire and a third arbitrator). The proposed amendment follows the trend in England (1950 Act s 9 as amended by s 6(2) of the 1979 Act pursuant to a recommendation in the *Report on Arbitration* of the Commercial Court Committee (Cmnd 7284 of July 1978) par 59; Hong Kong Ordinance s 11 (as amended in 1982) and the Victorian Act ss 12 and 14). The existing provision in the South African Act was based on s 9 of the English Act of 1950, as originally enacted, which was in turn a re-enactment of s 4(1) of the English Act of 1934. It appears to have had no equivalent in the colonial legislation. Our present Act therefore contains an artificial arrangement which has been replaced in the land of its origin and related jurisdictions.

Section 12 (Power of court to appoint an arbitrator or umpire)

1) This section has been completely redrafted in an attempt to simplify the unnecessarily complicated wording of the present section and to eliminate gaps in the court's powers of appointment. It therefore follows the basic approach of the British Columbian statute (s 17) and the Victorian statute (s 10) by providing a comprehensive power of appointment for the court as opposed to a list of specific instances as in s 12 of the existing Act and s 10 of the English Act of 1950 on which the present provision is based. The latter approach results in gaps, necessitating amendments to s 10 of the English Act in 1979 and 1985, to deal with some of the omissions.

2) S 12(4)(b) and (c) of the existing Act have been deleted from Draft D4. Where the arbitration agreement provides for more than one arbitrator, e g in an international arbitration, it appears dogmatically unsound that the court can in effect vary that agreement by appointing a sole arbitrator (compare the present s 12(4)(b)). If a party wishes that the court, when removing an arbitrator, should simultaneously order that the arbitration agreement should cease to have effect, he may ask the court to do so "on good cause shown" under s 3(2)(c). The existence of a separate power to grant such order under the present s 12(4)(c) without the express requirement that good cause be shown, could give the impression that the applicant has to discharge a lighter onus when using the latter provision.

3) Sub-section (5) is new. There is a precedent for excluding a right of appeal from the court's decision in section 20(2) of the present Act. In section 12 the court has a mainly administrative function (compare *Stewart v City of Harare* 1985 1 SA 34 (ZHC). When parties to an arbitration agreement are supposedly seeking a swift and cost-effective resolution of their dispute, a right of appeal will inevitably cause delay and further expense (see e g the application to court for the appointment of an arbitrator in *Dipenta Africa Construction (Pty) Ltd v Cape Provincial Administration* 1973 1 SA 666 (C), which was subsequently taken on appeal, but the appeal was then postponed to allow the appellant to make a separate application to court in terms section 3 (2) of the Act (1973 3 SA 47 (A)). It should also be noted that both the UNCITRAL Model Law article 11(5) and the Quebec arbitration statute article 941.3 disallow a right of appeal from the court's appointment of an arbitrator.

Section 14 [14(1) and (2)] (General powers of arbitration tribunal)

1) The arbitrator's procedural powers contained in s 14 of the existing Act have been revised and amplified in sections 14-16 of Draft D4. In accordance with the consensual basis of arbitration, these statutory powers are subject to the terms of the parties' arbitration agreement. The powers of the arbitrator have been amplified to give the arbitrator the maximum opportunity to determine the dispute in an expeditious and cost-effective manner. S 14(1), as in the present Act, is divided into powers which the arbitrator may exercise on application and those which he can exercise on his own initiative. S 15 contains certain powers relating to evidence, which apply unless the arbitration agreement provides otherwise, whereas s 16 contains a number of special powers which only apply if the arbitration agreement so provides (i e on a "contract in" basis).

2) The arbitrator's powers which may be exercised on the application of a party have been extended to include powers to:

(a) order security for costs, including additional security if the original amount is subsequently shown to be inadequate;

(b) order interim measures to protect the subject matter of the dispute;

(c) grant extensions of time in respect of periods fixed by the Act or the arbitration agreement.

3.1) Although the Executive Committee of the Association supported in principle the acquisition by the arbitrator of the power to order security for costs, it was considered inappropriate that he should be required to fix the amount of that security. In court proceedings this task is usually performed by the registrar under Rule 47 of the Supreme Court Rules. By analogy to the position regarding the taxation of costs (see s 35(3) of the existing Act as amended in s 38(3) of Draft D4), it is suggested that the arbitrator should still have the power to determine the amount of security in an appropriate case, if he is confident in the light of the parties' contentions what that amount should be, but if he fails or elects not to determine the amount, the taxing master of the court should be required to do so. It is also necessary to consider the manner in which security should be provided (e g by way of a bank guarantee or bond of security from a recognised financial institution - see *Petz Products (Pty) Ltd Commercial Electrical Contractors (Pty) Ltd* 1990 4 SA 196 (C) 199I-J and 203E-F). Where the amount and manner of providing security are determined by the taxing master it is suggested that his order should be subject to review by the court, as is the case when he taxes the costs of arbitration proceedings. It was also agreed at the Executive Committee meeting that the arbitrator should have the express discretionary power to stay the arbitration proceedings until a party has provided security as a means of ensuring compliance with his order. In the *Petz* case above, where security was ordered by the court, the court authorised the applicant for security to approach the court for two alternative forms of relief if the security was not duly provided. These were (a) a stay of the arbitration proceedings and (b) the dismissal of the respondent's claims in the arbitration proceedings. By restricting the arbitrator's power to staying the proceedings, it is implicit that the arbitrator cannot dismiss the claims because of the claimant's failure to provide security. To give the arbitrator such a power would be inconsistent with the recommendation in s 3(3) of Draft D4. The arbitrator would still retain his power to proceed under s 15(2) of the existing Act (s 18(2) of Draft D4).

4) The power to order a party to take interim measures to secure the subject matter of the dispute is based on the UNCITRAL Model Law article 17. The court has a concurrent power under s 24 and a party will have to choose which is more appropriate. A party may go direct to court if he does not trust the other party to obey the arbitrator's order without steps to enforce it through the court.

5) The arbitrator's power to examine parties or witnesses in subsection 14(1)(b)(iii) is now only subject to the defence of privilege. This amendment was necessitated by the proposal in s 15(c) below. It is questionable whether this wording adequately covers discussions without prejudice (compare Butler & Finsen 234-5 for the distinction between legal professional privilege and statements made without prejudice).

6) The arbitrator may receive evidence on affidavit without the consent of the parties or a court order. The drafting committee considered s 14(1)(b)(v) of the existing Act to be unnecessarily restrictive in this regard.

7) The arbitrator is expressly authorised to receive evidence through an interpreter (see Draft D4 s 14(1)(b)(vi)).

