

SOUTH AFRICAN LAW COMMISSION

PROJECT 94

DOMESTIC ARBITRATION

REPORT

MAY 2001

**TO DR P M MADUNA, MP, MINISTER FOR JUSTICE AND CONSTITUTIONAL
DEVELOPMENT**

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

Y MOKGORO

CHAIRPERSON: SOUTH AFRICAN LAW COMMISSION

MAY 2001

ACKNOWLEDGEMENT

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

INTRODUCTION

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The page numbers refer to the hard copy and may differ in electronic versions

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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 independent and impartial tribunal without unnecessary delay and expense; party autonomy; balanced powers for the courts; and adequate powers for the arbitral tribunal to conduct the arbitral proceedings 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 recommended by the Commission in this Report, 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 recommends 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 recommended 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, the power to decide whether or not there should be an oral hearing, 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. To address the problem posed by multi-party disputes, the Commission recommends that the tribunal should have a limited power to permit a third party to join the arbitral proceedings in certain circumstances. True to the principle of party autonomy the tribunal's statutory powers can be excluded or modified by the parties in their arbitration agreement. They are also subject to the tribunal's statutory duty to conduct the proceedings in a fair and impartial manner.

The Commission recommends that the powers of the court pertaining to arbitration 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 Report also contains certain provisions designed to facilitate the use of mediation by the parties to an arbitration agreement. In the interests of consumer protection, it is recommended that a consumer, as defined in the Draft Bill, who enters into an arbitration agreement relating to future disputes should be able to cancel that arbitration agreement within a specified period.

The Commission recommends:

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.

That in view of the procedural safeguards in the Draft Bill and the protection provided by it for consumers, arbitration agreements should be expressly exempted from the legislation recommended in 1998 by the Commission in its ***Report on Unreasonable Stipulations and the Rectification of Contracts***, which will enable the High Court to render unreasonable, unconscionable or oppressive contracts inoperative.

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SELECTED LEGISLATION

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Admiralty Jurisdiction Regulation Act 105 of 1983.

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Carriage of Goods by Sea Act 1 of 1986.

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CHAPTER 1

INTRODUCTION

(a) *The objects of the proposed new Arbitration Bill*

1.01 When South Africa entered a new democratic era in 1994, it was already obvious that its existing arbitration legislation was seriously defective as regards the needs of international arbitration. For this reason the Law Commission, after thorough investigation and due consultation, recommended the introduction of a new International Arbitration Act. It prepared a Draft International Arbitration Bill, which is now on the legislative programme of Parliament. A copy of this bill in the form recommended by the State Law Adviser is attached as Annexure A to this Report. A similarly thorough investigation has confirmed that the existing arbitration legislation is also inadequate for the needs of domestic arbitration, when compared to arbitration legislation recently enacted in other jurisdictions in Africa, Europe and elsewhere. The Commission produced a Discussion Paper¹ with preliminary proposals for a new domestic arbitration statute, which included a Draft Bill. The principles on which this Draft Bill were based received strong support at regional workshops² and in written responses to the Discussion Paper, with criticism being restricted to points of detail. This Report therefore contains detailed proposals for a new Draft Arbitration Bill which has been refined in the light of the responses to the Discussion Paper. It is attached to this Report as Annexure B and is referred to henceforth simply as "the Draft Bill"; it is to be distinguished from "the International Arbitration Bill".

1.02 The standard by which a country's arbitration legislation is measured is the UNCITRAL Model Law on International Commercial Arbitration of 1985. Although the Model Law was intended for international arbitration, several countries, including both developed and developing countries, have adopted the Model Law for both domestic and international arbitration.³ In its previous report, the Commission recommended that South Africa should adopt the Model Law for international arbitrations only.⁴ For reasons discussed below, the Commission recommends that South Africa should not adopt the Model Law for domestic arbitration as well. Instead, the provisions of the proposed new domestic legislation should be compiled in such a way that it will best meet the objects of arbitration, bearing in mind the specific needs of the users of arbitration in a South African context. The basic options, which were considered in order to achieve this goal, are discussed below.⁵ The Draft Bill is therefore partially based on provisions of the current statute which have worked well in practice, as well as certain provisions of the Model Law and the new English Arbitration Act of 1996.

¹ SA Law Commission **Domestic Arbitration** Discussion Paper 83 August 1999.

² See para 1.34 below.

³ See para 2.03 below.

⁴ See SA Law Commission **Arbitration: An International Arbitration Act for South Africa** Report July 1998 (hereafter referred to as "the Commission's Report on International Arbitration") paras 1.10 and 2.1-2.6.

⁵ See para (b) below.

1.03 The object of arbitration is to obtain the fair resolution of disputes by an independent and impartial arbitral tribunal without unnecessary delay or expense.⁶ In this regard, delay and expense are not to be measured only in relation to individual litigants, but society itself. Arbitration, effectively used, can substantially relieve the costs to society of resolving (in particular) complex commercial and construction industry disputes in the courts, thus permitting a better allocation of public resources. It follows logically that a prime objective of arbitration legislation should be to promote this object. The Draft Bill contains a number of provisions derived from English Arbitration Act of 1996, which are not found in the UNCITRAL Model Law, to ensure that this objective is achieved.⁷

1.04 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.⁸ Party autonomy is one of the main principles of both the UNCITRAL Model Law⁹ and the English Arbitration Act of 1996.¹⁰ The second objective of a domestic arbitration should therefore be the promotion of party autonomy.

1.05 The third objective should be balanced powers for the court. This is an objective of both the Model Law¹¹ and the English Arbitration Act of 1996.¹² 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 in the context of domestic arbitration legislation are considered in greater detail in the next chapter.¹³

1.06 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

⁶ See the English Arbitration Act of 1996 s 1(a), which however omits the requirement of independence for the reason referred to in para 3.120 below.

⁷ See ch 2 para (b) below.

⁸ See the English Arbitration Act of 1996 s 1(b).

⁹ See the Commission's Report on International Arbitration para 2.7.

¹⁰ See Departmental Advisory Committee on Arbitration Law **Report on the Arbitration Bill (Saville Report)** February 1996 (hereafter referred to as "1996 Saville Report") para 19.

¹¹ See the Model Law article 5 and the Commission's Report on International Arbitration para 2.7.

¹² See the English Arbitration Act of 1996 s 1(c).

¹³ See ch 2 para (c) below.

of the parties is failing or refusing to cooperate.¹⁴ This was also an objective of the Model Law.¹⁵

1.07 There is naturally a degree of tension between these objectives.¹⁶ The objective of party autonomy is not always easy to reconcile with the stipulated object of arbitration of resolving disputes without unnecessary delay and expense or the giving of adequate powers to the arbitral tribunal to conduct the arbitral proceedings 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.¹⁷

1.08 A consideration of the proposals in this Report 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, the latter is undermined by supervisory powers of the court which are excessive compared with those in modern domestic arbitration statutes.¹⁸ The powers of the arbitral tribunal to conduct the arbitral proceedings in a cost-effective and expeditious manner are also inadequate by modern standards.¹⁹

1.09 The following are the main changes contained in the Draft Bill, compared to the current statute, to ensure that the Bill achieves each of the objects of an arbitration statute identified above.

Changes intended to promote expeditious and cost-effective arbitration

1.10 The following provisions, based on the English Arbitration Act of 1996, are designed to improve the efficiency of the arbitral process:

- The imposition of a statutory duty on the arbitral tribunal to avoid unnecessary delay and expense (s 28(1)(b));
- The imposition of a general duty on the parties to facilitate the proper and expeditious conduct of the proceedings (s 35);
- The granting of a power to the arbitral tribunal to limit recoverable costs (s 56).

¹⁴ See Butler D W "South African Arbitration Legislation – The Need for Reform" (1994) 27 *CILSA* 118 at 122 (hereafter referred to as "Butler (1994 *CILSA*)").

¹⁵ See the Commission's Report on International Arbitration para 2.7.

¹⁶ See Butler (1994 *CILSA*) 122; Butler D W "A New Domestic Arbitration Act for South Africa: What Happens after the Adoption of the UNCITRAL Model Law for International Arbitration?" (1998) 9 *Stell LR* 3 at 17 (hereafter referred to as "Butler (1998)"); compare the 1996 Saville Report paras 154-156.

¹⁷ See further para 2.12 below.

¹⁸ 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 9 of the Draft Bill. 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 40 of the Draft Bill.

¹⁹ Examples of existing deficiencies include the following. S 14 of the current Act fails to confer a general discretionary power on the arbitral tribunal to decide how to conduct the arbitral proceedings where the parties' agreement is silent. Compare s 29(1) of the Draft Bill. There is no provision regarding the power of the arbitral tribunal to deal with jurisdictional issues. Compare s 26 of the Draft Bill. The arbitral tribunal currently has no power to order interim measures. Compare s 29(2)(b)(iii) of the Draft Bill. The arbitral tribunal cannot currently call a witness unless the parties agree. Compare s 31(5) of the Draft Bill.

Enhanced powers for the arbitral tribunal

1.11 The following are the main examples of enhanced powers for the arbitral tribunal:

- A new general power, subject to procedural fairness and the arbitration agreement, to conduct the arbitration as it deems fit (s 29(1));
- A limited power to allow the joinder of a third party (s 12);
- The power to rule on its own jurisdiction (s 26);
- A limited power to order interim measures (s 29(2)(b)(iii));
- The power to extend certain time limits (s 29(2)(b)(v));
- The power to dispense with an oral hearing (ss 29(2)(a)(iv) and 33(1));
- The power to depart from the ordinary rules of evidence (s 30);
- The power to order security for costs (s 31(2));
- The power to call a witness (s 31(5));
- Enhanced powers in the event of a party's default (s 36);
- In addition to the power to make an interim award, the power to make a provisional order regarding aspects of the merits of the dispute, which it may reconsider in its final award (s 46);
- Enhanced powers to correct errors in or to clarify an award (s 50).

Changes to the powers of the court

1.12 The proposed changes to the powers of the court are intended to provide enhanced judicial support for the arbitral process, while preventing applications to court from being abused as a delaying tactic:

- The discretionary power of the court **not** to enforce an arbitration agreement has been restricted in line with international standards (s 9);
- The power of the court to rule on jurisdictional issues has been clarified (ss 26, 27 and 52(2)(a)(i) and (iii));
- The powers of the court to extend the time limit for commencing arbitral proceedings and to decide on a question of law have been refined (ss 11 and 39);
- The court's power to grant interim relief has been strengthened, whereas its power to decide procedural issues has been reduced (s 40);
- The grounds on which a court may refuse to enforce an award have been specified (s 53);
- The court's power to order remittal of an award has been restricted, in line with international trends (s 52(4)).

Changes pertaining to the award

1.13 The following are the main changes relating to the award:

- The award must be reasoned unless parties otherwise agree (s 43(3));
- Provision has been made for an award, with the consent of the tribunal, on agreed terms (s 44);
- The provisions regarding the time for making the award (s 42) and its delivery to the parties have been revised (s 45).

Other changes relating to the arbitral tribunal

1.14 The following are the main changes proposed relating to the arbitral tribunal, other than those referred to elsewhere in this outline:

- The abolition of statutory provision for an umpire as opposed to a three-member tribunal (ss 16 and 17);
- Limited provision is made for the immunity of arbitrators from liability (s 25);
- The consequences of an arbitrator's resignation are regulated (s 23);
- Parties are jointly and severally liable for arbitrators' fees (s 54(5)).

Other important new provisions

1.15 Other important new provisions include the following:

- Acceptance of the principle of the severability of the arbitration clause in a contract from the rest of that contract is confirmed (s 26(1));
- The privacy of the arbitration hearing and the confidentiality of the arbitral process and the award are confirmed, subject to certain exceptions (s 34);
- A cooling-off period has been provided for arbitration agreements involving consumers (s 58);
- Provisions to encourage and facilitate mediation between parties to an arbitration agreement have been included (ss 13-16);
- The description of what matters are arbitrable has been refined (s 5).

1.16 Most of these provisions²⁰ were contained in the Previous Draft Bill annexed to Discussion Paper 83. To facilitate comparison a copy of the previous Draft Bill is contained in Annexure C to this Report.²¹

(b) Basic options regarding domestic arbitration legislation

1.17 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 developing countries in the period since 1979.

1.18 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.²² The Model Law can also be regarded as having set the standard against which

²⁰ New provisions with no equivalent in the previous Draft Bill are s 13 (Right to mediation process); s 34 (Confidentiality of arbitral proceedings); s 44 (Award on agreed terms); and s 59 (Regulations).

²¹ The footnotes to the sections of the Draft Bill in Annexure A contain references to the corresponding provision of the previous Draft Bill, where applicable.

²² Examples of countries which have adopted the Model Law with minimum changes for both domestic and international arbitration include New Zealand, Kenya, Zimbabwe, Uganda 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. Regarding the position in Mozambique, new legislation on

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,²³ the Model Law subsequently had a far greater influence on the new English Arbitration Act of 1996 than was initially foreseen.²⁴ 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 law²⁵ are potentially indicative of possible flaws in the South African Arbitration Act.

1.19 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.²⁶ As this report 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.

1.20 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 1994.²⁷ There are two main difficulties with this approach.

1.21 First, it takes insufficient account of the provisions of the UNCITRAL Model Law. This Report 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 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 above.²⁸

1.22 Secondly, while the drafters of the English Arbitration Act of 1996 had regard to the

both international and domestic arbitration took effect during 1999. The section of the legislation dealing with international arbitration incorporates some features of the UNCITRAL Model Law but also contains important differences. The legislation has however achieved some success in restricting the scope of court involvement in the arbitration process. (The information on Mozambique was furnished by Dr Samuel Levy, an American lawyer and former official with US Aid in Maputo, who now runs a legal and financial management consulting firm SAL Consultoria in Maputo.)

²³ See Mustill M J *Report of the Departmental Advisory Committee on the UNCITRAL Model Law* London 1989 reproduced in (1990) 6 *Arbitration International* 3-62.

²⁴ See the introduction by Lord Saville to Bernstein R, Tackaberry J & Marriott A L *Handbook of Arbitration Practice* 3 ed Sweet & Maxwell London 1998 (hereafter referred to as "Bernstein et al") 7 and the 1996 Saville Report para 4.

²⁵ 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.

²⁶ Compare the Commission's Report on International Arbitration para 1.3.

²⁷ A copy of the Draft Bill accompanying the submissions of the Association of Arbitrators is contained in Annexure B to Discussion Paper 83.

²⁸ See para (a) above.

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.²⁹ The implementation of statutory corrective measures necessitates a more drastic departure from the provisions of the existing Arbitration Act of 1965.

1.23 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.

1.24 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.

1.25 Having regard to the objectives of a modern arbitration statute discussed above, and the very favourable response to Discussion Paper 83, the Commission recommends that the third of these alternatives should be adopted.

(c) *A brief history of the Law Commission's arbitration project*³⁰

1.26 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.

1.27 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.

1.28 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.

1.29 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.

1.30 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

²⁹ See para 2.09 below.

³⁰ A more detailed account of the work of the Law Commission on international arbitration appears from 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.

1.31 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.³¹

1.32 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.

1.33 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 undertook the preparation of a Discussion Paper dealing with the reform of domestic arbitration legislation. A Draft Arbitration Bill reflecting the committee's proposals was contained in Annexure A to the Discussion Paper. This report, based on the Discussion Paper, marks the completion of the second stage of the Commission's inquiry into arbitration legislation. This will be followed by a third stage, which will consider alternative dispute resolution techniques for resolving commercial disputes.

(d) *Regional Workshops and the response to Discussion Paper 83*

1.34 Four regional workshops were held to consider the Discussion Paper during September 1999 at Pretoria, Durban, Cape Town and East London. A list of persons who attended these workshops is contained in Annexure D to this Report. All four workshops started with a consideration of the question of whether the third of the three options considered by the Project Committee was the correct approach. There was general and enthusiastic support for this approach.³² Subsequent to the workshops written submissions were also received. A list of respondents who submitted written submissions is contained in Annexure E to this Report.

1.35 The Pretoria workshop supported the approach of the Bill in principle. Comment was restricted to points of detail. Policy concerns related to the provisions regarding consumer arbitration agreements and, to a lesser extent, the provisions regarding mediation. At a practical

³¹ An expanded Project Committee was appointed for this purpose. An issue paper *Alternative Dispute Resolution* Issue Paper 8, with a closing date for comments of 15 July 1997 has since been published on this aspect of the investigation. A discussion paper, *Community Dispute Resolution Structures* Discussion Paper 87 was published in September 1999 and a report on this aspect of the investigation is currently in preparation.

³² Only one delegate reserved his position on this issue, namely Mr G Elsworthy of the City of Cape Town.

level a prime concern was the avoidance of unnecessary costs and delay and to provide for the expedited enforcement of arbitral awards.

1.36 At the Durban workshop, the perception that revised arbitration legislation could be aimed at facilitating the avoidance of courts staffed by black judicial officers was raised and discussed. It was also asked to what extent the Draft Bill attempted to address African needs. Once again, the provision on consumer arbitration agreements was perceived as providing inadequate protection.

1.37 In Cape Town, the policy considerations behind the Draft Bill were questioned.³³ It was asked to what extent does the Bill accommodate African culture. It was also asked to what extent would the Draft Bill assist in promoting access to justice for the poorer sections of the community and how the Bill would interact with community courts. Concern was expressed that diverting work from the civil courts to arbitration could further reduce the funds available to support such courts. These concerns are briefly addressed in the text below.