8) The arbitrator is given a new general power in s 14(2) to conduct the proceedings as he sees fit, subject only to the Act and the arbitration agreement. Whereas s 14(1) of our existing Act contains a list of specific powers without a general provision, s 12(1) of the English Act of 1950 contains a general power, with the rest of s 12 containing only a few examples of specific powers. Both s 14 of the Victorian Act and the UNCITRAL Model Law article 19(2) confer a general power on the arbitration tribunal to conduct the proceedings as it thinks fit (subject to the Act and the arbitration agreement), without a list of specific powers. However, in recommending the adoption of the UNCITRAL Model Law for domestic arbitrations, the New Zealand Law Commission supplemented article 19 of the Model Law, by providing a list of specific powers which apply unless specifically excluded (sch 2 clause 3). The drafting committee responsible for Draft D4 also favoured this approach of including a list of specific powers, partly for the benefit of inexperienced arbitrators and parties not familiar with arbitration, while the general provision strengthens the hand of the experienced arbitrator to adopt an innovative approach, if appropriate. The drafting committee's basic approach is similar to that contained in clause 11 of the English DTI's draft bill of 1994.

9) The specific powers included in clause 11 of the English DTI's draft bill of 1994 are in some respects more extensive than those contained in Draft D4 and include the power to order that the expert witnesses for each party be limited to a specified number and the power to order that experts' reports, witnesses' statements and affidavits be exchanged (see clause 11(4)(h) and (i)).

Section 15 [No equivalent] (Power of arbitration tribunal to consider evidence)

1) The arbitrator is empowered, subject to the rules of natural justice, to rely on his own knowledge and expertise.

2) In para (c) it is expressly provided that subject to the rules of natural justice the arbitrator is not obliged to apply the rules of evidence applicable in civil proceedings. The Victorian statute (s 19(3) and the British Columbian statute s 6(2) contain similar provisions, but on an "express contract out" basis. The UNCITRAL Model Law (art 19(2)) gives the arbitrator the power to determine the admissibility, relevance and weight of any evidence. The proposal of the drafting committee is also broadly in line with the suggested restatement of the present legal position in South Africa, suggested by Butler & Finsen 220-1.

Section 16 [No equivalent] (Special powers of arbitration tribunal)

1) The arbitration tribunal may be given the following special powers, on a "contract in basis":
   (a) the power to determine a matter on the basis of general considerations of justice and fairness, i e the power to act as a so-called amiable *compositeur* (a similar power is contained in *inter alia* the Victorian statute s 22, the British Columbian statute s 23; the UNCITRAL Model Law article 28(3) read with article 28(4) and the Dutch Arbitration Act article 1054(3) and (4); the possible effect of such a clause is discussed by Butler & Finsen 254-5);
   (b) the power to call a witness, including an expert, on its own motion (compare the British Columbian statute s 24 and the UNCITRAL Model Law article 26; see also Butler & Finsen 241 regarding the present legal position, which is basically confirmed by the proposal).

Section 17 [14(3) and (4)] (Manner of arriving at decisions where the tribunal consists of more than two arbitrators)

1) If an arbitration tribunal consists of more than two arbitrators and there is not a majority decision, it is proposed that unless the arbitration agreement provides otherwise, the chairman should have the final say. (See further Redfern & Hunter 2 ed 489-90 and 520-

1 on the practical problems in achieving majority decisions). The existing Act presently requires the matter concerning which the deadlock has occurred to be referred to an umpire. The aim of the amendment is to avoid the additional expense of using an umpire. The proposal goes further than the UNCITRAL Model Law in giving the chairman the final say in all matters where a majority decision cannot be achieved. Article 29 of the UNCITRAL Model Law gives the parties or all the members of the arbitral tribunal the power to authorise the chairman to decide questions of procedure. He can only decide matters of substance (the merits) if the arbitration agreement so provides, i e on a "contract in" basis (see Redfern & Hunter 520-1). The English DTI's draft bill of 1994 gives the chairman of a tribunal of three or more arbitrators the power to make an award in the absence of a unanimous or majority award unless the arbitration agreement provides otherwise (see clause 22).

2) Subsection 17(3) makes certain consequential amendments to s 14(4) but retains the principle of the existing s 14(4) as to what is regarded as a majority award, e g when a sum of money is awarded. For a majority award under s 14(4), the majority must be agreed on the precise amount, it is not sufficient to take the lowest figure or an average. The position under the common law was different. According to Voet 4.8.19, the lesser amount is included in the greater, with the result that the arbitrators were taken as agreeing that the lesser amount should be awarded (see Butler & Finsen 264 n 58).

Section 18 [15] (Notice of proceedings to parties and right to representation)
Butler & Finsen 178-9 take the view that a party is entitled to be represented by the person of his choice in arbitration proceedings (who need not necessarily be a lawyer), unless the right to representation is limited in the arbitration agreement. There is some support for this in s 15(1) of the present Act as the word "representative" there, when read with the definition of "party" in s 1, cannot just mean a "legal representative" like the guardian of a minor or the curator of a person under legal disability.

It is however probably better to spell the matter out to avoid any confusion in practice and s 18(1) of Draft D4 proposes that s 15(1) of the existing Act be amended accordingly, with a new subsection (2) to make it abundantly clear that the representative need not be a lawyer. The Hong Kong Arbitration Ordinance was amended in 1990 by the insertion of s 14A, making it clear that representation was not restricted to persons with legal qualifications (see Sutton (1990) 6 *Arbitration International* 359). Australian domestic arbitration adopts a different approach: a party is in principle expected to appear in person, although the arbitrator has a discretion to allow legal or other representation, and should do so if the duration or costs of the arbitration proceedings will be shortened thereby, or if the person applying for representation would otherwise be unfairly disadvantaged (see the Commercial Arbitration Act of 1984 s 20). It has been suggested that this approach of restricting the right to representation confuses "small claims arbitration" with commercial arbitration generally (see Hannah (1984) 58 *Law Institute Journal* 1456). It seems preferable to rather allow the parties the right to decide how they should be represented, subject to any limitations in the arbitration agreement.

Section 21 [18] (Reference of particular points to umpire)
1) The new introduction has been added as a consequential amendment resulting from other suggested amendments. The section will only apply to a tribunal consisting of two arbitrators, or if the tribunal consists of more than two arbitrators, and the parties have contracted out of the new section 17, which gives the chairman the power to decide if there is no majority decision.

2) Where provision is made for an umpire and the arbitrators are unable to agree on a procedural ruling, the present section appears to give them the discretion to refer the matter to the umpire. In terms of the amendment, they will be compelled to refer the matter to the umpire, who, if one has not already been appointed, they are obliged to

appoint in terms of the amended s 11(1).

Section 23 [20] (Statement of case for opinion of court or counsel during arbitration proceedings)

1) A new subsection 3 has been added to restrict the type of question of law which may be referred to the **court** and to try to prevent the abuse of the section by a party bent on causing delay. At present, no great ingenuity is required to find a point of law which complies with the criteria laid down by Lord Denning in *Halfdan Grieg & Co A/S v Sterling Coal & Navigation Corporation* [1973] 2 All ER 1073 (CA) 1077c-e and accepted by our courts (see further Butler & Finsen 209-10). The test with which the question of law must comply in terms of the new subsection is based on the English Arbitration Act 1979 s 2(2)(b) read with s 1(3)(b) and (4) (see also the Hong Kong Ordinance s 23A(2)(b) read with 23(3)(b) and (4) and the New Zealand draft Act sch 2 clause 4(2)(b)). An example of an application which was ostensibly not *bona fide* is *Government of the RSA v Midkon (Pty) Ltd* 1984 3 SA 552 (T), where the use of s 20 of the existing Act was correctly rejected by both the arbitrator and the court (see further Butler & Finsen 210 n 269).

2.1) At present, there is some doubt as to the validity of an agreement purporting to exclude a party's statutory right to apply for a question of law to be referred to the court. See Butler & Finsen 210-11 with reference to *Czarnikow v Roth, Schmidt and Company* [1922] 2 KB 478 (CA) where it was decided that such agreements were void as being contrary to public policy. This case concerned an exclusion agreement in a standard-form contract. Nevertheless, some arbitrators in the Cape recommend that parties enter into an exclusion agreement at the preliminary meeting. It was agreed at a meeting of the Executive Committee in February 1994 that because of the present uncertainty regarding the validity of such agreements, an express provision permitting an exclusion agreement should be incorporated in s 23. To prevent the automatic exclusion of the section by arbitration clauses in standard-form contracts referring future disputes to arbitration, it was suggested that the exclusion agreement should be entered into once the dispute arose but before the commencement of the hearing. The equivalent provisions of the English and Victorian statutes require the exclusion agreement to be entered into "after the commencement of the arbitration" (see the English Arbitration Act of 1979 s 3(6) and the Victorian statute s 40(6)). The Commercial Arbitration Act of 1986 (British Columbia) s 34 permits an exclusion agreement "after an arbitration hearing has commenced".

2.2) The expression "after the commencement of the arbitration" is not very clear. It was apparently intended to refer to the stage once a dispute has arisen and been referred to arbitration (see the Commercial Court Committee *Report on Arbitration* Cmnd 7284 of July 1978, which preceded the English Act of 1979, para 43). The wording used in the British Columbian statute, by referring to a *hearing*, creates difficulties in the case of a documents-only arbitration. One must also remember that on the wording of the section, the power to refer a question of law to the court or counsel is available at any stage before the making of a final award. These problems can be avoided by providing that the exclusion agreement can be entered into once the dispute has arisen and after the arbitration tribunal has been appointed. Both requirements are necessary to deal with the situation where the arbitrator is appointed in the arbitration agreement, before the dispute arises.

3) At the Indaba held by the Association of Arbitrators in Johannesburg in May 1991, at least one participant favoured the abolition of s 20 of the existing Act entirely. It should however be noted that our s 20 has a narrower scope than the repealed s 21 of the English Arbitration Act of 1950, which in addition to a request to the court for an opinion on a point of law before the award, also provided for an *award* in the form of a "stated case", with the matter then going to the court for a judgment on the point of law (see further Butler & Finsen 206-7 for the other differences between the two provisions). It is also important to bear in mind that s 2 of the English Arbitration Act of 1979 retains the

possibility of a consultative case ("Determination of preliminary point of law by court"), but in a restricted form compared to the repealed s 21 of the 1950 Act, to prevent abuse.

Section 24 [21] (General powers of court)

1) Section 21 of the present Act has no equivalent in the colonial legislation and is based on s 12(6) of the English Act of 1950. (The English provision is a re-enactment of the English Arbitration Act of 1934 s 8(1) and sch 1). An equivalent provision appears in the Hong Kong Ordinance (s 14(6)), but not in the Victorian and British Columbian statutes. However, the New Zealand Law Commission has amplified the UNCITRAL Model Law by providing the court with the power to order discovery, evidence on commission or the preservation or inspection of property in the taking of evidence in arbitration proceedings (sch 1 article 27(2)(c))) The English provision was enacted before the modern trend in favour of reducing the role of the courts in arbitration proceedings. In South Africa, the court moreover accepts that it has the power at common law to interfere during the course of arbitration proceedings with a procedural ruling by the arbitrator, although this power is not one which will be exercised readily. (See *Tuesday Industries (Pty) Ltd v Condor Industries (Pty) Ltd* 1978 4 SA 379 (T).) This power is in addition to the statutory power to set aside or remit an award by reason of a gross procedural irregularity.)

2) The existing section has been amended by deleting the powers of the court to order discovery, evidence on affidavit and examination of a witness by a commissioner. These powers duplicate powers of the arbitrator under section 14 and it seems preferable that the court should not be able to interfere with how the arbitrator conducts the proceedings in this regard, unless his conduct is such as to justify setting aside or remittal of the award or removal of the arbitrator. (The power of an English court to order discovery under s 12(6)(b) of the 1950 Act has recently been repealed by the Courts and Legal Services Act of 1990 s 103).

3) The duplication of certain other powers also possessed by the arbitrator does appear desirable (e g interim custody of goods) as a court order will be easier to enforce and would, in appropriate circumstances, be available against persons who are not necessarily parties to the arbitration agreement. The power to appoint a receiver has been provisionally deleted, as it does not appear to be used in practice.

Section 25 [22] (Offences)

1) It is proposed to link the penalty for an offence in connection with arbitration proceedings to the penalty in the Supreme Court Act for an equivalent offence, so that the penalty in the Arbitration Act would automatically be in line with any increase in the penalty for a similar offence in civil proceedings in the Supreme Court. The present penalty (under both statutes) is hardly an effective detergent, but the legislature is unlikely to allow a greater penalty than that applicable to proceedings in the Supreme Court.

2) The method of providing a criminal prosecution as a means of ensuring that the authority of the arbitration tribunal is respected is not used in the other arbitration statutes referred to in this commentary. S 18 of the Commercial Arbitration Act 1984 (Victoria) provides for a witness (other than a party) who e g ignores a subpoena to be ordered by the court, on application, to give evidence before the court. Article 27 of the UNCITRAL Model Law provides for court assistance in the taking of evidence and the drafters envisaged that the court would either order a witness to give evidence before the court or before the arbitration tribunal (see Herrmann in Lew Contemporary problems in international arbitration (1986) at 171). The Law Commission of New Zealand in adopting the UNCITRAL Model Law, used the latter method by providing for court assistance in compelling the witness to give evidence before the arbitral tribunal (see sch 1 article 27(2)(a) and (b)). No express sanction is provided in the event of non-compliance with the court order.

Section 26 [23] (Time for making an award)

1) It is proposed that unless the arbitration agreement otherwise provides, an arbitrator must make his award within two months of the completion of the hearing or receipt of all the parties' submissions (especially applicable to a documents-only arbitration). He is presently required to make his award within four months of entering on the reference.

2) The calculation of the time within which an umpire is required to give an award has been modified. It is suggested that the three month period may also run from receipt of a notice to act from the *arbitrators*.