1.38 At the East London workshop, concern was expressed that arbitration was currently no cheaper than the courts. It was also argued that there is a need to move away from the courtroom procedures which lawyers tended to indulge in when appearing in arbitrations.

1.39 As far as the Project Committee is aware little has been published about the relationship between arbitration and African culture or custom.³⁴ Indeed the perception exists that mediation as a method of dispute resolution has more in common with traditional African methods of dispute resolution than the usual adversarial style of arbitration practice associated with colonial arbitration legislation of English origin.³⁵ A more important issue in the present-day African context is how to provide appropriate access to justice for the majority of the population, both urban and rural, in a situation where there are severe constraints on resources.³⁶ This concern illustrates the importance of the parallel investigation by the Commission's Project Committee dealing with community dispute resolution structures.³⁷ It is also necessary to add a word of caution about having unrealistic expectations as to what domestic arbitration by private arbitrators can do to promote access to justice, because of the costs involved. Nevertheless arbitration service providers are giving increasing attention to

³³ By Ms Doris Ndlovu.

³⁴ See however Amissah A N E "Ghana" in Cotran E & Amissah A (eds) *Arbitration in Africa* Kluwer The Hague 1996 113-119 for a discussion of customary arbitration in Ghana (as opposed to arbitration under the arbitration statutes). The essential characteristics of this customary arbitration are a voluntary submission of the dispute to arbitrators for the resolution of the dispute on its merits using an informal procedure; a prior agreement by both parties to accept the award; and publication of that award. In practice where the dispute was resolved by a Chief, it could be difficult to show whether a disputant attended a hearing before the Chief pursuant to an agreement to submit the dispute to arbitration or out of respect for the Chief. Sakala J B "Zambia" in Cotran & Amissah 186 stated that the Local Courts Act (Ch 54 of the Laws of Zambia) s 50(1) allowed for "arbitration or settlement in any matter with the consent of the parties thereto if such settlement or arbitration is conducted in the manner recognised by the appropriate African customary law".

³⁵ See para 3.90 below.

³⁶ See Schärff W "Dispute Resolution in Africa – Past and Present" Unpublished paper presented at the conference of the Association of Arbitrators on *Dispute Resolution and Cross Border Trade* in Johannesburg on 15 September 2000, 1-2.

³⁷ See para 1.31 n 31 above.

low-cost administered arbitrations for consumer disputes, as an alternative to the magistrates' court and the small claims court.³⁸ This indicates that general legislation dealing with arbitration pursuant to an agreement between the parties can and should endeavour to promote a culture of cost-effective arbitration. It is not however the object of such legislation to create specific machinery and regulations for low-cost arbitration schemes, whether these be funded by the private or public sector.³⁹

³⁸ See eg Association of Arbitrators (Southern Africa) *Rules for the Conduct of Arbitrations* 4 ed August 2000, which contain a subdivision "Rules and Guidelines for the Conduct of the Small Claims Arbitration Tribunal". The latter rules deal with three classes of claim, those up to R5 000, claims between R5 000 and R25 000 and claims between R 25 000 and R50 000, with a separate prescribed costs structure for each category.

³⁹ The possibility of court-annexed arbitration as a means of reducing pressure on the courts and making better use of public funds allocated for the administration of civil justice is outside the ambit of this report.

CHAPTER 2

UNDERLYING PRINCIPLES OF THE DRAFT BILL

2.01 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. The conclusion reached on this issue⁴⁰ has been fortified by the very positive response at the regional workshops to the same conclusion, put forward on a provisional basis in Chapter 2 of the Discussion Paper on which this chapter of the Report is based.

2.02 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 Report. The drafting principles which have been used in drawing up the Draft Bill are also set out.

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

2.03 Two developed countries, namely New Zealand and Germany, and four developing countries, namely Kenya, Zimbabwe, India and Uganda, have recently adopted the Model Law for both domestic and international arbitrations.⁴¹ 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".⁴² It may also be argued that

⁴⁰ See para 2.25 below.

⁴¹ By 1994 some 22 states had adopted the Model Law: see Sanders P "Unity and Diversity in the Adoption of the Model Law" (1995) 11 *Arbitration International* 1-37 and the Commission's Report on International Arbitration para 2.3 n 4; Butler (1994 *CILSA*) 132-134. Countries which have adopted the Model Law for international arbitration only while retaining a separate law on domestic arbitration include Australia, Scotland, Hong Kong, Singapore and most of the provinces of Canada. Hong Kong adopted the Model Law for international arbitration in 1989. The Hong Kong Arbitration Ordinance of 1963 was further amended in 1996 in the light of the English Arbitration Act of 1996. The revision was necessarily limited in scope because of the pressure on the legislative programme occasioned by the colony being returned to China in 1997. This made it impossible to give effect to a proposal from the Hong Kong International Arbitration Centre for a complete redraft of the arbitration legislation, in terms of which the Model Law would have been adopted for both international and domestic arbitrations with certain "add-on" provisions for domestic arbitrations. See Kaplan N "An Update on Hong Kong's Arbitration Law" 1998 (Special Supplement) *ICC IC Arb Bull* 11 at 12; Schaefer J K "Leaving Colonial Arbitration Laws Behind: Southeast Asia's Move into the International Arbitration Arena" (2000) 16 *Arbitration International* 297 at 313-314.

⁴² See Herrmann G "The Role of the Courts under the UNCITRAL Model Law Script" in Lew J D M (ed) *Contemporary Problems in International Arbitration* Centre for Commercial Studies Queen Mary College London 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

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 opposed to domestic.⁴³ However, even jurisdictions which in principle 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.⁴⁴ 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.⁴⁵

2.04 There are however a number of arguments against adopting the Model Law for both domestic and international arbitration.⁴⁶

2.05 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.⁴⁷ 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.⁴⁸ Both these powers have been used beneficially over the years and the Commission recommends that they should be retained, subject to certain refinements to prevent abuse.⁴⁹

contains special requirements for the enforcement of a consumer arbitration agreement entered into in New Zealand).

⁴³ 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.

⁴⁴ 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.

⁴⁵ See Butler (1998) 9 n 39.

⁴⁶ See generally Butler (1998) 7-12.

⁴⁷ See para (c) below.

⁴⁸ See the Arbitration Act 42 of 1965 ss 8 and 20.

⁴⁹ See ss 11 and 39 of the Draft Bill and paras 3.77-3.81 and 3.196-3.204 below.

2.06 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.⁵⁰ 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.⁵¹ 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.

2.07 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.⁵²

2.08 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".⁵³ 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 Act contains a fairly detailed list of powers, which apply unless the arbitration agreement provides otherwise.⁵⁴ 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

⁵⁰ See the Commission's Report on International Commercial Arbitration paras 2.9 and 2.52.

⁵¹ See the Commission's Report on International Commercial Arbitration paras 2.52-2.60 and the Draft International Arbitration Bill s 8.

⁵² 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.

⁵³ See article 19(2) of the Model Law. The procedural safeguards are contained in articles 18 and 24.

⁵⁴ See the Arbitration Act 42 of 1965 s 14(1).

the Model Law.⁵⁵

2.09 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.⁵⁶ 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 described⁵⁷ 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."⁵⁸

(b) *Lessons from the English Arbitration Act of 1996*⁵⁹

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".⁶⁰ 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

⁵⁵ See further Butler (1998) 10-11.

⁵⁶ See Butler D W "Expediting Commercial Arbitration Proceedings – Recent Trends" (1994) 6 *SA Merc LJ* 251 at 254-5; Lane P M M "Cost Effective Arbitration" (1997) 63 *Arbitration* 5-6; Butler (1998) 6 and 12-14.

⁵⁷ In the editor's introduction to the article cited in the next footnote.

⁵⁸ See Saville M "An Introduction to the 1996 Arbitration Act" (1996) 62 *Arbitration* 165 (hereafter referred to as "Saville") at 166.

⁵⁹ See further Butler (1998) 14-19.

⁶⁰ See the Arbitration Act of 1996 s 1(a).

delay and expense are fundamentally unfair."⁶¹

An arbitrator who ignores this duty runs the risk of incurring certain sanctions, namely removal from office or the setting aside of the award.⁶²

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.⁶³ 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.⁶⁴ However, because of the principle of party autonomy, these powers are subject to any agreement between the parties.⁶⁵ 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.⁶⁶

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.⁶⁷ Properly exercised,⁶⁸ 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.⁶⁹

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.⁷⁰ 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

⁶¹ Butler (1998) 15 (footnotes omitted).

⁶² See further Butler (1998) 15-16 regarding ss 24 and 68 of the English Arbitration Act.

⁶³ See the English Arbitration Act s 34(2) and Landau T "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" London 4 July 1996 4. The tribunal's powers in ss 29-31 and 33 of the Draft Bill in Annexure B have been drafted on similar lines.

⁶⁴ See Bernstein et al 27.

⁶⁵ See the English Arbitration Act ss 1(b) and 34(1).

⁶⁶ See the Arbitration Act of 1996 s 25 and the 1996 Saville Report para 162.

⁶⁷ See the English Arbitration Act s 65 and Butler (1998) 17-19.

⁶⁸ 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.

⁶⁹ See further paras 3.267-3.272 below.

⁷⁰ See the English Arbitration Act of 1996 s 40(1) and (2)(a).

more drastic than those contained in the comparable provision of the Model Law.⁷¹

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 was done in the previous Draft Bill⁷² and the response at the regional workshops was overwhelmingly positive.

(c) *Balanced powers for the court*⁷³

2.16 One of the most controversial issues of arbitration law reform concerns the powers of the court in relation to arbitration.⁷⁴ 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.⁷⁵ There is the danger of a perception, particularly among black lawyers, that

⁷¹ See Butler (1998) 19 n 112 for a comparison between s 41 of the English Arbitration Act with article 25 of the Model Law.

⁷² See especially the corresponding provisions in the Draft Bill ss 2 (General Principles), 23 (Resignation of arbitrator), 28 (General duty of tribunal), 30 (Power of tribunal to consider evidence), 35 (General duty of parties), 36 (Powers of tribunal in case of party's default) and 56 (Power to limit recoverable costs). In addition, following s 34(1)(h) of the English Arbitration Act, s 33(1) of the Draft Bill now gives the tribunal the discretion to decide whether or not hearings should be held, unless the parties otherwise agree. See further para 3.174 below.

⁷³ 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 hereafter referred to as "Chukwumerije", especially 182-183.

⁷⁴ See generally Butler (1994) *CILSA* 123-9.

⁷⁵ See Butler D W "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.

some white members of the legal profession see arbitration as a form of "privatised litigation",⁷⁶ 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 the administration of justice by relieving the burden on the courts. Countries like India, Kenya and Zimbabwe point the way in this regard.

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.⁷⁷ Arbitration in this country therefore requires the support of judges who are sympathetic towards arbitration as a means of resolving disputes.⁷⁸ 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.⁷⁹

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 generally inadequate for purposes of domestic arbitration, although all four⁸⁰ did confer certain additional powers on the court.

⁷⁶ 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 2.09 above.

⁷⁷ This comment was forcefully made by KRK Harding, as Secretary General of the Chartered Institute of Arbitrators, based in London, at an international arbitration conference held in Johannesburg during March 1997.

⁷⁸ Such support was recently provided by Justice J M Hlophe "The New Domestic Arbitration Act" Unpublished paper presented at the Dispute Resolution and Cross Border Trade Conference held by the Association of Arbitrators (Southern Africa) Sandton 16 September 2000.

⁷⁹ See the Commission's Report on International Arbitration para 2.288.

⁸⁰ Regarding the position in New Zealand see the 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 11 and 39 of the Draft Bill. As appears from the text below, the Commission 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. In India, s 37 of the Indian Arbitration and Conciliation Act 26 of 1996 provides for a wider right of appeal to the courts on certain matters than is permitted by the Model Law. Both Kenya and Uganda provide in domestic arbitrations for a contract-in right to refer a question of law to the court as a consultative case and for a contract-in right of appeal to the courts on a point of law. (See the Kenyan

2.22 The Commission has therefore generally followed the provisions of the version of the Model Law which it recommended for international arbitrations in South Africa, in preference to the powers of the courts contained in the existing Arbitration Act of 1965.⁸¹ This 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.⁸²

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 1979.⁸³ This right of appeal is also found in New Zealand, Kenya and Uganda.⁸⁴ It was introduced in England 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.⁸⁵ This rule has never been part of South African law.⁸⁶ 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.⁸⁷ The Commission recommends that no change should be made to the law on this point.⁸⁸

(d) Guiding principles for a new domestic arbitration statute

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

(a) The Draft Bill endeavours to give effect to the objectives of a modern arbitration

Arbitration Act 4 of 1995 s 39 and the Ugandan Arbitration and Conciliation Act 7 of 2000 s 39.). The Commission recommends the retention of the former right on a contract-out basis but rejects the creation of the latter. See further the commentary on s 39 of the Draft Bill in paras 3.201-3.204 below.

⁸¹ 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 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.

⁸² See ss 11 and 39 of the Draft Bill.

⁸³ 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.

⁸⁴ See n 41 above. In Kenya and Uganda the right is provided on a contract-in basis.

⁸⁵ See the English Arbitration Act of 1979 s 1(1).

⁸⁶ 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 39 of the Draft Bill.

⁸⁷ See the Arbitration Act 42 of 1965 s 28 and s 48 of the Draft Bill.

⁸⁸ See further para 3.204 below.

statute as set out in Chapter 1 paragraph (c) above.

- (b) The Draft Bill retains those provisions of the existing legislation which have worked well in practice, with appropriate modifications to ensure the achievement of the objectives of a modern arbitration statute.
- (c) The Draft Bill seeks to achieve a reasonable degree of commonality with the relevant provisions of the proposed International Arbitration Bill, particularly as regards the powers of the court and the powers of the arbitral tribunal.
- (d) Because of problems currently 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 The main recommendations of the Commission in the Draft Bill discussed in the next chapter of this Report were prepared in accordance with the above principles and accepted by interested parties during a consultation process based on Discussion Paper 83. For the reasons set out earlier in this chapter, legislation based on these principles is more likely to ensure that the objectives of arbitration legislation are actually achieved than a statute which implements the Model Law for both international and domestic arbitration, as has been done in several other jurisdictions.

(e) Other matters considered

2.26 Other aspects on which the Commission specifically invited comment in the Discussion Paper included the following two matters.⁸⁹

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,⁹⁰ but does not seem to have caused any difficulties. No concerns were raised by respondents to the Discussion Paper in this regard.

Arbitration provisions in other legislation

⁸⁹ See Discussion Paper 83 paras 2.26-2.30. The third matter raised there, namely confidentiality, is discussed in the commentary on s 34. See paras 3.179-3.182 below.

⁹⁰ 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.

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 1965.⁹¹ The possible effect of changes to the law in a new domestic arbitration statute on arbitrations under the Labour Relations Act may require consideration. However, this Report is concerned with domestic arbitration legislation of general application, which should not in principle cause any major difficulties when applied to specialist fields. Particular provisions which may be required in such fields is a matter for legislation covering that field only.⁹²

⁹¹ See eg the grounds for reviewing arbitral awards in s 145 which are based on s 33 of the Arbitration Act.

⁹² Compare the discussion of restrictions on arbitrability in certain other laws discussed in paras 3.32-3.34 below.

CHAPTER 3

COMMENTARY ON DRAFT BILL

3.01 The principles underlying the proposed Draft Bill were set out in the previous chapter. The purpose of this chapter, which is based on chapter 3 of Discussion Paper 83, is to discuss the provisions of the proposed legislation in more detail. Particular attention is given to explaining changes made in the light of responses to the Discussion Paper.

CHAPTER 1

General Provisions

S 1 Definitions

3.02 In line with the International Arbitration Bill,⁹³ the definitions have been moved to s 1, with the general principles on which the bill is based now being in s 2. Several of the definitions in s 1 are based on those in s 1 of the 1965 Act.⁹⁴

3.03 Following the English Arbitration Act of 1996, the term "arbitration proceedings" in the 1965 Act has been replaced by "**arbitral proceedings**". Consideration was given to referring simply to "proceedings" instead of "arbitral proceedings". However, the Draft Bill also refers to "legal proceedings",⁹⁵ "mediation proceedings"⁹⁶ and "proceedings which are a prerequisite" to arbitral proceedings.⁹⁷ To promote clarity, it therefore appears preferable to retain the term "arbitral proceedings". Following the more modern drafting style of the English Arbitration Act⁹⁸ and to promote clarity, the term "reference" in the current Act has been replaced with "arbitral proceedings" or "proceedings".

3.04 S1 now merely contains a formal definition of an "**arbitration agreement**" referring the reader of the bill to s 6(2), where the definition is now contained. The reason for this change appears from the discussion of s 6 below.⁹⁹

3.05 The definition of "**award**" comes from the existing arbitration statute and caused no difficulties in practice in that all the provisions of the statute dealing with an award logically

⁹³ See para 1.01 above.

⁹⁴ See the definitions of "arbitral proceedings", "award", "court", "party" and "tribunal".

⁹⁵ See for example s 9.

⁹⁶ See s 14.

⁹⁷ See s 11(1).