3) The existing provision has its origin in the English Arbitration Act 1889 (s 2 and sch 1 par (c) and (e) read with s 9). Basically, unless the arbitration agreement provided otherwise, an arbitrator was required to make his award within three months of entering on the reference or being called upon to act, but the *arbitrator* could extend the period for making the award "by any writing signed by (him)". Equivalent provisions were adopted in the colonial legislation (see e g the Cape Act 29 of 1898 s 4 and the schedule par (d) and (f) read with s 15 and the Natal Act 24 of 1898 s 5 and the schedule par (d) and (f) read with s 16). Furthermore, the court could extend the time for making the award whether that time had expired or not. In England, the statutory time limits for making an award by an arbitrator or umpire were repealed by the Arbitration Act 1934 (s 21(6) and sch 3). Except where an award was remitted to the arbitrator and subject to the terms of the arbitration agreement, the arbitrator was empowered to make an award at any time (s 6(3)), but the court was given the power to remove an arbitrator who failed to enter on the reference and to make his award with all reasonable dispatch (s 6(1)). Similar provisions are contained in the English Act of 1950 (s 13(1) and (3)). The court's existing power to extend the time stipulated in an arbitration agreement for making the award (1889 Act s 9) was retained (1950 Act s 13(2)). (A similar provision to s 13 of the English Act of 1950 is contained in s 15 of the Hong Kong Ordinance.) The reason for the changes in England in 1934 was that the Mackinnon Committee saw no reason for fixing a time for making the award by statute, if the arbitrator, as the person against whom the provision was presumably directed, could enlarge it. The power could also be abused by an arbitrator sympathetic to a party with no defence. The period for making an award was therefore dropped, but delay was made an express ground for the removal of the arbitrator by the court. (See LRC 55 (British Columbia) 44). The British Columbian statute contains no time limit for the making of the award. Where the agreement contains a time limit, the statute contains a peremptory provision empowering either the arbitrator or the court to extend that time limit, whether it has expired or not. The arbitrator's power of extension does not detract from the court's power to remove him for undue delay (ss 13 and 18(1)(b)).

4) The South African legislature used a different method in 1965 to deal with the problem in the original legislation of the arbitrator being able to extend the time for making his award, thereby nullifying the apparent object of the provision of trying to protect the parties against delay occasioned by the arbitrator. If no time was fixed by the agreement, the time for making the award was extended to four months from entering on the reference or being called on to act (whichever was the earlier), but the parties (instead of the arbitrator) were empowered to extend the time by writing signed by them. The court's power to extend the period was retained (s 23). These amendments left three problems. First, if the provision was aimed at preventing delay by the arbitrator, the arbitrator could still be prevented from making his award within four months of entering on the reference or being called on to act, through no fault on his part, but because of delays caused by the parties. Experience has shown that the time for making the award could elapse before the completion of the hearing because of the dilatory conduct of either or both parties. Secondly, the expression "after enter[ing] upon the reference" was

not always easy to apply in practice (see Butler & Finsen 257; *Bester v Easigas (Pty) Ltd* 1993 1 SA 30 (C) 33; *Van Zijl v Von Haebler* 1993 3 SA 654 (SE) 664E-F). The proposals of the drafting committee contained in Draft D4 would deal with these two problems.

5) The third problem concerns the formalities applying to an extension by the parties of the time for making an award. It would appear that the legislature, by requiring writing signed by the parties, has precluded the possibility of an extension by an informal agreement (see *Pasa Construction (Pty) Ltd v Roofing Guarantee Co (Pty) Ltd* (WLD case no 12243/1983 (unreported) 89-08-18; Butler & Finsen 258). A party's conduct in continuing with an arbitration, notwithstanding the fact that the period has expired, would nevertheless be a relevant factor for the court in deciding whether or not to extend the period for making the award under s 23 of the existing Act (see the cases referred to by Butler & Finsen 259 n 17 and compare *Van Zijl v Von Haebler* 1993 3 SA 654 (SE) at 664J-665C). However, as Draft D4 provides that the time within which the award must be made is to run from the completion of the hearing or from the receipt of submissions in the case of documents-only arbitrations, the need for extensions in practice because of delays on the part of one or both of the parties will be much less common.

Section 27 [24] (Award to be in writing)

1) Whether or not an arbitrator should usually be required, as a matter of good practice, to give a reasoned award is a contentious issue on which opinions, whether among members of the drafting committee or among members of the Association in general, are divided. Arguably the most effective way of encouraging reasoned awards is for the Act to contain a requirement that reasons be furnished, but on a "contract out" basis. A new subsection (3) along these lines has therefore been inserted.

2) The practice of giving unreasoned awards arose because of the rule of English law empowering the court to set aside an award by reason of an error on the face of it. The rule never applied in South Africa, but the practice of unreasoned awards was nevertheless adopted. However, in certain other jurisdictions an unreasoned award is regarded as invalid (see e g the French *Nouveau code de procédure civile* articles 1471 and 1480).

3) The rule of English law referred to above was repealed by section 1(1) of the Arbitration Act of 1979. One of the reasons for the repeal was to encourage reasoned awards. However, an English court may only order reasons to be furnished if a party wishes to exercise his statutory right to take the award on appeal on a question of law. (See the Arbitration Act 1979 s 1(5). A similar approach has been adopted in the Hong Kong Ordinance s 23(5) and the British Columbian statute s 32.)

4) The proposal in Draft D4 is based on the intermediate position adopted in the UNCITRAL Model Law article 31(2), the New Zealand draft Act sch 1 article 31(2) and the Victorian Act s 29, namely a regulatory provision that reasons should be furnished, making it possible for the parties to contract out. In the Dutch Code (article 1057(4)(e) (subject to two exceptions) and the Quebec Code article 945.2 the furnishing of reasons is compulsory. In the Netherlands, non-compliance is a ground for setting aside the award (article 1065(1)(d)). If the above proposal is adopted in South Africa, it is submitted that failure to furnish reasons where the parties elected not to contract out would be a "good cause" for the remittal of the award under section 32 of the present Act.

5) One of the objects of the Association of Arbitrators is "to ensure high standards of professional competence and conduct on the part of its members" (Constitution clause 4.1.7). The Association's support for reasoned awards in this provision of the Draft Act is consistent with this object. See also the support for reasoned awards in Butler & Finsen 269-71.

Section 28 [25] (Delivery of award)

1) "Publication" of the award at a joint meeting between the arbitrator and the parties has been replaced by a requirement that the arbitrator deliver the award to the parties.

2) To promote certainty, the arbitrator's obligation to deliver his award has *expressly* been made subject to his statutory right of retention (the present s 34(4)) pending payment of his fees and expenses, although the two provisions are not really incompatible (see Butler & Finsen 268 n 83 regarding s 25(1) and 34(4) of the present Act).

3) The wording of subsection 2 has been clarified to make it clear that the parties are free to agree on a different method of delivery and that the method of delivery in s 28 of Draft D4 is therefore not mandatory. Compare *Van Zijl v Von Haebler* 1993 3 SA 654 (SE) 663I-664A), where the validity of an agreement between the parties and the arbitrator in terms of which the arbitrator published the award by sending it to the parties by telefax was not challenged in the subsequent court proceedings.

4) The existing section with its requirement of publication in the presence of both parties has no equivalent in the colonial predecessors of the present Act or in arbitration statutes in other jurisdictions. It finds support in Voet 4.8.15, but as early as 1858, it was stated that it was the universal practice in the Cape Colony not to require the presence of the parties at the delivery of the award (*Hawes, Stanbridge & Hedley v Meintjies & Dixon* (1858) 3 Searle 62 at 74; Jacobs 92). Mustill & Boyd (2 ed) 383 state that publication of the award to the parties is not necessary for its validity unless the agreement otherwise requires, and that old English cases on the subject of publication and delivery are now considered obsolete (383 n 14). It appears from Hansard 16 March 1965 col 3059, that the Minister of Justice justified the inclusion of the requirement for publication in the Act as being consistent with a rule of practice applying to all judicial and quasi-judicial proceedings (see Butler & Finsen 267 n 78). However, the main function of the existing s 25 in the context of the Act as a whole may be explained as follows. The colonial legislation, the previous and current English statutes and statutes in other jurisdictions based on the English model impose no time-limit within which the court can be asked to set aside or remit an award. Sections 32 and 33 of our Act now require such applications to be brought "within six weeks of the publication of the award to the parties" (subject to s 38). The main function of publication, therefore, is to establish the commencement of the six week period. There is no reason in principle why delivery for this purpose requires the presence of the parties before the arbitrator. It is sufficient if a party wishing to challenge the award can establish that he has launched the application within six weeks of his being notified of the contents of the award (compare s 27 of the British Columbian statute, which gives a party the right to apply to the arbitrator for certain amendments to the award or for an additional award within specified times after being notified of or receiving the award).

Section 31 [28] (Award to be binding)

1) Notwithstanding support among some members of the Association for the introduction of a right of appeal from an arbitrator's award to the courts on a question of law, on the English model (as introduced by the English Arbitration Act of 1979), the drafting committee, in line with its approach of limiting rather than expanding the court's existing powers, was not in favour of such a step. The committee favoured the present position of a limited power for the court to remit or set aside an award where the procedure was in breach of the rules of natural justice, but not where the arbitration tribunal has made an error of judgment on a point of law. Our courts have interpreted the wording of the existing s 28 ("Unless the arbitration agreement provides otherwise, an award shall ... be final and not subject to appeal ...") as allowing the parties to create a right of appeal to another arbitration tribunal but not to the courts (see *Goldschmidt v Folb* 1974 1 SA 576 (T) 576G-577D and *Blaas v Athanassiou* 1991 1 SA 723 (W) 274C-I; Butler & Finsen 271 n 107). The existence of the two cases however confirms that there is some confusion on this point in practice, with the result that an amendment to the wording of the section has been suggested to reflect expressly the existing legal position on this point, thereby avoiding any further confusion.

Section 33 [30] (Power of arbitration tribunal to correct errors in award)

1) After an arbitrator has delivered his award, he is *functus officio* and his jurisdiction lapses (see Butler & Finsen 271-2). However s 30 of the existing Act gives the arbitrator a limited power to correct certain errors in his award. The power is more restricted than that in the corresponding provision of the English Act of 1950 s 17 and the colonial legislation in that the arbitrator's power to correct slips is limited to *patent* errors. The power conferred by s 17 of the English Act is in turn considerably narrower than the powers contained in more modern statutes like the UNCITRAL Model Law article 33, the Victorian statute s 30 and the British Columbian statute s 27. The English DTI's draft bill of 1994 also gives the arbitration tribunal wider powers to clarify an award or remove ambiguities than those contained in the existing legislation (see clause 23).

2) The drafting committee therefore proposes that the arbitrator should be given more extensive powers to correct errors in his award or to clarify it. However, these powers relate to situations where the original award does not express what the arbitrator intended to say or does not express his intention clearly. The section does not apply in a situation where the arbitrator afterwards changes his mind.

3) On the application of a party, the arbitrator may also give an additional award regarding a claim which he failed to deal with in his first award. Under the present Act, such omission could only be dealt with by remittal under s 32, which requires either the agreement of all the parties (which may not be readily forthcoming) or a court order.

4) Although the proposals are based mainly on the British Columbian statute s 27 and the UNCITRAL Model Law article 33 (subsection (5) in Draft D4 being based on article 33(5)), the proviso to subsection (4) in Draft D4 is based on the Dutch Code article 1061(3).

Section 35 [32] (Remittal of award)

1) Pursuant to the amendment to s 25 of the existing Act in s 28 of Draft D4, discussed above, the time within which remittal must ordinarily be sought is now linked to delivery as opposed to publication.

Section 36 [33] (Setting aside of award)

1) Misconduct has been deleted as one of the four grounds on which an award may be set aside by the court. The term "misconduct" as a ground for setting aside an award has long been disliked by arbitrators because of its negative connotations. (The legislature in British Columbia took note of this feeling and replaced "misconduct" with the term "arbitral error" in s 30 as a ground for setting aside an award. However, the change is cosmetic because "arbitral error" is defined in s 1 "as an error ... that constitutes misconduct". Misconduct is then defined in s 1 to include both "actual" misconduct (e g bias and corruption) and "technical" or "legal" misconduct (e g a failure to observe the rules of natural justice), ie the wide meaning given to "misconduct" in English arbitration law. The drafting committee was of the view that because of the substantial overlapping between the present grounds for setting aside in s 33(1) of the existing Act, it is possible to omit the term "misconduct" without in any way reducing the rights of an aggrieved party to challenge an award.

2) The drafting committee, working in 1990, proceeded from the premise that the case of *Benjamin v Sobac South African Building and Construction (Pty) Ltd* 1989 4 SA 940 (C) at 971B-D was correctly decided in defining misconduct widely, as in English law, to include both actual and technical misconduct. This view in *Benjamin's case* has since been rejected in *Bester v Easigas (Pty) Ltd* 1993 1 SA 30 (C) at 36I-J and *Hyperchemicals International (Pty) Ltd v Maybaker Agrichem (Pty) Ltd* 1992 1 SA 89 (W) 100B. In South African law, therefore, misconduct requires *mala fide* or other improper conduct on the part of the arbitrator (see further Butler & Finsen 292). The recent Appellate Division judgment in *Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun* 1994 1 SA 162 (A) at 169D is also consistent with the view that "misconduct" should be narrowly construed. In the light of the above and the clear trend on the part of our courts to give misconduct a narrow or usual meaning of *mala fide* or morally blameworthy conduct, the need to remove the word "misconduct" as a ground for setting aside because of its wide meaning in English law actually falls away, although the term could easily be misconstrued by an English lawyer reading the South African Act.

3) Section 33(1)(b) of the existing Act has been divided into two separate subparagraphs in s 36(1)(a) of Draft D4 to emphasise that it contains two separate grounds for setting aside an award, namely a gross procedural irregularity and the arbitration tribunal exceeding its jurisdiction.

4) Pursuant to the amendment of s 28 of Draft D4 discussed above, the time within which an application for setting aside must ordinarily be brought is now linked to delivery as opposed to publication.