⁹⁸ Compare for example s 45 of the Arbitration Act of 1996 concerning the court's power on application by a party to the arbitral proceedings to determine any question of law arising in the course of the proceedings with s 2 of the Arbitration Act of 1979, which refers to an application to court by a party to the reference for the court to determine a question of law arising in the course of that reference.

⁹⁹ See para 3.35 below.

applied to an interim award. The previous Draft Bill provided for an additional category of award, namely a "provisional award" on a contract-in basis.¹⁰⁰ Certain of the references in the Draft Bill to an award would clearly not include a provisional award.¹⁰¹ This problem has been solved in the Draft Bill by making use of the term "provisional order" instead of "provisional award".¹⁰²

3.06 The terms "**claim**" and "**claimant**", which are used in several sections, have been defined to make it clear that they also cover a counterclaim and a claimant in reconvention.¹⁰³

3.07 Subsequent to the workshops, consideration was given to revising the definition of "**court**" to include a magistrate's court for certain purposes.¹⁰⁴ It was however decided that most of the matters to be dealt with by the court are properly matters for the High Court. Therefore an extensive definition of court has been included only in those sections where it is appropriate.¹⁰⁵

3.08 The definition of court has nevertheless been extended¹⁰⁶ to make it clear that a court can acquire jurisdiction under the Arbitration Act by virtue of the provisions of another law. An example is the jurisdiction conferred on the Labour Court by the Labour Relations Act.¹⁰⁷

3.09 A definition of "**juristic person**" has been added.¹⁰⁸ The purpose of the definition is to indicate that the expression should be extensively interpreted to include a partnership, voluntary association, trust and stifting.

3.10 In view of the inconsistent use of the terms "mediator" and "conciliator" in practice, a definition of "**mediation**" and "mediator" has been included, particularly for purposes of ss 13-16 of the Draft Bill to make it clear that those provisions also apply to conciliation and a

¹⁰⁰ See s 43(2) and Discussion Paper 83 paras 3.128-3.129.

¹⁰¹ See for example s 26(5) regarding an award on jurisdiction, s 44 regarding an award on agreed terms, s 48 regarding the finality of the award, and s 51 regarding remittal of the award with the agreement of the parties. In the last-mentioned case the award is in any event open to reconsideration by the tribunal. An application to court for setting aside under s 52 would also usually be inappropriate in that a party with an objection to the provisional order could raise this objection with the tribunal.

¹⁰² See s 46(1)(b) and paras 3.224-3.227 below. Compare the English Arbitration Act of 1996 s 39 which uses the term "provisional award" in the heading but not in the text.

¹⁰³ See for example ss 8, 31 and 36. The inclusion of this definition was suggested by Adv PMM Lane SC in his response to Discussion Paper 83 para 12.

¹⁰⁴ See also the response of the Legal Administration Officer of the Provincial Administration: Western Cape para 4.

¹⁰⁵ See for example ss 9(1), 37(3), 46(3) and 53(6).

¹⁰⁶ By the addition of the words "or a court having jurisdiction by virtue of an Act of Parliament referred to in section 3". The addition was supported by the response of the Legal Administration Officer of the Provincial Administration: Western Cape in para 4 and Mr Graham Giles in an oral submission at the Cape Town workshop.

¹⁰⁷ Act 66 of 1995.

¹⁰⁸ The expression is used for example in ss 8 and 31(3). This term, on the recommendation of the Law Society of South Africa (see para 8 of its response) replaces the term "body corporate" in s 7(1) of the previous draft and "corporate body" in s 5 of the 1965 Act.

conciliator.

3.11 The term "conciliation" was used in the International Arbitration Bill in preference to "mediation", because the former occurs in the UNCITRAL Conciliation Rules, which are contained in a schedule to the bill.¹⁰⁹ The previous Draft Bill adopted the same approach for the sake of consistency. The terms "mediation" and "conciliation" were extensively discussed at the Pretoria workshop. It was suggested that the word order of the definition in the previous Draft Bill should be reversed in the domestic statute to read "mediation includes conciliation" as the expression "mediation" is possibly more common.¹¹⁰ The Project Committee supported this view on the basis that using terminology more familiar to domestic users outweighs the desirability of conformity with the International Arbitration Bill in this instance.

3.12 The term "**specified authority**" was defined in the previous Draft Bill with reference to the International Arbitration Bill on the assumption that the relevant provision would be implemented in the form recommended by the Commission and the State Law Adviser. The "specified authority" has two functions under the International Arbitration Bill. 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.¹¹¹ The function of making default appointments under the existing arbitration legislation is vested in the court.¹¹² In the context of an international arbitration, this can cause considerable delay and expense. The Commission therefore 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.¹¹³ Although the delay and expense resulting from an appointment by the court may be less in a domestic as opposed to an international context,¹¹⁴ 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.

3.13 The Commission invited comment on the envisaged role of the specified authority. The

¹⁰⁹ See further the Commission's Report on International Arbitration para 2.95.

¹¹⁰ See also the response of the Law Society of South Africa to Discussion Paper 83 para 5.

¹¹¹ See the International Arbitration Bill s 12(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.

¹¹² See s 12 of the Arbitration Act 42 of 1965.

¹¹³ See the Commission's Report on International Arbitration para 2.128. Compare the Ugandan Arbitration and Conciliation Act 7 of 2000 ss 68, 69 and 70, which deal with the establishment, functions and composition of a juristic person named the Centre for Arbitration and Dispute Resolution. (Although s 3(1) of the Act apparently envisages the designation of an appointing authority by the Minister, this function is allocated to the Centre by s 69(a) of the Act.) The approach recommended by the Commission has the advantage that the implementation of legislation will not be delayed by debate on the designation of the appointing authority and the composition of its governing body. The functions of the specified authority in the Draft Bill, explained below, are moreover much more limited than those allocated to the Centre by s 69 of the Ugandan statute.

¹¹⁴ 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.

proposal was supported by respondents to the Discussion Paper.¹¹⁵ It was nevertheless suggested that the term should be fully defined in the new domestic arbitration statute and not just by reference to the International Arbitration Bill.¹¹⁶ This suggestion has been accepted by the Commission. It does however carry the implication that the Chief Justice could designate separate appointing authorities for purposes of the two statutes.¹¹⁷ Another respondent suggested that the legislation should spell out the criteria which the authority must meet in more detail.¹¹⁸

3.14 The role of the specified authority under the Draft Bill is limited to the appointment of arbitrators and mediators in the circumstances specified by ss 14(1) and 20¹¹⁹ and the furnishing of advice to the Minister of Justice before the Minister makes regulations on certain matters pertaining to the maintenance and promotion of arbitration standards in practice.¹²⁰ The appointing authority will therefore have a more limited role than the statutory body created under the new Ugandan arbitration legislation, namely the Centre for Arbitration and Dispute Resolution.¹²¹ In addition to the appointment of arbitrators, the latter body is empowered to decide challenges of arbitrators and disputes regarding the termination of an arbitrator's mandate to the exclusion of the court.¹²² The Commission stands by its view that only the appointment of arbitrators should be performed by the specified authority, instead of the court.¹²³ The Ugandan Centre, besides being given statutory powers to function as an arbitral institution administering arbitrations,¹²⁴ is also given certain powers to regulate the arbitration

¹¹⁵ See the responses of the Association of Arbitrators para 6; the Law Society of South Africa para 6; the Law Society of the Cape of Good Hope para 3.6; and Philip Loots para 2.

¹¹⁶ See the response of the Law Society of South Africa para 6.

¹¹⁷ The Commission stated in its Report on International Arbitration para 2.128 that the appointing authority will have to be independent and sufficiently representative, if it is to be acceptable to the broad legal profession and commercial sector in South Africa as well as to potential foreign users. The specified authority under the domestic statute will have to be acceptable to a still broader range of potential users and existing arbitral institutions may have difficulty in meeting these criteria. (The response of the Law Society of the Cape of Good Hope para 3.6 apparently overlooked these concerns.)

¹¹⁸ See the response of the Arbitration Forum para 4.3. The Arbitration Forum is of the view that the authority should be independent of any body administering panels of arbitrators. It is difficult to see how the chairperson of the specified authority can perform the appointment function expeditiously if the authority does not maintain lists or panels of suitable arbitrators (Compare the Ugandan Centre for Arbitration and Dispute Resolution, discussed below, which, in conjunction with its role as statutory appointing authority, is required to establish a comprehensive roster of competent and qualified arbitrators and conciliators). The Project Committee is also opposed to the Forum's suggestions that the authority should be appointed by public tender and operate under a regulatory authority like the Financial Services Board. It is however envisaged that the authority should have an advisory role in promoting the standard of arbitration practice. See s 59(b) of the Draft Bill and the text below.

¹¹⁹ Although the removal of an arbitrator from office is normally a matter for the court (subject to the parties first making use of any challenge procedure to which they may have agreed – see s 22 of the Draft Bill), the specified authority does have a limited power under s 20(3) to revoke a default appointment.

¹²⁰ See s 59(b) of the Draft Bill.

¹²¹ See the Ugandan Arbitration and Conciliation Act 7 of 2000 s 69.

¹²² See the Ugandan Arbitration and Conciliation Act s 69(a) read with ss 14 and 15.

¹²³ See the Commission's Report on International Arbitration para 2.124.

¹²⁴ See the Ugandan Arbitration and Conciliation Act s 69(b), (c) and (h).

industry generally.¹²⁵ As stated above, the Commission envisages an advisory role for the specified authority before the Minister makes certain regulations. However, the Commission is of the view that it is inappropriate for a particular arbitration service provider to be given the power to regulate directly arbitrators conducting arbitrations other than under the auspices of that arbitral institution, as has been done in Uganda.

3.15 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.¹²⁶ The reason for the exclusion of an umpire from the definition is discussed below.¹²⁷

3.16 A new s 1(3) has been added, which explains how a period of days must be calculated for purposes of the Draft Bill. The purpose of the addition was to make it unnecessary for users of the bill to refer to the relevant provision of the Interpretation Act.¹²⁸ All periods of time in the Draft Bill have therefore been adjusted to refer to days rather than weeks or months.¹²⁹ The provision also applies to periods of time fixed by the parties, in days, weeks or months, unless they otherwise agree.¹³⁰

S 2 *General principles*

3.17 S 2 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 as the fair resolution of disputes by an independent and impartial tribunal without unnecessary delay and expense, are not intended as empty rhetoric.¹³¹ 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.

3.18 Examples of provisions specifically directed at giving effect to the stated object of arbitration are s 28 (the general duty of the arbitration tribunal), ss 29-31 (giving wider powers to the arbitral tribunal to give effect to that duty), s 35 (the general duty of the parties), s 36 (the arbitral tribunal's enhanced powers in the event of a party's default) and s 56 (the power of the arbitral tribunal to limit recoverable costs).

3.19 S 2(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

¹²⁵ See for example s 69(d), (e), (g), (j) and (l).

¹²⁶ See Butler D W & Finsen E *Arbitration in South Africa – Law and Practice* Juta Cape Town 1993. (hereafter referred to as "Butler & Finsen") 70 n 2 for the position of minors as arbitrators under the common law.

¹²⁷ See paras 3.103-3.104 below.

¹²⁸ S 1(3) is based on s 4 of the Interpretation Act 33 of 1957, except that if the period would otherwise end on a Saturday, that Saturday must also be excluded.

¹²⁹ See for example ss 42 and 52(3).

¹³⁰ Compare s 78 of the English Arbitration Act 1996.

¹³¹ See Butler (1998) 15; Saville 165-166; the 1996 Saville Report para 18.

are restricted to those which are necessary in the public interest.¹³²

3.20 The proposed legislation follows the example of the Model Law¹³³ 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 from being abused by a party intent on delaying the arbitral process.¹³⁴

3.21 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.

3.22 Two respondents to Discussion Paper 83 specifically endorsed the general principles in s 2 of the Draft Bill.¹³⁵

S 3 *Application of Act*

3.23 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.

3.24 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 International Arbitration Bill. The latter contains a corresponding provision (s 3) which excludes an international commercial arbitration from the application of the Arbitration Act of 1965.

3.25 One respondent to Discussion Paper 83 advocated the inclusion of a "contract-out" provision, which would allow parties to an arbitration agreement subject to the domestic arbitration legislation to agree to exclude that legislation and to apply instead the International Arbitration Bill.¹³⁶ The main arguments advanced in support of this submission were party autonomy and the fact that a contract between a South African controlled and registered company and a foreign controlled but locally registered company would usually fall under the domestic arbitration legislation.¹³⁷ It was further submitted that the latter factor could be a disincentive to foreign investment. This matter has previously received detailed consideration by the Commission and the possibility of a contract-out provision was expressly rejected.¹³⁸ The powers of the court under the Draft Bill are not significantly more intrusive than those

¹³² See eg s 28 (the general duty of the arbitral tribunal) and certain of the court's powers.

¹³³ See article 5 and the Commission's Report on International Arbitration paras 2.7 and 2.116-2.117.

¹³⁴ See para 2.17 above.

¹³⁵ See the responses of the Association of Arbitrators para 3 and the Law Society of South Africa para 3.

¹³⁶ See the response of Michael Chapman, Secretary of the Forum for International Commercial Arbitration.

¹³⁷ Compare the Commission's Report on International Arbitration paras 2.107-2.109.

¹³⁸ See the Commission's Report on International Arbitration paras 2.270-2.276.

under the Model Law. Moreover, the Draft Bill imposes an express duty on the tribunal to conduct the arbitral proceedings in a cost-effective manner and contains express and specific powers to enable the tribunal to fulfill this duty. These considerations outweigh the disadvantages of not including a "contract-out" provision.

S 4. This Act binds the State

3.26 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 International Arbitration Bill, because the latter statute is only intended to apply to international *commercial* arbitrations.

3.27 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 International Arbitration Bill to commercial matters may create a problem. An arbitration between the State and another state in a commercial matter will fall under the International Arbitration Bill. 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, could arguably not exclude its peremptory provisions in that arbitration agreement. The Commission invited comment on the necessity or desirability of retaining the exception in the Discussion Paper but none was received.

S 5 Matters subject to arbitration

3.28 S 5(1) of the previous Draft Bill repeated s 2(a) of the 1965 Act which prohibits arbitration¹³⁹ in respect of "any matrimonial cause or any matter incidental to any such cause". An exception was however added to s 5(1) of the previous 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 mediation or conciliation has never been doubted. It can be argued that the policy objections to private adjudication of matrimonial disputes which affect the rights of minor children¹⁴⁰ do not necessarily apply to disputes regarding matrimonial property disputes where the interests of minor children are not involved. The Commission invited comment on this question.¹⁴¹

3.29 Of the responses received, most favoured the suggested exception,¹⁴² although it was

¹³⁹ The exclusion of arbitration logically also applies to an oral arbitration agreement. See *Pitt v Pitt* 1991 3 SA 863 (D) 864H-J.

¹⁴⁰ See *Ressell v Ressell* 1976 1 SA 289 (W) 292A-B.

¹⁴¹ Subsequent to the regional workshops and after the expiry of the closing date for written comments to the Discussion Paper, the Project Committee requested and received additional submissions from the Family Advocate, Adv Barbara Hechter; Ms Zenobia du Toit, a Cape Town attorney specialising in family law; and Mr Charles Cohen, a mediator in Gauteng with extensive experience of matrimonial disputes.

¹⁴² See eg the responses to the Discussion Paper of the Arbitration Forum para 3.3(i) and the Law Society of the Cape of Good Hope para 4.1. While the response of the Law Society of South Africa para 7 supported the resolution of matrimonial property disputes by arbitration in principle, it foresaw a number of practical difficulties.

pointed out that it would be difficult to apply. When a marriage is dissolved where there are minor children, disputes on matrimonial property rights will either actually affect the rights of those children or can be presented in a way so that it at least appears to be the case. For example it may be argued that reduced maintenance payments for minor children can be justified on the basis of a substantial property settlement on the parent with custody thereby providing good accommodation for those children. Most if not all awards or settlements of disputes regarding matrimonial property on the dissolution of a marriage where there are minor children, as well as further property disputes after the divorce would therefore arguably have to be subject to a degree of court control on the merits.¹⁴³ The court would exercise its power in most cases after considering a report by the Family Advocate. It can be argued that this court control would involve an exception to the fundamental principle that arbitral awards are not subject to review by the courts on the merits of the dispute but only as regards procedural and jurisdictional issues. It is unlikely in terms of this approach that the court would wish to restrict its review jurisdiction to the test: "Is the award so contrary to the interests of the minor children that it would be contrary to public policy to enforce it or allow it to stand?"¹⁴⁴ The test on review is far more likely to be: "Is the award in the best interests of the minor children?" This would involve an unrestricted power of review on the merits. This argument is however in the view of the Project Committee fallacious.¹⁴⁵ S 5(1) of the previous Draft Bill proposed an exception to the prohibition on arbitration in matrimonial disputes in the case of property disputes not affecting the interests of any child of the marriage. A court asked to enforce the award must address the question of whether the award does affect the interests of such child. To the extent that it does, the award is invalid, because it deals with a matter which is not arbitrable. The issue is a matter of the arbitral tribunal's jurisdiction, rather than the correctness of its award on the merits. A court with jurisdiction in matrimonial causes could then substitute its own order for the invalid portion of the award. This is therefore not a review on the merits or an exception to the usual standards applying to the review of arbitral awards.