Section 37 [34] (Remuneration of arbitrators and umpire)

1) It has generally been accepted in practice that an arbitrator can protect himself against the risk of his fees being reduced on taxation by agreeing the rate or tariff with the parties (e g Rx per hour) - compare Butler & Finsen 87-88. This interpretation of s 34(1) of the present Act has recently been challenged in a case in Port Elizabeth. The interpretation adopted by the taxing master was that even where the rate has been fixed, the total can still be reduced if the taxing master is of the view that the time spent by the arbitrator for example in preparing for the hearing or preparing his award was excessive. The uncertainty on this point needs to be clarified.

2) From the arbitrator's point of view, it would be preferable that the Act be worded so that he could protect himself entirely against the danger of his fees being reduced on taxation. However, even where professional fees are charged by agreement, an aggrieved party could take the matter to the supervisory body of the relevant profession for appropriate action. In the case of an arbitrator, however, he will not necessarily be a member of a professional association which could exercise supervisory powers and this position will remain unchanged as long as the parties are free to appoint whoever they want to arbitrate. Under the circumstances, it seems that the taxing master of the court is the most appropriate person to protect the party who must ultimately bear the arbitrator's charges (usually the losing party) from exploitation by an arbitrator who has made extravagant claims in respect of time spent preparing for the hearing or the award. An appropriate amendment to the wording of subsection (1) has been made to give effect to this proposal.

Section 38 [35] (Costs of arbitration proceedings)

1) Subsection (3) has been amended to compel the taxing master of the court to tax the costs of arbitration proceedings if the parties so require. The taxing master of at least one provincial or local division has, on occasion, refused to tax costs when asked to do so by the parties. Under s 35(4) of the existing Act, the court may, on making the award an order of court, order the taxing master to tax costs. S 35(4) would however apparently have no application if the party directed by the arbitrator to pay costs in an award also dealing with the merits of the dispute immediately complies with the award on the merits before the parties attempt to have the costs taxed. Even if s 35(4) is available, costs are increased by the court application, when the party obliged to pay costs may be perfectly willing to do so once the amount has been taxed.

Sections 40-45 [37-43] (Miscellaneous provisions)

1 The reasons for the proposed amendments to the corresponding sections of the existing Act are self-evident.

Part 3: Topics considered for inclusion in the Arbitration Act, but rejected

Restriction of the court's power to interfere with an arbitrator's award on costs

Section 38(1) of draft D4 (s 35(1) of the present Act) gives the arbitrator a discretion as to the award of costs, in the absence of a contrary arrangement in the arbitration agreement. Normally, an arbitrator's ruling on a procedural matter will only be interfered with by the court where there has been a gross irregularity or a departure from the rules of natural justice. His award on the merits can usually be attacked only if he has exceeded his jurisdiction or failed to decide all the matters referred to him, unless he has breached his duty to the parties (e g by not being impartial) in his conduct of the proceedings. An error of judgment in his findings on the facts or the law will not render the award liable to be set aside or remitted. Although there appears to be no basis in the Act for such a distinction, the courts apply a different and much stricter standard when considering the arbitrator's award on costs. The courts require the discretion to be exercised judicially, and a failure to observe the settled practice and principles upon which costs are generally awarded is a "vitiating irregularity or misdirection" rendering the award of costs likely to be set aside or remitted. See *Kathrada v Arbitration Tribunal* 1975 1 SA 673 (A) at 680 and *John Sisk & Son (SA) (Pty) Ltd v Urban Foundation* 1985 4 SA 349 (N) 352. In the latter case, failure to observe the usual principles was held to be "good cause" for remittal under s 32 of the existing Act. Given the object of achieving finality in arbitration proceedings and bearing in mind that costs should be a side-issue of minor importance (although sadly in practice the total costs of proceedings may sometimes exceed the amount in dispute), it can be argued that there are not sufficient reasons for singling out an award of costs for different treatment to any other award or ruling by an arbitrator. (The leading South African case for the courts' present view on the arbitrator's discretion to award costs, which was cited with approval in the *Kathrada case*, is

Harlin Properties (Pty) Ltd v Rush & Tomkins (SA) (Pty) Ltd 1963 1 SA 187 (D) (in respect of par (p) of the schedule to the Natal Act 24 of 1898) where the court followed English precedents without considering possible differences between the two legal systems. In neither of these cases was older South African authority like *Austen v Joubert* 1910 TS 1095 at 1096-7 considered, where the court was not prepared to interfere with an arbitrator's award of costs where it appeared that the tribunal had duly considered the matter but may have made a mistake of law (see also Butler & Finsen 278; Christie (1993) 9 *Arbitration International* 153 at 164).) Therefore the drafting committee initially proposed an amendment to s 35 of Draft D4 (s 32 of the existing Act) to include a subsection (5) restricting the court's power to review an arbitrator's award of costs:

> "(5) An error of law by the arbitration tribunal in the exercise of its discretion in respect of the award of costs in section 38(1) shall not amount to good cause for purposes of subsection (2) in the absence of one of the grounds referred to in section 36(1)."

The intention was that the court should only be able to remit an award of costs on the same limited grounds on which an award on the merits may be set aside, and not because of a failure to award costs precisely as a court would have done, as at present.

It is however possible to argue that the issue of costs relates to due process. A party who, through an error of law by the arbitrator, has been deprived of his costs, has objectively speaking, not received fair treatment (compare Butler 1994 *CILSA* footnote 191). Therefore the proposed amendment was deleted after the subject had been discussed by the Executive Committee. Prof Christie is not convinced by the due process argument: his view is that an error regarding the award of costs is no more unfair towards a party than an error by the arbitrator in his award on the merits, e g on a claim for damages.

Consolidation and joinder in arbitration proceedings

The Drafting Committee was asked by the Executive Committee on 3 February 1994 to suggest possible solutions to the problem of joinder and consolidation, but without delaying the finalisation of its other recommendations. This will enable the Draft Act to be circulated for comment to other parties, while the Drafting Committee is still dealing with joinder and consolidation.

Joinder, in its widest sense, concerns the possibility of a person who is not a party to the arbitration agreement being joined as a party or being able to intervene as a party to arbitration proceedings held pursuant to that agreement. Consolidation is concerned with the consolidation of two or more references to arbitration under different arbitration agreements so that the matters in dispute can be determined by the same arbitration tribunal (see generally Butler & Finsen 151-3).

Joinder

None of the common law arbitration statutes consulted contains a provision on joinder, but the matter is dealt with in the Netherlands Arbitration Act of 1986, art 1045, the translation of which (contained in (1987) 12 *Yearbook Commercial Arbitration* 372 at 377) reads as follows:

"Article 1045 - Third parties

1. At the written request of a third party who has an interest in the outcome of the arbitral proceedings, the arbitral tribunal may permit such party to join the proceedings or to intervene therein. The arbitral tribunal shall send without delay a copy of the request to the parties.

2. A party [to arbitration proceedings] who claims to be indemnified by a third party may

serve a notice of joinder on such a party. A copy of the notice shall be sent without delay to the arbitral tribunal and the other party.