3.30 The Project Committee therefore recommends that the proposed exception to the non-arbitrability of matrimonial disputes should be retained, but that following a suggestion in response to the Discussion Paper,¹⁴⁶ it should be restricted to cases where the interests of minor children are involved. S 5(1) of the Draft Bill has been worded accordingly. The committee's recommendation was influenced by the fact that it is strongly of the view that a married couple, where there are no rights of minor children involved, should have the right to resolve a patrimonial dispute by arbitration, just as an unmarried couple or same sex-couple would have. The committee concedes that the exception may well be difficult to apply in practice.

3.31 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 International Arbitration Bill. The proposed provision should be easier to apply and is more

¹⁴³ See the response of the Family Advocate.

¹⁴⁴ Compare ss 52(2)(b)(ii) and 53(4) of the Draft Bill.

¹⁴⁵ The argument does however demonstrate the theoretical and practical objections to allowing a wider use of arbitration for resolving matrimonial disputes than is recommended in s 5(1) of the Draft Bill.

¹⁴⁶ See the response of the Arbitration Forum para 3.3(i).

in keeping with the provisions in modern arbitration statutes in other jurisdictions.¹⁴⁷ However, the new definition will still in effect prohibit the resolution of disputes regarding status by arbitration as this is not a matter which parties are entitled to dispose of by agreement.¹⁴⁸ 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 will however apply to an international 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.

3.32 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 Promotion of Administrative Justice Act 3 of 2000, which empowers 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.¹⁴⁹ Although the Admiralty Jurisdiction Regulation Act confers sole jurisdiction on the High Court over maritime claims, this provision is not intended to exclude the resolution of such claims by arbitration.¹⁵⁰

3.33 Other existing legislation imposes certain restrictions on the use of arbitration. The Local Government: Municipal Systems Act prohibits a municipality from submitting to arbitration "a matter involving a decision on its status, powers or duties or the validity of its actions or by-laws".¹⁵¹ This restriction would not apparently prevent a municipality from submitting a

¹⁴⁷ 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 D P "Arbitrability of Intellectual Property Disputes in Germany" (1999) 15 *Arbitration International* 193 at 196.

¹⁴⁸ See Butler & Finsen 53-54. Compare the concern raised by the Law Society of the Cape of Good Hope in para 4.6 in its response to Discussion Paper 83.

¹⁴⁹ It could be argued that the public interest in an 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 the commentary on s 34 of the Draft Bill below para 3.180 n 250.

¹⁵⁰ See Act 105 of 1983 s 2, read with s 1(1) "maritime claim" (para (aa)) which is defined to include an arbitration award relating to a maritime claim, whether made in South Africa or elsewhere. Although s 4(3) of the Act purports to give the Chief Justice power to make rules prescribing the practice and procedure for referring to arbitration any matter arising out of court proceedings relating to a maritime claim, the existence of this power was dependent on s 43 of the Supreme Court Act 59 of 1959. S 43 has been amended to delete the Chief Justice's power to make rules, with the result that s 4(3) of the former statute is inoperative.

¹⁵¹ Act 32 of 2000 s 109(2).

dispute concerning a contract to which it is a party to arbitration, unless the capacity of the municipality to enter into that contract is in issue. Rules made under s 55 of the Short-term Insurance Act 53 of 1998 impose restrictions on the use of arbitration.¹⁵² These restrictions may be unnecessary if the Commission's recommendations concerning arbitration in consumer matters under s 58 of the Draft Bill are accepted.¹⁵³ The desirability of the restriction on arbitration in the Carriage of Goods by Sea Act was also questioned by a participant at the Durban workshop.¹⁵⁴

3.34 South Africa was recently referred to as an example of a jurisdiction with a restrictive approach to the arbitrability of intellectual property disputes, because of the provisions of s 18(1) of the Patents Act 57 of 1978.¹⁵⁵ S 18(1) provides that "no tribunal other than the commissioner shall have jurisdiction in the first instance to hear and decide any proceeding ... relating to any matter under this Act". As the reference is to a tribunal and not to a court, an arbitral tribunal is also covered by this restriction.¹⁵⁶ The restriction could also pose a problem in the context of international arbitration. Restrictions on arbitration of intellectual property disputes are logical to the extent that the validity of an act of registration by a state official is in issue.¹⁵⁷ An arbitral award in this instance and in other intellectual property disputes would not bind persons who are not parties to the arbitration. Subject to these reservations s 18(1) of the Patents Act and any similar restrictions in other legislation pertaining to intellectual property may require reconsideration to ensure that the South African legislation meets generally accepted international standards. However these concerns have no direct effect on the content of the Draft Bill or the International Arbitration Bill and have therefore not been given detailed consideration by the Project Committee.

CHAPTER 2

¹⁵² See para 3.297 below.

¹⁵³ However the restriction in s 58(3) of the Draft Bill of the definition of consumer to natural persons and to contracts not exceeding R50 000 may be considered too restrictive in the context of the short-term insurance industry.

¹⁵⁴ Oral intervention by Adv Lopes. S 3(1) of the Carriage of Goods by Sea Act 1 of 1986 provides protection inter alia against contractual provisions conferring jurisdiction on foreign courts or stipulating for arbitration outside South Africa in relation to transactions covered by the legislation. S 3(2) makes it clear that s 3(1) does not apply to arbitral proceedings held in South Africa under the Arbitration Act 42 of 1965. Although s 3 will have no effect on the Draft Bill, its provisions may nevertheless require refinement when the International Arbitration Bill is enacted.

¹⁵⁵ See Lew J D M "Final Report on Intellectual Property Disputes and Arbitration" (1998) Vol 9 No 1 *ICArb Bull* 37 at 42.

¹⁵⁶ Compare s 5(3) of the Draft Bill.

¹⁵⁷ Compare the discussion in the article by Simms referred to in n 55 above.

The Arbitration Agreement

S 6 Definition of arbitration agreement and related matters

3.35 The previous Draft Bill contained definitions of "arbitration agreement" and what was meant by an agreement in writing in s 2(1)(ii) and (2) of the definitions section. Following the Model Law article 7 it was subsequently decided that it was more appropriate for these definitions to be moved and included in the first section of Chapter 2 dealing with the arbitration agreement.

3.36 The current Act and the previous Draft Bill contain numerous regulatory provisions which apply "unless the arbitration agreement otherwise provides". This expression is misleading in that it suggests that an agreement between the parties on procedural matters is only effective if it is contained in the arbitration agreement. The expression has therefore been replaced where appropriate by "unless the parties otherwise agree". However, because of the impact of party autonomy on the powers of the tribunal, it appears advisable that subsequent agreements between the parties affecting the arbitration proceedings must also be in writing in the interests of certainty. S 6(1) of the Draft Bill therefore provides that it only applies where the arbitration agreement is in writing and that any other agreement between the parties is effective for purposes of the Draft Bill only if it is in writing.

3.37 An arbitration agreement which is not in writing is not invalid, but is not covered by the current Act or the Draft Bill and is subject to the common law.¹⁵⁸ Consideration was given in the context of domestic arbitration to following the example of New Zealand¹⁵⁹ and widening the definition of an arbitration agreement to include an oral agreement. Comment was invited on this question. Respondents generally supported the position that only arbitration agreements in writing should be subject to the Act.¹⁶⁰

3.38 An arbitration agreement is an agreement in which the parties provide for the submission of existing or future disputes between them to arbitration. It has therefore recently been held that a dispute, which is capable of proper formulation, must exist before there can be an arbitration and before an arbitrator can be appointed.¹⁶¹ The existence of a dispute is therefore a prerequisite for the enforcement of the arbitration agreement. This is a potential source of problems and uncertainty where the addressee fails to respond to a letter of demand. This issue is discussed below in the context of the court's power to stay litigation so that a dispute

¹⁵⁸ See Butler & Finsen 38.

¹⁵⁹ See the New Zealand Arbitration Act 99 of 1996 sch 1 article 7(1).

¹⁶⁰ See the responses of the Law Society of the Cape of Good Hope para 3.1 and the Association of Arbitrators para 5. The response of the Arbitration Forum para 3.1 was less emphatic on this point. Where the parties to an oral arbitration agreement hold a preliminary meeting with their arbitral tribunal and draw up a written minute of that meeting, the minute will constitute an arbitration agreement in writing, making the arbitration proceedings subject to the Act. Compare the response of the Law Society of the Cape of Good Hope para 3.5.

¹⁶¹ See *Telecall (Pty) Ltd v Logan* 2000 2 SA 782 (SCA) 786I-J, relying on *Parekh v Shah Jehan Cinemas (Pty) Ltd* 1980 1 SA 301 (D) 304E-G and Mustill M J & Boyd S C *Commercial Arbitration* 2 ed Butterworths London 1989 (hereafter referred to as "Mustill & Boyd") 46. See also Butler & Finsen 109-110.

can be referred to arbitration.¹⁶²

3.39 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 essentially 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.¹⁶³ The existing definition does not seem to have caused any problems in practice.¹⁶⁴ The definition in the Draft Bill¹⁶⁵ has nevertheless been amended to bring it into line with that proposed in the International Arbitration Bill.¹⁶⁶

3.40 Two extensions are proposed in the 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 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.¹⁶⁷ Similar additions have been included in the Draft Bill.¹⁶⁸

3.41 An arbitration agreement for purposes of the Draft Bill can in principle be concluded by e-mail, as a "means of telecommunication which provides a record of the agreement".¹⁶⁹

S 7 Binding effect of arbitration agreement

3.42 S 7 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. Unlike the position under the current Act that consent must now be in writing in the interests of certainty. S 7 makes it clear that this principle is subject to the court's limited power in s 9 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". It is nevertheless possible that a party can waive its right to rely on the arbitration agreement. This can for example occur either when a party takes a dispute which is subject to a valid arbitration agreement straight to court, or when a party participates as defendant in the court proceedings without relying on the arbitration agreement.

¹⁶² See the commentary on the Draft Bill s 9(4) in paras 3.64-3.72 below.

¹⁶³ See **Mervis Brothers v Interior Acoustics** 1999 3 SA 607 (W) 610E.

¹⁶⁴ See the discussion in Butler & Finsen 37-41.

¹⁶⁵ S 2(1)(ii) read with s 2(2).

¹⁶⁶ See s 2(1) and sch 1 article 7 of the International Arbitration Bill.

¹⁶⁷ See the Commission's Report on International Arbitration paras 2.131-2.133.

¹⁶⁸ See s 6(2). S 6(2)(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).

¹⁶⁹ See s 6(3) 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.

3.43 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 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 9 below; and secondly because of the special protection envisaged for consumers who are parties to consumer arbitration agreements in terms of s 58 of the Draft Bill.¹⁷⁰

3.44 Certain respondents were concerned about the effect of the omission of the court's discretionary power in the context of multi-party disputes where the same issues arise for decision in different fora giving rise to the danger of conflicting decisions on these issues. This matter is discussed in the context of s 9 and s 12 below.

S 8 Effect of death or insolvency of a party

3.45 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 the Draft Bill submitted to the Law Commission by the Association of Arbitrators in 1994. The wording of the section has been simplified compared to that of s 7 of the previous Draft Bill.

3.46 S 8(2) follows the approach of the previous version by providing that arbitral proceedings are stayed in the event of the death or sequestration of the estate of a party who is a natural person. The arbitral proceedings are likewise stayed where a party which is a juristic person is placed under winding-up or judicial management. The stay remains in effect until the appointment of an appropriate representative. This term is defined in s 8(8) as an executor, administrator, curator, trustee, liquidator, or judicial manager, as the case may be.

3.47 After the appointment of the appropriate representative, the current legislation and previous Draft Bill (s 7(3)) applied the relevant insolvency or similar legislation to the stayed arbitral proceedings as if they were civil proceedings in a court. In the context of a company in liquidation the other party would have to give the liquidator three weeks' written notice of its intention to commence or proceed with the arbitration, within four weeks of the liquidator's appointment.¹⁷¹ Failure to do so would result in the proceedings being regarded as abandoned unless the court¹⁷² otherwise directs. This example illustrates that the current provisions would not necessarily be easy to apply to arbitral proceedings in practice and are based on the assumption that arbitral proceedings are analogous to civil litigation.

3.48 The Commission recommends a fresh approach in s 8(3) of the Draft Bill, which is intended to deal with the specific needs of arbitration. In terms of the recommendation, it is now up to the representative to notify the other parties and tribunal of his or her appointment

¹⁷⁰ See paras 3.274-3.319 below.

¹⁷¹ See the Companies Act 61 of 1973 s 359.

¹⁷² S 359(2)(b) of the Companies Act in the context of civil proceedings refers to the court. Applying this provision to arbitration, it could be argued that the power should be that of the arbitral tribunal. However, in the case of a company in compulsory liquidation, "court" has been interpreted to mean the court which granted the winding-up order (see Meskin P M *Henochsberg on the Companies Act* Vol 1 5 ed Butterworths Durban 1995 761).

within 21 days of such appointment. The arbitration will then proceed subject to any directions which the tribunal may give for a further stay should this be required by the representative in order to prepare properly for the arbitration or to take instructions from creditors whether or not to proceed. In practice the tribunal would give appropriate directions after hearing both parties. Where the juristic person in liquidation is the claimant, it is in any event likely that the other party will apply to the tribunal for security for costs, if it has not already done so.¹⁷³ S 8(3) also envisages that where the other party is the claimant, that party may elect to withdraw the claim rather than to proceed with arbitration against a respondent which is clearly insolvent.

3.49 S 8(2) and (4) both refer to a claim being submitted to arbitration. This expression was therefore defined in s 1(2) of the previous Draft Bill to avoid doubt as to when a claim may be said to have been submitted to arbitration. As this definition only applied to s 8, it was decided to move it to s 8 as s 8(5).

3.50 S 8(6) deals with the effect of the stay under s 8(2) on any period of time fixed under the Act.

3.51 It seems unnecessary to make any special provisions in an arbitration statute staying the enforcement of arbitral awards because of the sequestration of a party's estate or the placing of a party under winding-up. This is because the award could only be enforced through the courts with the result that the ordinary restrictions on execution against property in an insolvent estate would apply.

3.52 S 8(7) makes it clear that s 8 does not affect any rule of law by which any right of action is extinguished by the death of any person, for example a delictual claim for damages for pain and suffering.

S 9 Stay of legal proceedings where there is an arbitration agreement

3.53 The main provisions of s 9 of the Draft Bill read as follows:

"9(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 submitted 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.

(2) On any application under this section, the **court** must 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."

3.54 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. There are three main issues regarding s 9 which require consideration. The first is the desirability of curtailing the court's discretion and the effect of this curtailment, particularly in the context of multi-party disputes. The second is the extent to which it is possible to avoid a stay under s 9 by averring that there is not in fact a dispute between the parties. The third is

¹⁷³ See s 31(2) and (3) of the Draft Bill.

the grounds on which the court may refuse a stay, namely if "the arbitration agreement is null and void, inoperative or incapable of being performed".

3.55 The court can refuse a stay under s 6(2) of the current statute if it is satisfied that there is a "sufficient reason" why the matter should not be referred to arbitration. The courts have 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.¹⁷⁴ On the whole, the courts have been supportive of arbitration in exercising their discretion under ss 3 and 6,¹⁷⁵ but there are instances where the court has appeared to be unnecessarily ready to exclude arbitration and to tackle the dispute itself.¹⁷⁶

3.56 The reasons for recommending 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.¹⁷⁷ 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 58) to protect consumers who enter into an arbitration agreement.¹⁷⁸

3.57 Probably the strongest argument against the proposed change concerns the situation which arises in multi-party disputes 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.¹⁷⁹

¹⁷⁴ See Butler & Finsen 64-65.

¹⁷⁵ For a discussion of the case law see Butler & Finsen 65-67 and *Altech Data (Pty) Ltd v MB Technologies (Pty) Ltd* 1998 3 SA 748 (W) 752I-754J.

¹⁷⁶ See *Sera v De Wet* 1974 2 SA 645 (T); Christie R H "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".

¹⁷⁷ See article 8 of the Model Law (which is based on article II of the New York Convention) 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.

¹⁷⁸ In essence, instead of giving the court a discretion not to enforce the arbitration agreement, the consumer may elect to withdraw from the agreement for a limited period. See paras 3.302-3.304 below.

¹⁷⁹ Assume that a building contract between X, the owner, and Y, the contractor, contains an arbitration clause. Assume that Y enters into a further contract for part of the work with Z, a subcontractor, without an arbitration clause. A dispute arises between X and Y as to the quality of the work, which is referred to arbitration. Assume that the arbitrator decides that work performed by the subcontractor is defective and Y is therefore liable to X for damages. Y loses the arbitration with costs and seeks to recover the damages from Z in court proceedings. Assume that the court finds that the work performed by Z was not defective. As a result Y loses the court case with costs. If there was no arbitration clause, the disputes between X and Y and Y and Z could be dealt with in one consolidated trial under the court rules. Besides the danger of conflicting decisions, separate proceedings will also expose Y to greater expense and delay. However from the perspective of Z, forced participation in protracted consolidated proceedings with both X and Y may involve greater expense and delay than a separate trial between Y and Z only. Separate hearings

This has been one of the grounds on which the courts have in the past declined a stay.¹⁸⁰ The problem is aggravated by the impossibility of providing a comprehensive statutory provision for the consolidation of arbitration proceedings, without undermining the principle of party autonomy. See further the commentary on s 12 of the Draft Bill below.

3.58 This aspect worried several respondents to the Discussion Paper.¹⁸¹ Several alternatives were considered by the Project Committee to deal with these concerns.

3.59 One option, notwithstanding the concerns expressed by respondents to the Discussion Paper, would be to retain the position adopted in ss 8 and 11 of the previous Draft Bill. The court would have no discretion to exclude arbitration and neither the court nor the arbitral tribunal could consolidate proceedings or order joint hearings. As a result parties using arbitration would be entirely dependent on their own contractual arrangements to deal with the problems caused by multi-party disputes.

3.60 A second option would be to create an exception to s 9(2) allowing the court to refuse a stay, thereby excluding arbitration, where there is a genuine possibility of multi-party disputes leading to conflicting decisions. However there is a real danger of abuse as a delaying tactic,¹⁸² which is aggravated by the fact that a decision by the court under s 9 is subject to appeal.¹⁸³

3.61 A third option would be a statutory provision empowering the tribunal to terminate (or suspend) arbitral proceedings in this situation. This option, which appears preferable to the second option, is discussed further below in the context of s 12 of the Draft Bill.

3.62 The fourth option is court or tribunal ordered joinder or consolidation, even without the consent of all the parties, notwithstanding the fact that this option undermines the principle of party autonomy. The Project Committee ultimately decided to recommend an addition to s 12 on consolidation, giving the tribunal a limited power to permit joinder in certain circumstances.¹⁸⁴ This approach reduces the problem of multi-party proceedings without diluting the principle of limiting the court's discretion to refuse a stay in s 9(2).

3.63 As an alternative to applying for a stay under s 6 of the 1965 Act, it is at present possible

also give rise to procedural issues. For example in the case between Y and Z, which party should call X as a witness, bearing in mind procedural advantages and disadvantages for the party calling X?

¹⁸⁰ 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.

¹⁸¹ See the responses to Discussion Paper 83 of the Arbitration Forum para 3.4; the Association of Arbitrators para 8; Adv PMM Lane SC para 6 and Philip Loots para 3.

¹⁸² See *Transvaal Alloys v Polysius* 1983 2 SA 653 (T) 656F where the court concluded that there was reason to think that the plaintiff sued the second defendant (subcontractor) in an attempt to avoid the arbitration clause in the contract between the plaintiff and the first defendant.

¹⁸³ This problem could be lessened in certain circumstances by including a provision on the lines of article 8(2) of the Model Law, permitting a tribunal to commence or continue with arbitration proceedings and make an award, while the legal proceedings referred to in s 9(1) are pending.

¹⁸⁴ The recommendation is based on article 22(1)(h) of the LCIA Rules (1998) edition. See further para 3.86 below.

to raise the arbitration agreement as a special defence under the common law.¹⁸⁵ The court then has the same discretion to exclude arbitration as it has under s 3(2) and 6 of the current Act. Raising a special plea under the common law will be excluded by s 2(c) of the Draft Bill in the case of an arbitration agreement covered by the Draft Bill.¹⁸⁶ However, if the proposal in s 9 of the Draft Bill is accepted, the party seeking to enforce the arbitration agreement will in any event be well advised to use the statutory remedy because of the court's curtailed discretion to decline a stay.

3.64 In terms of the general principle in s 2(a) of the Draft Bill, the object of arbitration is to obtain the fair resolution of disputes. The question therefore arises as to whether it is possible by submitting a "matter agreed to be submitted to arbitration" to court for the plaintiff to defeat an application for a stay under s 9 by contending that there is no dispute, and if so, what is meant by "dispute". The debate in England on this point has centred round a change in the wording of the legislation. Prior to the 1996 Act, the court was required to stay court proceedings to allow the matter to go to arbitration, "unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred".¹⁸⁷ The underlined words were inserted in the English legislation on the recommendation of the MacKinnon Committee of 1927 to counter the possibility of the defendant applying to stay an action for a contractual claim brought for example by the seller because of an arbitration clause in the contract, "without being able or condescending, to indicate any reason why he should not pay for the goods, or the existence of any [real] dispute to be decided by arbitration".¹⁸⁸ The underlined words were however subsequently omitted from what became s 9 of the 1996 Act on the recommendation of the Saville Committee "as being confusing and unnecessary for the reasons given in *Hayter v Nelson*".¹⁸⁹

3.65 In English practice, prior to the Arbitration Act of 1996 the defence of there not in fact being any dispute to an application for a stay came to be regarded as the opposite side of the coin to the jurisdiction of the High Court under its rules to give summary judgment in favour of the plaintiff where the defendant had no arguable defence.¹⁹⁰ The jurisdiction to grant

¹⁸⁵ *Universiteit van Stellenbosch v JA Louw (Edms) Bpk* above 329H.

¹⁸⁶ S 2(c) provides that in matters governed by this law, the court must not intervene except as provided by this Act. The court's wider discretion under the common law will be superseded by s 9 of the Draft Bill.

¹⁸⁷ See the Arbitration Act 1975 s 1(1), which was enacted to give effect to the New York Convention and compare the Arbitration Act 1950 s 4(2) which had a similar provision. These provisions applied to arbitration agreements for international as opposed to domestic arbitrations.

¹⁸⁸ See *Hayter v Nelson* [1990] 2 Lloyd's Rep 265 269-270 and *Halki Shipping Corp v Sopex Oils Ltd* [1988] 2 All ER 23 (CA) 33h-34a for the quotation from the Mackinnon Committee's *Report on the Law of Arbitration* Cmd 2817 1927 para 43.

¹⁸⁹ See the 1996 Saville Report para 55. The chairperson of the Saville Committee delivered the judgment in *Hayter v Nelson*. It has been said that para 55 of the report "was a shorthand cross-reference to the judgment in *Hayter v Nelson* and the clearest possible indication that the intent was to incorporate the ratio decidendi of that case into s 9" (*Halki Shipping Corp v Sopex Oils Ltd* above 57g per Swinton Thomas LJ).

¹⁹⁰ See *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] 1 All ER 664 (HL) 680j-681a per Lord Mustill. Lord Mustill however stressed the need to distinguish between a situation where the defendant disputes the claim on grounds which the plaintiff is very likely indeed to overcome with the situation in which the defendant is not really raising a dispute at all (at 681b). The former situation would still have been subject to arbitration, even under English law prior to the Arbitration Act of 1996.

summary judgment in this way was terminated by the repeal of the defence that there was not in fact any dispute.¹⁹¹ When the plaintiff opposes a stay, the question is now simply whether there is a dispute contemplated by the arbitration agreement. If a letter of demand is written by the claimant and the other party does not reply, then there is a dispute until that party admits that the sum is due and payable.¹⁹²

3.66 Three policy arguments have been advanced in support of the English position. The first is that arbitration is not necessarily slower than litigation where the defence for part of the claim is not sustainable, as the tribunal can make an interim award. Secondly, even if arbitration were to be slower, the parties are bound by their agreement to resolve their dispute by arbitration. Thirdly, if the courts are to decide whether or not the claim is disputable, they are doing precisely what the parties agreed should be done by the arbitral tribunal.¹⁹³

3.67 The English courts have been able to consider the requirement of a dispute for purposes of s 9 of the English Arbitration Act in the light of an important change in wording which was clearly highly relevant. S(9)(1) and (2) of the Draft Bill, quoted above, do not differ significantly on this point from the existing provisions in the current Act, with the result that existing cases regarding the requirement of a dispute continue to apply. These decisions must nevertheless be viewed in their correct context.

3.68 It was recently stated by the Supreme Court of Appeal in *Telecall (Pty) Ltd v Logan*¹⁹⁴ that:

"[B]efore there can be a reference to arbitration a dispute, which is capable of proper formulation at the time when an arbitrator is to be appointed, must exist and there cannot be an arbitration and therefore no appointment of an arbitrator can be made in the absence of such a dispute. It also follows that some care must be exercised in one's use of the word 'dispute'. If, for example, the word is used in a context which shows or indicates that what is intended is merely an expression of dissatisfaction not founded on competing contentions no arbitration can be entered upon".

3.69 This statement was made in the context of an application to court for the appointment of an arbitrator. It could easily happen that the arbitration agreement provides for the arbitrator to be appointed by an arbitral institution. Assume that the claimant's letter of demand to the other party has evoked no response. The efficacy of the arbitration agreement would be seriously impaired if the claimant is precluded from applying to the arbitral institution for the appointment of an arbitrator unless the defendant has replied to the letter of demand to create a formulated dispute. Silence or inaction on the part of the defendant should not prevent the claimant from taking steps to initiate the arbitration process, especially as the defendant could respond to

¹⁹¹ See *Halki Shipping Corp v Sopex Oils Ltd* above 44g-45j.

¹⁹² See *Halki Shipping Corp v Sopex Oils Ltd* above 48b-h, 56d-e relying on *Ellerine Bros v Klinger* [1982] 2 All ER 737 (CA) 741. In the *Ellerine* case the defendant remained silent, in the *Halki* case the charterers (defendants) refused to admit and refused to pay the shippers' claim for demurrage.

¹⁹³ See *Hayter v Nelson* above 268-269; *Halki Shipping Corp v Sopex Oils Ltd* [1997] 3 All ER 833 (QBD) 838j-839b.

¹⁹⁴ 2000 2 SA 782 (SCA) 786I-787A. It appears from 788I that the statement was obiter. The decision of the employer which led to the grievance of the applicant resulting in his application for the appointment of an arbitrator was in any event not subject to the arbitration provision in the pension fund rules on which the applicant relied.

court proceedings instituted by the claimant by relying on the arbitration clause and stating that he does have a defence to the claim.¹⁹⁵

3.70 Another recent case concerned reliance on an arbitration clause in a situation where the court concluded that there was an undisputed claim and a disputed counterclaim for damages which could not be set off against the claim.¹⁹⁶ Having found the claim to be undisputed, the court exercised its discretion against referring the claim to arbitration. It ordered the respondent to pay the claim, subject to the applicant providing security for payment of the counterclaim. That discretion will cease to exist under s 9(1) and (2) of the Draft Bill. Where a defendant admits liability for the claim, subject to determination of a contested unliquidated counterclaim, which is not subject to set-off until determined by arbitration, it appears likely under s 9 of the Draft Bill that a court will grant judgment for that claim, rather than stay the action so that an undisputed claim could be referred to arbitration.¹⁹⁷ However, where in addition to bringing a counterclaim, a defence is raised to a claim, the court should preferably refer the entire dispute to arbitration, for the policy reasons identified by the English courts, referred to above. This does have the admitted disadvantage of encouraging defendants to raise untenable defences to ensure a stay under s 9. However, the claimant could have gone straight to arbitration and applied for an interim award¹⁹⁸ on the claim, subject to security being provided for the counterclaim. The tribunal's power to grant interim relief under s 29(2)(iii) is apparently wide enough for the tribunal to order such security, where the claimant does not offer to provide security, unless the parties have excluded this power by agreement.

3.71 Concern raised by one of the respondents to the Discussion Paper on this point¹⁹⁹ has led the Commission to recommend the incorporation of a new subsection (4) reading as follows:

"(4) Failure to reply to a demand for performance of a contractual obligation or to respond to steps to refer a matter covered by an arbitration agreement to arbitration or failure to comply with a time-limit referred to in section 11 does not render the agreement inoperative or incapable of being performed for purposes of subsection (2)."

3.72 The language of this provision read with s 9(1) and (2) is intended to reflect that the jurisdictional fact is an arbitration agreement covering the matter. A sensible interpretation dictates that there must be a dispute but it is not for the court to enter into the merits of that dispute as the court did in the **Altech** case. The **Altech** case was in any event decided by

¹⁹⁵ See too the argument of the Arbitration Forum in para 3.3(ii) of its response to Discussion Paper 83. Compare Butler & Finsen 109-110 for the contrary view.

¹⁹⁶ See **Altech Data (Pty) Ltd v MB Technologies (Pty) Ltd** 1998 3 SA 748 (W) 763E. The case differed from the situation in **Parekh v Shah Jehan Cinemas (Pty) Ltd** above in that in the latter case the defendants admitted their liability on the claim from the outset and merely contended that payment was excused until their unliquidated counterclaim had been resolved. In the **Altech** case it required a three-day hearing to enable the court to decide that the claim was undisputed and, in the exercise of the court's discretion, should not be referred to arbitration.

¹⁹⁷ The court could nevertheless simultaneously direct the claimant to provide security for payment of the amount which might ultimately be awarded on the counterclaim in the arbitration, as the court did in the **Altech** case above at 764C-D.

¹⁹⁸ The interim award is final on what it decides. See the commentary on s 46 of the Draft Bill in para 3.223 below.

¹⁹⁹ See the response of the Arbitration Forum para 3.3(ii).

exercising the court's discretion which will no longer exist in terms of s 9(2) of the Draft Bill.

3.73 The court is obliged by s 9(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".²⁰⁰ It has been suggested that the word "inoperative" would cover those cases where the arbitration agreement has ceased to have effect. This could occur where, as a result of the parties taking their dispute to court, the issue has become *res judicata*. The words "incapable of being performed" would apply to cases where the arbitration cannot effectively be set in motion, for example the case where the arbitral clause is too vaguely worded or the situation where the sole arbitrator named in the agreement refuses to accept appointment.²⁰¹ 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.

3.74 S 9(5) provides that if the court refuses to stay the legal proceedings, any contractual provision that an award is a prerequisite to the bringing of legal proceedings in respect of that matter will not affect the determination of that issue by the court. This subsection is based on s 9(5) of the English Arbitration Act of 1996, which was inserted in the English Act to avoid a situation where the arbitration clause is unworkable yet no legal proceedings can be successfully brought. The Saville Committee regarded it necessary to avoid a situation in which a party can neither arbitrate nor litigate in the interests of justice.²⁰² As appears from s 9(4) of the Draft Bill, s 9(5) is clearly however not intended to nullify the effect of a time-bar clause regulated by s 11 of the Draft Bill.

S 10 Reference of interpleader issue to arbitration

3.75 S 7(2) of the 1965 Act, dealing with interpleader proceedings, was based on s 5 of the English Arbitration Act of 1950.²⁰³ 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".²⁰⁴ Although the Draft Bill is intended to apply to domestic arbitrations, the discretion of the court to

²⁰⁰ This phrase is taken from article II of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 and article 8 of the UNCITRAL Model Law. It is also used in the corresponding provision of the English Arbitration Act of 1996 s 9(4).

²⁰¹ See Van den Berg AJ *The New York Arbitration Convention of 1958* Kluwer Deventer 1981 (hereafter referred to as "Van den Berg") 159. See further Mustill & Boyd 464-5; Sutton D, Kendall J & Gill J *Russell on Arbitration* 21 ed Sweet & Maxwell London 1997 (hereafter referred to as "Sutton et al") 330. Compare too the response of Prof LF van Huyssteen to Discussion Paper 83 who advocated the inclusion of the word "unenforceable" after "null and void".

²⁰² See the 1996 Saville Report para 57; compare Van den Berg 159.

²⁰³ See Butler & Finsen 68.

²⁰⁴ See the 1996 Saville Report para 58.

disallow arbitration in s 10(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 9(2) of the Draft Bill.

3.76 In s 10(2) of the Draft Bill, "prerequisite" has been substituted for the English term "condition precedent". S 10 was supported by the one respondent to the Discussion Paper who specifically referred to it.²⁰⁵

S 11 Power of court to extend time fixed in arbitration agreement for commencing arbitral proceedings

3.77 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 8.²⁰⁶ 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 mediation proceedings which are a prerequisite for arbitration.²⁰⁷ The wording has been broadened to make it clear that the section is intended to cover this sort of situation.²⁰⁸

3.78 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 respondent in the arbitral proceedings has let the time limit for referring the dispute to arbitration expire without requiring the dispute to be referred to arbitration.²⁰⁹ The wording has been extended to make it clear that the court may also assist the prospective respondent in arbitration proceedings.²¹⁰ The power of the court in s 8 of the Current Act and s 10 of the previous Draft Bill only applied to a time-limit imposed by an arbitration agreement to refer future disputes to arbitration. S11(1) of the Draft Bill extends the provision to apply also to an arbitration agreement made after the dispute has arisen.²¹¹

3.79 The standard set by s 8 of the current Act 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.²¹² 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

²⁰⁵ See the response of the Law Society of the Cape of Good Hope to Discussion Paper 83 para 7.

²⁰⁶ See Butler (1994) 27 *CILSA* 138-9.

²⁰⁷ See **Gordon Verhoef & Krause (Transvaal) (Pty) Ltd v Pritchard Properties (Pty) Ltd** case no 22094/85 WLD 1986-08-05 (unreported) 20.

²⁰⁸ By the insertion in s 11(1) of the Draft Bill after "to commence arbitration" of the words "or other proceedings which are a prerequisite thereto".

²⁰⁹ See **Administrateur, Kaap v Asla Konstruksie (Edms) Bpk** 1989 4 SA 458 (C).

²¹⁰ By the insertion in s 11(1) of the Draft Bill after "any claim" the words "or defence".

²¹¹ See the Draft Bill Annexure A to this report n 29 for the practical benefit of this extension.

²¹² See Butler & Finsen 117. The leading English case in this regard is **Moscow V/O Exportkhleb v Helmvile Ltd (The Jocelyne)** [1977] 2 Lloyd's Rep 121 at 129.