3. The joinder, intervention or joinder for the claim of indemnity may only be permitted by the arbitral tribunal, having heard the parties, if the third party accedes by agreement in writing between him and the parties to the arbitration agreement.

4. On the grant of a request for joinder, intervention, or joinder for the claim of indemnity, the third party becomes a party to the arbitral proceedings. Unless the parties have agreed thereto, the arbitral tribunal shall determine the further conduct of the proceedings."

The crucial provision is contained in art 1045(3). True to the consensual basis of arbitration, the arbitrator can only permit intervention by or joinder of a third party if that third party and the original parties to the arbitration have entered into a tripartite arbitration agreement (see Sanders (1984) 4 Pace Law Review 581 592). The article therefore does not permit joinder or intervention without the consent of all the parties involved. The advantages of the provision are that it draws the attention of interested parties to the possibility of joinder or intervention taking place, and provides an orderly process to achieve it. The arbitrator can also play the role of a facilitator in reaching an agreement for joinder. The arbitrator is also expressly empowered to determine the further conduct of the proceedings, if the parties have not provided for this in their agreement. It would therefore appear that the inclusion of such a provision in our legislation could be beneficial.

However, the wording of the translated article requires some refinements to make it suitable for inclusion in South African legislation. The Drafting Committee decided not to make a final recommendation for the inclusion of this provision until it has decided whether or not to recommend the inclusion of a provision on consolidation.

Consolidation

The complexity of the problems concerning the drafting of a comprehensive statutory provision on consolidation appears from the article by Lord Mustill in (1991) 7 Arbitration International 393-402. In May 1990, the Departmental Advisory Committee on Arbitration Law in England decided that the advantages of a statutory provision for consolidation were outweighed by the disadvantages (see (1991) 7 *Arbitration International* 389-391). The attitude of the English DTI has not changed in the interim (see part III para 12 of the February 1994 Consultation Paper). Various attempts have recently been made in this regard in other jurisdictions. The British Columbian statute s 21 does no more than confirm that consolidation can be achieved with the agreement of all the parties concerned. The Dutch Act article 1046 and the Victorian statute s 26 both give the power to consolidate arbitration proceedings to the court in certain circumstances. (A problem with this approach is that the court's order could undermine the consensual basis of arbitration.) The UNCITRAL Model Law is silent on the issue, but the New Zealand Commission in sch 2 clause 2, in by far the most elaborate provision of any referred to in this paragraph, gives the power to consolidate arbitration proceedings to the arbitration tribunal(s).

The Drafting Committee will have to decide whether to recommend a statutory provision on consolidation at all, and if so, whether the power should be vested in the court or the arbitrator. An example of a provision for consolidation by the court is contained in s 26 of the Commercial Arbitration Act of 1984 (Victoria), which reads as follows:

"26(1) Where in relation to two or more arbitration proceedings it appears to the Court upon the application of all the parties to those proceedings-

(a) that some common question of law or fact arises in both or all of them;

(b) that the rights to relief claimed in both or all of them are in respect of or arise out of the same transaction or series of transactions; or

(c) that for some other reason it is desirable to make an order under this section-

the Court may order those arbitration proceedings to be consolidated on such terms as it thinks just or may order them to be heard at the same time, or immediately after another, or may order any of them to be stayed until after the determination of any other of them.

(2) Where the Court orders arbitration proceedings to be consolidated under sub-section (1) and all the parties to the consolidated arbitration proceedings are in agreement as to the choice of arbitrator or umpire for those proceedings the arbitrator or umpire shall be appointed by the Court but if all the parties cannot agree the Court shall have the power to appoint an arbitrator or umpire for those proceedings.

(3) Nothing in this section shall be construed as preventing the parties to two or more arbitration proceedings from agreeing to consolidate those proceedings and taking such steps as are necessary to effect that consolidation."

This provision appears to be modeled on s 6B of the Hong Kong Arbitration Ordinance (added in 1982 and before its amendment in 1985), but contains in addition the underlined words in subsection (1) and a new subsection (3). The Australian version remains closer to the consensual basis of arbitration, by requiring all the parties to support the application for consolidation. The court's role is limited to facilitating consolidation, where all the parties support the idea of it taking place. The Hong Kong Ordinance has no such qualification, which implies that the court could order consolidation even if this were opposed by one or more of the parties affected. The Netherlands Arbitration Act (art 1046) also gives the power of consolidation to the president of the district court, on the application of any of the parties. Once again, this implies that consolidation could be ordered notwithstanding the opposition of one or more of the parties. The president must first hear all the parties and all the arbitrators before deciding on the

application (art 1046(2)). The Dutch Act also expressly provides for complete or partial consolidation (i e consolidation in respect of one or some issues only - see also Sanders (1984) 4 *Pace Law Review* 594). If the drafting committee decides to give the power of consolidation to the court, it will first be necessary to decide whether it will be a power to facilitate consolidation where all the parties are in agreement or a stronger power to order consolidation if the idea is supported by only some of the parties involved, where it appears desirable to the court to do so.

The Draft Act of the New Zealand Law Commission sch 2 clause 2 gives the power to consolidate in the first instance to the arbitrator(s) concerned. Consolidation does not require the support of all the parties, but one of the factors referred to in sub-clause (4) must be present to justify consolidation. This statutory power applies automatically to domestic arbitrations unless the parties contract out (see s 6(2)(b) of the Draft Act). If an arbitral tribunal *refuses or fails* to order consolidation, a dissatisfied party may apply to court. It should be noted that there is no provision in clause 2 for a party dissatisfied with an order *granting* consolidation to take the matter to court. It is also interesting that Lord Mustill in "Multipartite arbitrations: an agenda for law-makers" (1991) 7 *Arbitration International* 393 396 only considers two basic methods for consolidating arbitrations, namely with the agreement of the parties or by a court order. The possibility of giving the power to the arbitrator(s) is not considered.

Liability of arbitrators

Because of the present uncertainty in English law on the liability of arbitrators for negligence (see Butler & Finsen 100-3), certain common law jurisdictions have now resorted to legislation. S 51 of the Victorian statute provides that an arbitrator is not liable for negligence in respect of anything done or omitted in that capacity, but is liable for fraud. S 11 of the draft Act of the New Zealand Law Commission is identical in this regard. These provisions avoid dealing specifically with the issue of liability for reckless or grossly negligent conduct. Compare para 34-36 of the Working Paper of the Sub-Committee on Arbitration of the English Commercial Court, published in February 1985, who refer to this problem and conclude that the entire issue of arbitrators' liability should rather be left to the courts. Nevertheless, the English DTI draft bill of February 1994 contains a provision in clause 9 excluding arbitrators' liability except in respect of acts or omissions in bad faith. The commentary (part III para 10) stresses that there was no consensus on the provision and that it was included to focus attention on the issue.