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".²¹³

3.80 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 parties was such that it would be unfair to hold one of them to the time limit.²¹⁴ The third case was regarded as a situation calling for consumer protection which is dealt with elsewhere in the English Arbitration Act of 1996.²¹⁵

3.81 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 11 of the Draft Bill has been similarly restricted by s 11(2). One respondent opposed the restriction of the court's discretionary power in this way and favoured a wider power. This proposal was partially motivated by the fact that a decision by the court not to grant the application is not subject to appeal.²¹⁶ It must however be noted that where the court refuses to grant an extension, which could effectively deprive the unsuccessful applicant of the right to pursue the dispute through either arbitration or litigation,²¹⁷ there is still a right of appeal. Where an extension is granted, however, the parties must proceed to arbitration without the possibility of delaying the arbitration by an appeal. No other respondent raised any problems with the current s 11 of the Draft Bill. It is therefore recommended that the proposed restrictions on the court's discretion as set out in s 10(2) of the previous Draft Bill should be implemented without further modification.

S 12 Consolidation

3.82 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.²¹⁸ S 12 of the previous Draft Bill therefore followed s 10 of the International Arbitration Bill and s 35 of the

²¹³ See the 1996 Saville Report para 67. The same idea seems to have influenced the court in *Administrateur, Kaap v Asla Konstruksie (Edms) Bpk* above 470D.

²¹⁴ See the 1996 Saville Report para 71.

²¹⁵ See ss 89-91 and para 3.288 below. The committee justified the recognition of contractual time-bars by stating that "they enable commercial concerns (and indeed others) to draw a line beneath transactions at a much earlier stage than ordinary limitation provisions would allow". See the 1996 Saville Report para 68.

²¹⁶ See the response of the Law Society of the Cape of Good Hope para 8. It favours the court being able to extend the period on good cause shown or where there would otherwise be substantial prejudice. A wide discretion for the court however seriously undermines the efficacy of the contractual time bar.

²¹⁷ See Butler & Finsen 114.

²¹⁸ See generally regarding the daunting task facing those seeking statutory solutions to the problems posed by the consolidation of arbitration proceedings Mustill M J "Multipartite Arbitrations: An Agenda for Law-Makers" (1991) 4 *Arbitration International* 393-402.

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.²¹⁹

3.83 This is not the only approach to the problem of consolidation.²²⁰ In the Netherlands, the court has the power to order consolidation.²²¹ 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.²²² It must however be emphasized that these provisions violate the principle of party autonomy and can lead to increased court involvement.

3.84 Because of concerns expressed about the restriction of the court's discretion to prevent arbitration on the ability of the court to deal effectively with the danger of conflicting decisions on the same issues by different fora in multi-party disputes,²²³ the Project Committee decided to recommend an addition to s 12. Three alternatives were considered.

3.85 The first was to give the tribunal the power to terminate the proceedings.²²⁴ This would be a contract-out power, which may only be exercised on the application of a party, in the specified circumstances. The other proceedings need not be arbitral proceedings but would include court proceedings. The effect of termination would remove the ground for the stay of court proceedings under s 9.²²⁵ Its effect is that if all the parties involved in the dispute are unable to agree to consolidated arbitral proceedings, a party to the arbitration prejudiced by

²¹⁹ See Diamond A "Multiparty Arbitrations – A Plea for a Pragmatic Piecemeal Solution" (1991) 7 *Arbitration International* 403-409 and Bernstein et al 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.

²²⁰ See Hardy C "Multi-party Arbitration: Exceptional Problems Need Exceptional Solutions" (2000) 66 *Arbitration* 15-20 for a plea for more imaginative solutions than the English approach, which he regards as not serving the public well, particularly the construction industry.

²²¹ See the Netherlands Arbitration Act of 1986 article 1046.

²²² 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)).

²²³ See the commentary on s 9 of the Draft Bill above paras 3.57-3.62.

²²⁴ This would be done by adding the following subsections:
 "(3) Unless the **parties** otherwise agree, the **tribunal** may terminate the **arbitral proceedings**, on the application of a **party**, if the **tribunal** is satisfied that there is a reasonable probability that the rights or interests of that **party** will be substantially affected by his or her inability to obtain the joinder of a third party in the **arbitral proceedings** or the consolidation of the **arbitral proceedings** with other current or anticipated proceedings in which the applicant is or will be a party.
 (4) The termination of the **arbitral proceedings** by the **tribunal** under subsection (3) renders the **arbitration agreement** inoperative for purposes of section 9.
 (5) If the **tribunal** grants an application under subsection (4) it must make such order regarding the costs of the **arbitral proceedings** as it regards appropriate.
 (6) Subsection (4) does not derogate from the **tribunal's** power to stay the **arbitral proceedings** pending a decision in other current or anticipated proceedings."

²²⁵ This solution was suggested by the Arbitration Forum in para 3.4 of its response to Discussion Paper 83.

separate proceedings could obtain consolidated court proceedings, provided that the tribunal in any other relevant arbitral proceedings also terminates those proceedings. Other problems with this approach are the need for a fairly detailed investigation by the tribunal to satisfy itself that there is genuinely a reasonable possibility of the applicant for termination being prejudiced by being exposed to separate proceedings; the danger of the provision being abused as a delaying tactic; and possible prejudice to the other party to the arbitration agreement where it is deprived of its contractual right to have its dispute resolved by the agreed method.

3.86 The second alternative was to provide for tribunal ordered joinder in certain circumstances. This alternative is a contract-out provision, based on article 22(1)(h) of the LCIA Rules. It will only be effective in addressing the multi-party dispute situation²²⁶ to the extent that non-parties to the original arbitration agreement consent to be joined in the arbitration.²²⁷ This was the alternative ultimately adopted by the Commission and reads as follows:

"(3) Despite subsection (2), unless the **parties** otherwise agree the **tribunal**

(a) may, on the application of a **party**, or

(b) must, if the court so directs under the High Court Rules,

allow one or more third persons to be joined in the **arbitral proceedings**, if any such third person has consented to joinder in writing.

(4) The **tribunal** may thereafter make a single final **award**, or separate **awards** in respect of all the **parties** to the arbitration."

3.87 Regarding s 12(3)(b), Rule 11 of the High Court Rules on consolidation deals only with the consolidation of court proceedings. This subsection therefore envisages that the court rules could be amended to empower the court to order a non-party to be joined to pending arbitral proceedings, with that person's consent.

3.88 The third alternative was to provide for either tribunal ordered consolidation, with court assistance or for court ordered consolidation. This alternative would still not deal with a situation where one of the interrelated disputes was either based entirely on delict or arose from a contract with no arbitration clause. In such instances at least one of the disputes would not be subject to arbitration at all. The Commission prefers the second alternative for the following reasons. It involves the smallest departure from the principle of party autonomy. It is consistent with reducing the court's power to intervene in the arbitral process. If the application for joinder is made at an early stage, the arbitration will be able to proceed without unnecessary delay. It is also the easiest method to facilitate by means of appropriately worded arbitration clauses in linked contracts.

CHAPTER 3

Mediation pursuant to an arbitration agreement

²²⁶ See para 3.57 n 87 above for an explanation of the problems posed by this situation in practice.

²²⁷ Article 1045 of the Netherlands Arbitration Act goes further by allowing joinder on the initiative of a third party. However according to Sanders P *Het nieuwe arbitragerecht* Kluwer Deventer 1996 169, the consent of all three parties is required to joinder under article 1045 in all circumstances.

3.89 Sections 12-15 of the previous Draft Bill were based on sections 11-14 of the International Arbitration Bill. Because of their consensual basis, there has to date been little support in submissions to the Commission for legislation regulating mediation and conciliation.²²⁸ The provisions in the Draft Bill are therefore restricted to dealing with certain problems which may arise regarding mediation 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 [mediator] where the parties cannot agree on an appointment;
- (b) the question whether or not a person who has been involved as [mediator] should be able to continue as arbitrator if the [mediation] attempt fails;
- (c) the effect of [mediation] attempts on the running of prescription; and
- (d) the enforcement of a settlement reached by [mediation], particularly outside the jurisdiction where the settlement was reached."²²⁹

3.90 There are, moreover, two policy arguments in favour of including limited provisions on mediation in South Africa's proposed new domestic arbitration statute.²³⁰ 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 mediation as their first option. The inclusion of some provisions on mediation would indicate an official policy supportive of the cost-effective and expeditious resolution of commercial disputes through mediation. Secondly, mediation as a method of dispute resolution is apparently more in keeping with traditional African methods of dispute resolution than the adversarial procedure of the (English) common law.²³¹

3.91 The mediation provisions are now discussed in the light of responses to the Discussion Paper. A more detailed discussion is contained in the Commission's Report on International Arbitration.²³² The term "mediator" in these provisions is defined in s 1 of the Draft Bill to include a "conciliator".²³³

S 13 Right to mediation process

3.92 S 13 is a new provision, with no equivalent in the previous Draft Bill. It is based on s 11 of the International Arbitration Bill. The function of s 11 is to provide an appropriate introduction to the mediation provisions of the Draft Bill. It sets out the basic principle that parties to an arbitration agreement may refer a dispute covered by that agreement to mediation

²²⁸ 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**.

²²⁹ See the Commission's Report on International Arbitration para 2.78.

²³⁰ See the Commission's Report on International Arbitration para 2.79.

²³¹ See Asouzu A A "Conciliation under the 1988 Arbitration and Conciliation Act of Nigeria" (1993) 5 *African Journal of International and Comparative Law* 825 at 829.

²³² See paras 2.74-2.94 of the Commission's Report on International Arbitration.

²³³ See paras 3.10-3.11 above regarding this definition.

at any stage, whether before or after the commencement of arbitral proceedings. This provision is however subject to the arbitration agreement, which may, for example, require the parties to resort to mediation as a prerequisite to the commencement of arbitral proceedings.

S 14 Appointment of mediator

3.93 S 14(1) of the Draft Bill deals with the situation where there is an agreement between parties to an arbitration agreement providing for mediation and the parties are unable to agree on a mediator²³⁴ or their contractual mechanism for the appointment of a mediator has failed to operate. S 14(1) provides for this function to be performed by the chairperson of the specified authority.²³⁵ The provision is based on s 12 of the International Arbitration Bill which was derived from existing legislation in Hong Kong and Singapore.²³⁶

3.94 The purpose of s 14(2) is referred to in the commentary on s 15 below.

3.95 The purpose of s 14(3) is to provide a safeguard against mediation 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 from the three-month period in s 12(3) of the Draft International Arbitration Act to 28 days. The latter period appears more appropriate in the context of domestic dispute resolution.

3.96 The indemnity provided by s 25 of the Draft Bill also applies to an arbitrator acting as mediator and to the specified authority when appointing a mediator.

S 15 Power of arbitral tribunal to act as mediator

3.97 The provisions of ss 15 and 14(2) of the Law Commission's Bill envisage that the same person may act as mediator and arbitrator but **only** if the parties agree. (This possibility is sometimes referred to in arbitration literature and practice as 'med-arb'.) These proposals evoked a strong negative reaction from certain respondents to Discussion Paper 83.²³⁷ The procedure has obvious risks, with the result that the Draft Bill imposes appropriate safeguards, apart from stressing that it is only possible if both parties agree. For example, a mediator, unlike an arbitrator, is entitled to meet separately with the parties. Therefore, where a party has voluntarily disclosed confidential information to the mediator during such meeting, the mediator, before acting as arbitrator, must disclose to all other parties in the arbitration as

²³⁴ The Association of Arbitrators in its response to Discussion Paper 83 para 7 questioned the wisdom of the appointment of a mediator by the specified authority where the parties cannot reach agreement on the appointment. The Association contended that if the parties could not accommodate each other's point of view to the extent necessary to agree on the mediator, it is unlikely that they would be able to achieve a settlement through mediation. As a result the mediation process would be doomed to failure from the outset. This objection appears to exaggerate the problem. It also overlooks the existence of a provision for the appointment of a mediator by a third party where the parties cannot agree on the appointment in at least one standard-form contract in the construction industry (See Butler & Finsen 349 regarding clause 61(2)(a) of the General Conditions of Contract for Works of Civil Engineering Construction (6th ed 1990)).

²³⁵ See para 3.12 above regarding the term "specified authority".

²³⁶ See the Hong Kong Arbitration Ordinance 22 of 1963 s 2A and the Singapore International Arbitration Act 23 of 1994 s 16.

²³⁷ See the responses of the Law Society of the Cape of Good Hope paras 11 and 12 and of Adv PMM Lane SC paras 7 and 8. Some of their criticism was based on misconceptions regarding ss 12 and 13 of the previous Draft Bill.

much of that information as the mediator considers relevant.²³⁸ The mediator is not disclosing privileged information without the relevant party's consent, because that party must be taken to have consented to such disclosure, when agreeing to the same person acting as both mediator and arbitrator.

3.98 Some lawyers from a common-law tradition feel very uncomfortable with the idea of the same person acting as both mediator and arbitrator, because traditionally under the common-law adversarial approach a judge or arbitrator should not become directly involved in settlement negotiations between the parties. The justification for this tradition is that the adjudicator must preserve his or her impartiality and must be seen to do so. One commentator has responded to the Commission's proposals by submitting that notwithstanding the need to respect party autonomy, "any clause in an arbitration agreement that contemplates the arbitrator acting as a conciliator should be overridden by the proposed legislation".²³⁹ The same concerns are not shared by civil-law lawyers who are used to the judge making settlement proposals: the judge may be under a duty to do so.²⁴⁰ Another respected commentator on international arbitration has argued that permitting the parties to agree to the same person acting as mediator and then as arbitrator is in conflict with a party's mandatory right under the Model Law to a fair and full opportunity to put that party's claim or defence.²⁴¹ An eminent Indian jurist agrees that the normal and more prudent rule is and should be that the same person should not act as mediator and then as arbitrator.²⁴² However, he argues that the parties should be free to agree to this if that is what they want. Therefore, the Indian version of the Model Law provides that it is "not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, **with the agreement of the parties**, the arbitral tribunal may use mediation ... at any time during the arbitral process to encourage settlement".²⁴³

3.99 The Commission regards a statutory prohibition on med-arb as an unwarranted restriction on party autonomy. However, contrary to the approach in India, it nevertheless considered it preferable to spell out procedural safeguards in ss 14(2) and 15 of the Draft Bill²⁴⁴ to

²³⁸ See ss 14(2)(b) and 15(2) and (3) of the Draft Bill. Compare article 24(3) of the UNCITRAL Model Law which requires all information supplied to the arbitral tribunal by one party to be communicated to the other party.

²³⁹ See Turley IF "The Proposed Rationalisation of South African Arbitration Law" (1999) **TSAR** 235 at 244.

²⁴⁰ It must however be conceded that the judge's powers to promote a settlement do not include being able to meet separately with the parties.

²⁴¹ Oral submission by Dr M Aboul-Enein at the Association of Arbitrators (Southern Africa) Conference 2000 *Dispute Resolution and Cross Border Trade* at the Indaba Hotel, Sandton on 16 September 2000.

²⁴² See Nariman FS "Mediation and the Arbitrators" (1999) (Special Supplement) **ICC IC Arb Bull** (hereafter referred to as "Nariman (1999) **ICC IC Arb Bull**") 45 with reference to the UNCITRAL Conciliation Rules of 1980 article 19.

²⁴³ See the Indian Arbitration and Conciliation Act 26 of 1996 s 30(1) (emphasis added); Nariman (1999) **ICC IC Arb Bull** 46; Nariman FS "The Spirit of Arbitration" (2000) 16 **Arbitration International** 267. The mediator's familiarity with the dispute may for example be regarded by the parties as an asset in the particular circumstances.

²⁴⁴ Based on ss 2A and 2B of the Hong Kong Arbitration Ordinance 22 of 1963 (as amended) and ss 16 and 17 of the Singapore International Arbitration Act 23 of 1994.

counteract the worst risks of perceived procedural unfairness.²⁴⁵ A respected English commentator has said that the "devising of appropriate rules of procedure will be a task of some delicacy, but one which will repay the degree of formalisation necessarily introduced".²⁴⁶ Before giving their consent to "med-arb" or "arb-med" where the same person will act in a dual capacity, the parties are taken to have decided that the potential benefits regarding the savings in time and costs outweigh the potential disadvantages.

S 16 Settlement agreement

3.100 An agreement achieved through mediation can be enforced through the courts as a contractual obligation. S 44 provides for a tribunal to make an award on agreed terms. This provision could only apply to a settlement agreement achieved through mediation once the tribunal has been appointed. S 16, which is based on s 14 of the International Arbitration Bill, fills this gap. It provides that a written settlement agreement entered into by the parties to an arbitration agreement before a tribunal is appointed to settle their dispute, is enforceable as an award on agreed terms.²⁴⁷ S 16 of the Draft Bill is only intended to deal with a settlement agreement entered into in South Africa by parties to a domestic arbitration agreement. The enforcement of a settlement agreement entered into outside of South Africa by parties to a commercial dispute which is subject to an arbitration agreement, will be regulated by s 14 of the International Arbitration Bill.

S 15 of the previous Draft Bill, which was based on the International Arbitration Bill,²⁴⁸ provided that a party may resort to arbitration, notwithstanding a contractual requirement for mediation as a prerequisite to commencing arbitration, if "that party is of the opinion that such a step is necessary for the preservation of that party's rights". The purpose behind this provision was to enable a party to interrupt the running of prescription. One respondent considered the wording to be unnecessarily wide.²⁴⁹ The provision is necessary in the context of an international arbitration statute in that issues relating to prescription in an international arbitration held in South Africa will not necessarily be regulated by South African law.²⁵⁰ However, in a domestic context, the problem is adequately covered by existing case law. Where an arbitration agreement expressly provides for mediation of any dispute covered by that agreement as a prerequisite for the commencement of arbitration, the court is prepared to regard submission to mediation in terms of that provision as sufficient to regard the claim as one which

²⁴⁵ See the text above. It is submitted that these safeguards adequately meet the requirements of fairness imposed by articles 18, 24 and 13 of the Model Law. The fact that a person has previously acted as mediator in the dispute before acting as arbitrator may well have a negative effect on his or her impartiality. Parties agreeing to this procedure are taken to be aware of this risk. For that reason s 14(2)(a) and s 15(4) prevent the fact that the person has previously acted as mediator with the consent of the parties from being used as the sole ground for either challenging the person's appointment as arbitrator or for objecting to his or her conduct of the arbitral proceedings.

²⁴⁶ See Uff J "Dispute Resolution in the 21st Century: Barriers or Bridges?" (2001) 67 *Arbitration* 4 at 10.

²⁴⁷ The Association of Arbitrators supported this recommendation in its response to Discussion Paper 83 para 9. The insertion of s 44 in the Draft Bill addresses the concern raised by the Arbitration Forum in its response to Discussion Paper 83 para 3.5.

²⁴⁸ See s 15.

²⁴⁹ See the response of the Law Society of the Cape of Good Hope para 15.

²⁵⁰ See the Commission's Report on International Arbitration para 2.94.

has been subjected to *arbitration*. This will delay the completion of prescription under s 13(1)(f) of the Prescription Act 68 of 1969.²⁵¹ The Commission therefore recommends the deletion of s 15 of the previous Draft Bill.

CHAPTER 4

The arbitral tribunal

3.102 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.

3.103 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.)²⁵² 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".²⁵³

3.104 In practice, an umpire in a complex arbitration may be asked to attend the hearings to keep 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 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.²⁵⁴ The Commission therefore recommends that statutory provision for an umpire should be abolished and the Draft Bill has been drafted accordingly. There was also support for this proposal among respondents to the Discussion Paper.²⁵⁵ The same approach has been followed in New Zealand.²⁵⁶

²⁵¹ See *Murray & Roberts Construction (Cape) (Pty) Ltd v Upington Municipality* 1984 1 SA 571 (A) 582B-G.

²⁵² See *Kannenberg v Gird* 1966 4 SA 173 (C) 179A-B; Butler & Finsen 91-2.

²⁵³ See the 1996 Saville Report para 94.

²⁵⁴ See Butler & Finsen 92.

²⁵⁵ See the responses of the Association of Arbitrators para 10; Philip Loots para 5 and the Law Society of South Africa para 12.

3.105 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.

3.106 Thirdly, the imposition of a statutory duty on the arbitrator as to how the arbitral proceedings are to be conducted (see s 28 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.

S 17 Number of arbitrators

3.107 S 17(1) follows article 10(1) of the Model Law by stating that the parties are free to agree on the number of arbitrators. S 17(2) then re-enacts s 10 of the 1965 Act by providing for one arbitrator where there is no agreement to the contrary.

3.108 S 11(1) of the current statute indicates a policy against a tribunal of two arbitrators.²⁵⁷ Two arbitrators are entitled to appoint an umpire unless the parties otherwise provide. S 16(3) of the previous Draft Bill envisaged the amendment of 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. The third arbitrator would have acted as chairperson of a tribunal of three, rather than as an umpire. This provision was based on the corresponding provision of the current English statute.²⁵⁸ One of the respondents to the Discussion Paper pointed out that this provision could result in parties who had provided for two arbitrators in their arbitration agreement having to incur the expense of a third arbitrator,²⁵⁹ merely through failing to make it clear in their agreement that two means two and not three. It is conceivable that parties could desire the benefits of a multidisciplinary tribunal of two arbitrators²⁶⁰ and be prepared to incur the risk of the tribunal being unable to make an award because of a deadlock. The Commission, because of its support for the principles of party autonomy and the desirability of avoiding unnecessary expense in the arbitral process, therefore decided to recommend the deletion of subsection 16(3) of the previous Draft Bill.

²⁵⁶ See the New Zealand Arbitration Act 99 of 1996 sch 1 article 10 and sch 2 clause 1; Williams D A R "Arbitration and Dispute Resolution" 1998 *New Zealand LR* 1(hereafter referred to as "Williams") 14; New Zealand Law Commission *Arbitration* NZLC R20 1991 para 320.

²⁵⁷ The policy against two arbitrators is less strong than that of the Netherlands where the statute expressly requires the tribunal to be composed of an uneven number of arbitrators (See article 1026 of the Netherlands Arbitration Act of 1986). India, in adopting the UNCITRAL Model Law for both international and domestic arbitration, adapted article 10(1) by adding a proviso preventing the parties from agreeing to an equal number of arbitrators. See the Arbitration and Conciliation Act 26 of 1996 s 10(1) and Nariman F S "Even Numbers of Arbitrators - Article 10 of the UNCITRAL Model Law: India" (1999) 15 *Arbitration International* 405 regarding the application of this provision by the Indian courts to arbitration agreements entered into before the commencement of the Act.

²⁵⁸ See the Arbitration Act, 1996 s 15(2).

²⁵⁹ See the response of the Law Society of the Cape of Good Hope para 15.2.

²⁶⁰ For example in a construction dispute, the parties may want a tribunal consisting of a lawyer and a technically qualified arbitrator, as opposed to having a sole arbitrator, assisted by a neutral expert appointed under s 31(5). A person participating in the decision on the merits of the dispute referred to arbitration should properly be seen as an arbitrator and not as an expert.

S 18 Appointment of arbitrators

3.109 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 18(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.

3.110 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 20 to appoint the tribunal.

S 19 Power to appoint in case of default

3.111 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 18.²⁶¹ The further amendments are mainly of a technical nature. The chairperson of the specified authority²⁶² 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.

S 20 Power of specified authority to appoint an arbitrator

3.112 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.²⁶³ The new provision clearly covers this situation. 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.²⁶⁴

3.113 Like the corresponding provision of the Model Law (article 11(5)), s 20(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.

²⁶¹ Compare the response of the Law Society of the Cape of Good Hope para 16, which queried the need for s 18.

²⁶² 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 paras 3.12-3.14 above as to why it is proposed to vest this power in the chairperson of the specified authority.

²⁶³ See Butler (1994 *CILSA*) 145.

²⁶⁴ See paras 3.12-3.14 above.

S 21 *Revocation of arbitrator's mandate*

3.114 S 20(1) and (2) of the previous Draft Bill dealing with the revocation of the arbitrator's mandate read as follows:

"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."

3.115 These provisions were mainly based on s 23(1)-(3) of the English Arbitration Act of 1996. S 23 of the English Act is concerned with the revocation of the arbitrator's mandate as opposed to the termination of the arbitrator's mandate by the unilateral action of one party through applying to court or by the resignation of the arbitrator.²⁶⁵ Both s 23(1) and (2) of the English Arbitration Act 1996 and s 13(1) of the current Arbitration Act of 1965 create the impression that the parties could, by agreement, confer the power on one party to terminate the mandate of an arbitrator unilaterally. As discussed below, the parties can agree to a challenge procedure, also by reference to institutional rules, as a way of trying to avoid the need for an application to court for the removal of an arbitrator. However, the Commission is of the view that a party should not be able to terminate the mandate of an arbitrator unilaterally. S 20(1) of the previous Draft Bill, quoted above, has therefore been deleted, and what is now s 21(1) has been amended to read as follows:

"(1) The mandate of an arbitrator may not be revoked except:

- (a) by the agreement of the **parties** in writing; or
- (b) by an arbitral or other institution or person vested by the parties with the power of revocation."

3.116 S 21(1)(a) allows the parties to terminate the arbitrator's appointment by agreement. It would follow that the arbitrator's mandate cannot be terminated without the consent of all the parties to the arbitration, subject to the power of the court in s 22 to remove an arbitrator, discussed below. 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 an arbitral institution. S 21(1)(b) makes it clear therefore that the appointment can be validly revoked by the institution where the parties have agreed to the challenge procedure.

3.117 S 20(3) of the previous Draft Bill followed 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

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Under the Model Law article 14(1) the arbitrator's mandate may be terminated in a number of ways including withdrawal from office. The Draft Bill s 23, following s 25 of the English Arbitration Act 1996, deals only with the consequences of the arbitrator's resignation rather than attempting to specify the grounds.

agreement is required to be in writing, under English law, there are no formalities for its cancellation and the Saville Committee regarded it as unrealistic to require a written revocation in such circumstances.²⁶⁶ S 20(3) was deleted from the equivalent section (s 21) of the Draft Bill in view of the new requirement in s 7 that the termination of an arbitration agreement must be in writing. S 21(1)(a) therefore requires an agreement between the parties to revoke an arbitrator's mandate to be in writing in all circumstances. From the arbitrator's perspective the need for certainty in this regard is paramount. One apparent effect of this provision is that a settlement of their dispute by the parties will only formally terminate the tribunal's mandate once the parties have a written agreement reflecting either the settlement of their dispute or at least the termination of the tribunal's mandate.²⁶⁷ A settlement which is made an award on agreed terms under s 44 will however terminate the tribunal's mandate.²⁶⁸

3.118 S 21(2) provides expressly that s 21 does not detract from the court's statutory power to remove an arbitrator from office.

S 22 Power of court to remove arbitrator

3.119 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 22 of the Draft Bill follows the example of the Model Law²⁶⁹ in setting out the grounds for removal and restricting applications for removal to those grounds.

3.120 The two grounds in s 22(a) and (b) are those provided for the challenge of an arbitrator under article 12(2) of the Model Law. S 22(1)(a) empowers the court to remove an arbitrator if "reasonable grounds exist to doubt the arbitrator's independence or impartiality".²⁷⁰ 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.²⁷¹ The recommendation of the Commission follows the

²⁶⁶ See the 1996 Saville Report para 99.

²⁶⁷ Although they may coincide, the termination of the arbitrator's mandate and the termination of the arbitral proceedings are distinct events (The parties may eg terminate the arbitrator's mandate and continue with the arbitral proceedings after the appointment of another arbitrator). Compare the UNCITRAL Model Law article 32(2)(b) and (3) which provide that the mandate of the tribunal is terminated by an agreement between the parties to terminate the proceedings. The tribunal would nevertheless retain its power under article 33 to correct an error in an (interim) award made by the tribunal prior to the termination of its mandate (see article 32(3)).

²⁶⁸ S 44(1) requires the tribunal to terminate the proceedings, which will effectively terminate its mandate on delivery of the award on agreed terms.

²⁶⁹ See articles 12(2) and 14(1) of the Model Law.

²⁷⁰ Article 12(2) of the Model Law provides for the challenge of an arbitrator "if circumstances exist that give rise to justifiable doubts as to his impartiality or independence".

²⁷¹ See the 1996 Saville Report paras 101-104. This problem and its application to s 24 of the English Arbitration Act 1996 was examined in *Laker Airways Incorporated v FLS Aerospace Ltd* [1999] 2 Lloyd's Rep 45 discussed by Kendall J "Barristers, Independence and Disclosure Revisited" (2000) 16 *Arbitration International* 343-351 and Merjian A H "Caveat Arbitor: *Laker Airways* and the Appointment of Barristers as Arbitrators in Cases Involving Barrister-Advocates from the Same Chambers" (2000) 17.1 *J of Int Arb* 31-69. See also Lazarus L "Arbitrators, Bias and the Arbitration Act" (2000) 66 *Arbitration* 258-263.

wording of the Model Law which is also in accordance with the wording of the Constitution.²⁷² The wording of the test for perceived bias is also in line with current South African case law.²⁷³

3.121 S 22(1)(c) provides for the removal of an arbitrator who "is physically or mentally incapable of conducting the proceedings" or if "there are reasonable grounds to doubt the arbitrator's capacity to do so". It 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.

3.122 In line with article 14(1) of the Model Law, s 22(6) provides that there is no right of appeal against a court's decision regarding the removal of an arbitrator, subject to the qualification discussed below.

3.123 S 22(2) is based on s 24(2) of the English Act. It provides that the court may only be approached to remove an arbitrator after any right to challenge that arbitrator (by means of an application to an arbitral institution) to which the parties have agreed has first been exercised. S 22(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.

3.124 These provisions are included to discourage the abuse of an application for removal as a delaying tactic. Where there is no agreed challenge procedure or a challenge under the agreed institutional rules is unsuccessful, the Commission is of the view that the removal of the arbitrator from office is a matter for the court rather than the specified authority.²⁷⁴

3.125 S 22(4) provides that the court, when removing the arbitrator from office, apart from any order for costs which may be awarded against the arbitrator personally, may also deprive the arbitrator of his or her right to remuneration. One respondent to the Discussion Paper was concerned that the possibility of an adverse costs order under this provision would encourage arbitrators to resign whenever applications for their removal are brought.²⁷⁵ S 22(4) is based on s 13(3) of the current Arbitration Act. It must be conceded that under the current law an arbitrator apparently does not have the right to resign²⁷⁶ and the effect of the existing provision

²⁷² See s 34 of the Constitution of the Republic of South Africa, 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".

²⁷³ See ***President of the Republic of South Africa v South African Rugby Football Union*** 1999 4 SA 147 (CC) 177B-C: "The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel". Although this case concerned the recusal of judges, it is in line with the leading cases on the removal of an arbitrator because of perceived bias, namely ***Appel v Leo*** 1947 4 SA 766 (W) and ***Orange Free State Provincial Administration v Ahier; Parys Municipality v Ahier*** 1991 2 SA 608 (W).

²⁷⁴ The Commission therefore recommends the approach in the Singapore International Arbitration Act 23 of 1994 s 8 in preference to that of the Ugandan Arbitration and Conciliation Act 7 of 2000 ss 14, 15 and 69(a), which vests this power in the Centre for Arbitration and Dispute Resolution rather than the court.

²⁷⁵ See the response by the Arbitration Forum para 3.6, where it is suggested that the court's power to order costs against the arbitrator should be limited to cases where the court finds that the arbitrator acted in bad faith.

²⁷⁶ See para 3.127 below.

is therefore not directly comparable in this regard. However, the usual position is that the court will not make an order for costs against an arbitrator who does not participate in the proceedings but merely abides by the judgment of the court.²⁷⁷ An arbitrator who resigned where there are insufficient grounds would also run increased risk of an order under s 23, discussed below.

3.126 As stated above, a decision by the court regarding the removal of an arbitrator is not subject to appeal. However, where the court, when removing an arbitrator from office, decides to deprive that arbitrator of a portion of his or her remuneration or order costs against the arbitrator, such order is subject to appeal. Depriving the arbitrator of the right of appeal may have constitutional implications. Moreover an appeal brought by the arbitrator removed from office regarding the adverse financial consequences will not usually occasion any significant delay regarding the future course of the arbitration itself.

S 23 Resignation of arbitrator

3.127 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.

3.128 S 28 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.²⁷⁸ If the arbitrator wishes to resign on this ground, it should usually be done at an early stage of the proceedings, before substantial costs have been incurred.²⁷⁹

3.129 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 23, based on s 25 of the English Act of 1996.

3.130 S 23 needs to be read with s 25 of the Draft Bill dealing with the immunity of arbitrators. S 25 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 therefore falls outside s 25. Thus the

²⁷⁷ In **Orange Free State Provincial Administration v Ahier; Parys Municipality v Ahier** above 629C the court removed the arbitrator from office and in terms of s 13(3) of the 1965 Act ordered that the arbitrator should not be entitled to any fees. The arbitrator did not participate in the court proceedings and there is no indication that costs were sought or granted against the arbitrator. In the analogous situation of an application for the setting aside of an award, the arbitrator (second respondent) in a recent case did intervene in the court proceedings, because he had been accused of serious misconduct by the applicant. Although the court set aside the award on other grounds, it ordered the first respondent to pay the arbitrator's costs of opposition. This decision was upheld on appeal (see **Mervis Brothers v Interior Acoustics** above 613I-614A). This case illustrates that the courts will not lightly order costs against an arbitrator.

²⁷⁸ See the 1996 Saville Report para 115.

²⁷⁹ Compare the concerns of Philip Loots in his response to Discussion Paper 83 para 6.

court is empowered to exempt the arbitrator who has resigned from liability under s 23(2)(a) in appropriate circumstances.

S 24 Filling of vacancy

3.131 The Arbitration Act of 1965 contains several provisions on the filling of vacancies, eg ss 10(1), 11(2) and 12(6). S 24 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 section dealing comprehensively with the filling of vacancies and the effect of the vacancy being filled on the proceedings to date.

S 25 Immunity of arbitrators and arbitral institutions

3.132 This provision follows s 9 of the International Arbitration Bill. 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.²⁸⁰ Similar provisions have been included in arbitration statutes in several common-law jurisdictions, including the English Arbitration Act of 1996.²⁸¹

3.133 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.²⁸² Limited immunity is also proposed for arbitral institutions.