A statutory right of withdrawal for the arbitrator

Where the arbitrator has made his acceptance of appointment conditional on his having certain powers and the parties subsequently try to change the agreement or conduct themselves in a way which conflicts with those powers, the drafting committee proposed that the arbitrator should have a statutory right (in a new section 13(4)) to withdraw as arbitrator in certain circumstances, without prejudice to his right to be remunerated for his services to date.
The reason for this proposal is as follows. The procedural powers of the arbitrator are subject to the provisions of the arbitration agreement between the parties (see Butler & Finsen 97). This principle, taken in isolation, could cause difficulties where the parties initially agree that the arbitration should be conducted in accordance with certain rules which give the arbitrator strong powers to conduct the reference in a way that will avoid delay and unnecessary expense, but subsequently agree expressly or tacitly through conduct to vary their agreement to strip the arbitrator of some of these powers. (This problem is also referred to in the English DTI's February 1994 Consultation Paper - see part IV, comment on clause 11.) The precise basis of the legal relationship between the arbitrator and the parties is not entirely clear (see generally Butler & Finsen 92-95 for a discussion of the contractual and status theories). The arbitrator could seek to counter moves by the parties to reduce his powers during the course of the reference by entering into a tripartite agreement on accepting appointment that the reference will be conducted in accordance with certain rules. However, even where the contractual theory is adopted, the ordinary principles of contract, particularly regarding remedies for breach of contract,

are not consistently applied to the contract between the parties and the arbitrator (see Butler & Finsen 93-4). The suggested new subsection removes any doubt by giving the arbitrator a statutory right to withdraw in the circumstances referred to in the subsection. The mere existence of this power will be a powerful detergent in practice to prevent parties from attempting to vary the arbitration agreement without the arbitrator's consent. As the arbitrator was a party to the contract, the statutory right of withdrawal is not in conflict with the consensual basis of arbitration. The proposal is consistent with the drafting committee's endeavours to strengthen the arbitrator's powers to conduct the reference effectively.

The proposed subsection read as follows:

> "(4) Where an arbitrator stipulates in writing that his acceptance of appointment is subject to certain conditions as to the manner in which the arbitration proceedings are to be conducted, which stipulation is accepted in writing by all the parties to the reference, and the parties subsequently either amend the arbitration agreement or conduct themselves in a manner which conflicts substantially with those conditions, then the arbitrator may terminate his appointment on ten days' written notice to the parties, without prejudice to his right to remuneration for his services to the date of termination."

The Executive Committee of the Association expressed some misgivings regarding this provision. It was felt that the exercising of this unilateral right by the arbitrator could cause severe prejudice to the parties.

The proposed s 13(4) contemplates that the arbitrator may terminate his appointment where there was a tripartite agreement between the arbitrator and the parties regarding "the manner in which the arbitration proceedings are to be conducted" and the parties either by way of an agreement or through their conduct breach the provisions of the tripartite agreement. Three points should be noted. First, the arbitrator has a discretion as to whether or not he should withdraw. This discretion should be exercised cautiously bearing in mind his status and duties as arbitrator. Secondly, the provision contemplates withdrawal only as a result of the conduct (including a variation of the arbitration agreement) of *all* the parties to the arbitration. Thirdly, the right to withdraw only exists in the event of a (serious) breach of conditions regarding *the manner in which the proceedings are to be conducted*. The proposed right of withdrawal is only intended to be available where the parties, in breach of the arbitrator's terms of appointment, seek to limit the arbitrator's powers to conduct the proceedings in an efficient and cost-effective manner. The power is not available in the event of other breaches of the parties' contract with the arbitrator, for example, provisions regarding the payment of a deposit on his fees.

However, it must also be asked whether the proposed new subsection is really necessary. *Unilateral* delays by one party can be dealt with by the arbitrator using his default powers under s 18(2) of Draft D4 (s 15(2)) of Act 42 of 1965) or by the court under s 3 of the Draft D4, where the existing powers of the court have been strengthened by the addition of subsection (3). The problem that the proposed s 13(4) seeks to address is caused by the agreement or conduct of *both* parties. If a party is prejudiced thereby, he is at least partly to blame by agreeing to the reduction of the arbitrator's procedural powers in the arbitration agreement or by participating in the conduct. Ultimately, the provision, in effect, enables the arbitrator to avoid wasting his time or endangering his reputation through continued involvement in a situation where the parties are guilty of a joint abuse of the arbitral process. Is this not an occupational hazard for the arbitrator?

Subsequent to the Executive Committee meeting, the drafting committee decided to withdraw the proposal from Draft D4, and to include the proposal in this part of the commentary, as a contribution to the debate on the legal relationship between the arbitrator and the parties.

Conciliation

The drafting committee considered s 2A of the Hong Kong Arbitration Ordinance (inserted in 1982) which contains certain provisions to facilitate the use of conciliation in conjunction with arbitration proceedings. The committee decided not to recommend the incorporation of a similar provision in the South African arbitration legislation.

Arbitration in insurance matters

S 63(1) of the Insurance Act 27 of 1943 imposes certain restrictions on the use of arbitration in insurance matters, but the interpretation of the provision gives rise to certain difficulties (see Butler & Finsen 55-6 and the authorities cited there). The committee were of the view that this matter is more properly dealt with in a revision to the Insurance Act after consultation with interested parties.

D W BUTLER

Stellenbosch

(Original draft 14 April 1994.
Partially revised 20 July 1994.)

Db/comment

SCHEDULE

Principal textbooks referred to:

Berger KP *International economic arbitration* (Kluwer, Deventer, 1993)
Butler D & Finsen E: *Arbitration in South Africa: law and practice* (Juta, Cape Town, 1993)
Jacobs M: *The law of arbitration in South Africa* (Juta, Cape Town, 1977)
Lew JDM (ed) *Contemporary problems in international arbitration* (Centre for Commercial Law Studies, Queen Mary College, London, 1986)
Mustill MJ & Boyd SC *The law and practice of commercial arbitration in England* (2nd ed, Butterworths, London, 1989)
Redfern A and Hunter M *Law and practice of international commercial arbitration* (2nd ed, Sweet & Maxwell, London, 1991)

Principal reports consulted or referred to:

Canada:
Law Reform Commission of British Columbia: Report on arbitration (LRC 55) May 1982

England:
Commercial Court Committee *Report on arbitration* (Cmnd 7284 of July 1978)
Commercial Court Committee, Sub-committee on Arbitration: Working Paper 1 February 1985
Departmental Advisory Committee (Mustill Committee) 1989: reproduced as "A new Arbitration Act for the United Kingdom?" in (1990) 6 *Arbitration International* 3-62
Department of Trade and Industry (DTI): A consultation paper on draft clauses and schedules of an Arbitration Bill (February 1994), reproduced in (1994) 10 *Arbitration International* 189-251

Hong Kong:
Report of the Law Reform Commission of Hong Kong on Commercial Arbitration (Topic 1), December 1981
The Law Reform Commission of Hong Kong: Report on the adoption of the UNCITRAL Model Law of Arbitration (Topic 17), 1987

New Zealand:
New Zealand Law Commission: Arbitration (NZLC R20) October 1991