3.134 Only one respondent was opposed to the proposed provision on arbitral immunity, taking the line that arbitrators should be left to take out appropriate indemnity insurance to protect themselves against the financial consequences of negligent acts and omissions.²⁸³ There is however no logical basis for distinguishing between the position of arbitrators in international and domestic arbitration on this point. Potential liability of arbitrators for negligence resulting from an arbitration held in South Africa, at a time when many other jurisdictions are providing statutory immunity, would counteract one of the objects of the International Arbitration Bill, namely the promotion of South Africa as an attractive regional centre for international arbitrations.

CHAPTER 5

Conduct of arbitral proceedings

²⁸⁰ See the Commission's Report on International Arbitration paras 2.62-2.67. See also Butler & Finsen 101-2.

²⁸¹ For a discussion of these provisions and the principle of statutory immunity see Oyre T "Professional Liability and Judicial Immunity" (1998) 64 *Arbitration* 45-50; Yat-Sen Li J "Arbitral Immunity: A Profession Comes of Age" (1998) 64 *Arbitration* 51-57.

²⁸² See the 1996 Saville Report paras 131-136. See also Butler & Finsen 102-3.

²⁸³ See the response of the Law Society of the Cape of Good Hope to Discussion Paper 83 para 17.5.

S 26 Competence of tribunal to rule on its own jurisdiction

3.135 This provision is mainly based on article 16 of the Model Law. Unlike article 16 however, s 26(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.

3.136 Section 26(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.**²⁸⁴ Its recognition is consistent with the International Arbitration Bill and the position in other jurisdictions.

3.137 S 26(1) of the Draft Bill in effect provides that questions regarding the jurisdiction of the 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.²⁸⁵ 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 26(5) then allows a party dissatisfied with that ruling to take it on review to the court. One respondent to Discussion Paper 83 was of the view that the tribunal should decide challenges to its jurisdiction by means of a preliminary ruling in all cases to avoid the risk of exposing the parties to the costs of an unnecessary arbitral hearing.²⁸⁶ The answer to this is twofold. First, the tribunal must exercise its discretion having regard to its general duty to follow a procedure which avoids unnecessary delay and expense.²⁸⁷ Secondly, in some cases it may simply be impractical to rule on the jurisdictional issue before determining the merits where the two are closely interwoven.²⁸⁸ In exceptional circumstances s 27 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.

3.138 S 26(7) of the Draft Bill provides that a decision by the court under s 26(5) is not subject to appeal. S 26(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 its 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.

²⁸⁴ 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) in the context of an allegedly voidable main contract.

²⁸⁵ See s 52(2)(a)(iii) of the Draft Bill. The Arbitration Forum in its response to Discussion Paper 83 para 3.7 was concerned about the interaction between this provision and s 26(3). A party wishing to challenge jurisdiction can participate in the appointment of the tribunal, without losing its right to raise the jurisdictional issue. The party must however raise it together with its plea. Any other jurisdictional point must be raised when the party becomes aware of the point (s 26(4)). In both cases, unless the tribunal condones failure to raise the jurisdictional point timeously (s 26(9)), a party remaining silent will be held to have waived the right to object (compare s 60) and will not be able to challenge the award on the basis of lack of jurisdiction. Problems regarding the interaction of these provisions are therefore not anticipated.

²⁸⁶ See the response of the Law Society of the Cape of Good Hope para 18.2.

²⁸⁷ See the Draft Bill s 28(1)(b) and the 1996 Saville Report para 141.

²⁸⁸ See the 1996 Saville Report para 146.

3.139 The degree of court control provided in s 26 corresponds to that in the International Arbitration Bill and the Model Law.

3.140 Improvements to s 26 compared to the version with Discussion Paper 83 are of a technical nature.²⁸⁹

S 27 Determination of preliminary point of jurisdiction by court

3.141 A question as to the jurisdiction of the tribunal may, in certain circumstances, be referred directly to court by virtue of s 9 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.

3.142 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.²⁹⁰ The Saville Committee therefore stated:

"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."²⁹¹

3.143 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".²⁹² 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.²⁹³ Stringent conditions are imposed, particularly in s 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.²⁹⁴

3.144 There is no equivalent to s 27 of the Draft Bill in the Model Law or in the International Arbitration Bill. The role of the court is much more limited than that of the court under s 3(2) of

²⁸⁹ See further s 26 in Annexure B.

²⁹⁰ 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.

²⁹¹ See the 1996 Saville Report para 141.

²⁹² See the 1996 Saville Report para 141.

²⁹³ See Chukwumerije 178.

²⁹⁴ 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.

the current statute.²⁹⁵ The role of the court under s 27 of the Draft Bill is restricted to deciding whether or not the tribunal has jurisdiction. In Discussion Paper 83 the Commission invited comment on whether or not there is a need for the provision in a new domestic arbitration statute.

3.145 One respondent supported the inclusion of the provision, which could be useful in a situation where a complex jurisdictional issue has arisen and the tribunal is aware that one party will in any event challenge a ruling by the tribunal that it has jurisdiction in court. Time and money will then be saved by taking the jurisdictional issue straight to court, subject to the safeguards in s 27(2).²⁹⁶ Other respondents favoured the approach of the tribunal always deciding the jurisdictional issue in the first instance.²⁹⁷ If the tribunal finds that it has jurisdiction, there should then be a right of review by the court, subject to strict safeguards to prevent abuse as a delaying tactic.²⁹⁸ The difficulty with this approach of limiting the right to take a ruling by the tribunal that it has jurisdiction on review is that the parties may thereby be compelled to proceed with an arbitration until the award, which is then taken on review for lack of jurisdiction.²⁹⁹

3.146 The Commission recommends that s 27 of the Draft Bill should be retained. Although it is unlikely to be used often, its availability will prove useful in appropriate circumstances.³⁰⁰

S 28 General duty of tribunal

3.147 The crucial role of this new provision has been explained above.³⁰¹ Failure to comply with the duty in s 28(1)(a) to act fairly can clearly lead to the tribunal's removal from office under s 22 or to the setting aside of the award under s 52. Unnecessary delay by the tribunal in breach of the duty in s 28(1)(b) is also a ground for removal from office under s 22. A tribunal which is compelled by the parties' agreement to adopt procedures, which objectively speaking do not avoid unnecessary delay and expense, could resign.³⁰²

3.148 Non-compliance with the duty to avoid unnecessary delay and expense, resulting in

²⁹⁵ See para 3.55 above.

²⁹⁶ See the response of the Association of Arbitrators para 11. This view was shared by some members of the committee which drafted the response of the Law Society of the Cape of Good Hope (see para 19.4). They also shared the view of the Saville Committee that the provision's use would be exceptional in practice.

²⁹⁷ See the responses of the Arbitration Forum para 3.7 and the Law Society of the Cape of Good Hope para 19.

²⁹⁸ This approach is in contrast to s 26(5) of the Draft Bill which provides an automatic right to take the tribunal's preliminary ruling that it has jurisdiction on review. The danger of abuse is countered by s 26(6) which permits the tribunal to continue with the arbitration and make an award while the application to court is pending.

²⁹⁹ A party wishing to pursue the jurisdictional point after the award will be advised to reserve its right to do so, lest it be taken to have waived that right.

³⁰⁰ See for example **South African Transport Services v Wilson NO** 1990 3 SA 333 (W) at 339J-340B.

³⁰¹ See para 2.11 above with reference to the corresponding provision of the English Arbitration Act of 1996 s 33.

³⁰² See the commentary on s 23 of the Draft Bill at para 3.128 above.

substantial injustice to a party is now also a ground for setting aside the award.³⁰³

3.149 S 28(2) provides expressly that the tribunal must comply with the general duty imposed by subsection (1) in its conduct of the arbitral proceedings, when making decisions on procedural and evidential matters and in the exercise of all other powers conferred on it. S 28(2) therefore makes cross-references to the tribunal's duty under s 28(1) unnecessary in the sections of the Draft Bill dealing with its powers like ss 29, 30, 31 and 36.

S 29 General powers of tribunal

3.150 S 29 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.³⁰⁴ This omission was rectified by the inclusion of s 28(2) in the previous Draft Bill. At all the regional workshops, the suggestion was made that the general power should logically be placed first, before the list of specific powers. This suggestion was generally supported with the result that the general power now appears as s 29(1) of the revised 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 28.

3.151 S 29(2) of the Draft Bill, containing the tribunal's specific powers has also been rearranged. Departing from the position in s 14(1) of the current statute and s 28(1) of the previous Draft Bill, the specific powers which the tribunal may exercise on its own initiative are now set out before those which may only be exercised on the application of a party.

3.152 In s 29(2)(a)(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.

3.153 The powers of the tribunal regarding the conduct of the hearing have been simplified compared to those in the previous draft which were derived from the current statute. The revised provision reads:

- "(2) The tribunal may –
- (a) unless the parties otherwise agree –
 - iv) subject to section 33(1) decide whether any and if so what questions should be put to and answered by the parties and their witnesses and when and in what form this should be done".

3.154 This provision is based on s 34(2)(e) of the English Arbitration Act of 1996 and simplifies the comparable provisions of the previous draft, while emphasizing tribunal control over evidence. Control over the calling of witnesses is to be exercised at the hearing, rather than by requiring the tribunal's consent before a witness can be subpoenaed, as proposed in the

³⁰³ See the revised version of s 52(5) in the Draft Bill in Annexure B and compare s 68(2)(a) of the English Arbitration Act of 1996. This amendment received qualified support from the Law Society of the Cape of Good Hope in its response to Discussion Paper 83 para 20.

³⁰⁴ See Butler (1994 *CILSA*) 149.

previous Draft Bill.³⁰⁵ S 29(2)(a)(iv) expressly draws the tribunal's attention to s 33(1) of the Draft Bill which, like s 34 of the English Act, gives the tribunal the power to decide whether or not there should be a hearing, unless the parties agree otherwise.³⁰⁶

3.155 The tribunal has also been given a new power compared with the previous Draft Bill and the current statute to enable it to decide the language or languages to be used in the arbitral proceedings.³⁰⁷

3.156 The power to appoint an interpreter in s 29(2)(a)(vii) is subject to the tribunal's general duty in s 28(1). The tribunal could follow a more informal approach than the court by not necessarily requiring the interpreter to be sworn.³⁰⁸ The tribunal should nevertheless be satisfied as to interpreter's competence and should only normally appoint an interpreter after consulting the parties on the suitability of the proposed interpreter.

3.157 The powers of the tribunal to hold inspections have been widened to cover the requirements of personal injury cases.³⁰⁹

3.158 Consideration was given to amending the tribunal's power to order discovery so that it could be exercised by the tribunal on its own initiative and not just on application.³¹⁰ It was decided that this could encourage an unduly interventionist approach. It is in any event open to the tribunal to invite an application for discovery in circumstances where the tribunal considers discovery or further discovery to be necessary or desirable in the interests of justice and a fair hearing.

3.159 New powers, compared to the current statute, which may be exercised on application include the following:

3.160 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 International Arbitration Bill.³¹¹ The power of the tribunal to grant interim measures is narrower than that conferred on the court by s 40 of the Draft Bill.

3.161 S 29(2)(b)(iv) 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 40(1)(b) of the

³⁰⁵ See the commentary on s 37 at paras 3.189-3.191 below.

³⁰⁶ See the commentary on s 33(1) at para 3.174 below.

³⁰⁷ See s 29(2)(a)(vi).

³⁰⁸ In court proceedings an interpreter occupies a position analogous to an expert witness and must be sworn: see Zeffertt D *The South African Law of Evidence* 4 ed Butterworths Durban 1988 440.

³⁰⁹ See s 29(2)(a)(viii) and (b)(ii).

³¹⁰ Compare the Association of Arbitrators (Southern Africa) *Rules for the Conduct of Arbitrations* 4 ed Aug 2000 rule 25.1 which empowers the tribunal to order discovery on the application of a party or on its own initiative.

³¹¹ Compare s 29(2)(b)(iii) of the Draft Bill with the International Arbitration Bill sch 1 article 17.

Draft Bill.³¹² The tribunal's power is more limited in that it can only be applied to a party.³¹³ It could also not be exercised by the tribunal *ex parte*, ie on the application of one party in the absence of the other, in view of the tribunal's duty to avoid unilateral communications with a party as part of its duty of impartiality.

3.162 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.³¹⁴ 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.

3.163 The power of the tribunal to order the taking of evidence on commission has been deleted.³¹⁵ One of the benefits of arbitration as opposed to litigation is that the tribunal can in principle hold hearings at any place for the taking of evidence and is not confined to a particular geographical area.³¹⁶

S 30 Power of tribunal to consider evidence

3.164 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.³¹⁷ S 30 makes it clear that there is no such duty, but several safeguards are imposed. The section is subject to other provisions of the Draft Bill, particularly the tribunal's general duty in s 28(1)(a) and (b). Additional restrictions regarding the reception of evidence can be imposed by the arbitration agreement.

3.165 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.³¹⁸ 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 30(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. One respondent recommended the addition of a further qualification to s 30(b) to require the consent of the parties as well.³¹⁹ This would however reduce s 30(b) to the status of a contract-in provision and, in the Commission's view, would be

³¹² See para 3.207 below.

³¹³ See the comments in the (1996) Saville Report para 201.

³¹⁴ See s 29(2)(b)(v) of the Draft Bill.

³¹⁵ See the current statute s 14(1)(a)(iv) and the previous Draft Bill s 28(1)(a)(iii).

³¹⁶ See the response of Adv PMM Lane SC para 10.

³¹⁷ See the discussion of this point in Butler & Finsen 219-222.

³¹⁸ See Butler & Finsen 243-245.

³¹⁹ See the response of the Law Society of South Africa para 15.

too restrictive.³²⁰

S 31 *Special powers of tribunal*

3.166 S 31(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 International Arbitration Bill. 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 parties so agree³²¹ 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.³²² Its use is not merely discretionary. Guidelines exist as to how the power should be exercised³²³ 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'".³²⁴

3.167 Currently the tribunal does not have the power to order security for costs unless this power is conferred on it by the parties.³²⁵ Following the position in the International Arbitration Bill,³²⁶ s 40(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, unless the parties otherwise agree. 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.³²⁷

³²⁰ One participant in the Durban workshop, Prof Ken Knight, who is an experienced construction industry arbitrator, informed the workshop that s 30(b) as it stands reflects a practice which he has followed as an arbitrator for many years.

³²¹ Compare the response of the Law Society of the Cape of Good Hope para 23.2, who suggest that this power should operate in all cases. This is contrary to the current situation and the internationally accepted position, typified by the Model Law.

³²² See Christie R H "Amiable Composition in French and English Law" (1992) 58 *Arbitration* 259 (hereafter referred to as "Christie (1992)") 264.

³²³ See Christie (1992) and Butler & Finsen 254-255.

³²⁴ See Christie (1992) 266.

³²⁵ See *Petz Products (Pty) Ltd v Commercial Electrical Contractors (Pty) Ltd* 1990 4 SA 196 (C) 203H-I; Butler & Finsen 129.

³²⁶ 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.

³²⁷ See Lew J D M "Introduction to the Work of the Arbitration Practice Sub-Committee" (1997) 63 *Arbitration* 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.

3.168 Legislation³²⁸ gives the courts an express discretionary power to order security for the costs of legal proceedings against juristic persons in certain circumstances. These circumstances are where the plaintiff is a juristic person and there are reasonable grounds for believing that the juristic person, or if it is being wound up, its liquidator, will be unable to pay the costs of the defendant if the defendant is ultimately successful in his or her defence. These powers can be exercised by the court in respect of arbitration proceedings by virtue of s 21(1)(a) of the current Arbitration Act. To remove any doubt as to the power of an arbitral tribunal to order security for costs in these circumstances, a new subsection (3), which has no equivalent in the previous Draft Bill, has been added.

3.169 Currently the tribunal does not have the power to call a witness in arbitral proceedings without the consent of the parties.³²⁹ Following the international trend,³³⁰ s 31(6) of the Draft Bill gives the tribunal the power to call a witness, including an expert, unless the parties otherwise agree. 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.³³¹

S 32 Manner of arriving at decisions where the tribunal consists of two or more arbitrators

3.170 This section of the Draft Bill corresponds to s 14(3) and (4) of the current statute. Where the parties have provided for a tribunal of only two members, all decisions of the tribunal must be made unanimously. Where the tribunal comprises more than two arbitrators, s 32(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,³³² s 32(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 32(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.³³³

³²⁸ See the Companies Act 61 of 1973 s 13 and the Close Corporations Act 69 of 1984 s 8. See also **Shepstone & Wylie v Geyser NO** 1998 3 SA 1036 (SCA) 1045I-1046B as to how the court should exercise its discretion under these provisions.

³²⁹ See Butler & Finsen 241.

³³⁰ Regarding expert witnesses see article 26 of the Model Law.

³³¹ S 37(1) of the English Act of 1996 also expressly provides for the appointment by the tribunal of an "assessor" to assist it in technical matters. The introduction of this power is apparently supported in a South African context by Adv PMM Lane SC in his response to Discussion Paper 83 para 16.3. However, among modern arbitration statutes it is only the English Act that provides for an assessor. It is clear that no such role is intended for an expert appointed by the tribunal under the 1998 ICC Rules. (See Derains Y & Schwartz E A **A Guide to the New ICC Rules of Arbitration** Kluwer The Hague 1998 259.) An arbitrator is not allowed to delegate his or her decision-making power (see **Mervis Brothers v Interior Acoustics** above 612F). The assessor, dogmatically, is either an arbitrator or an expert witness. The assessor is not a co-decision-maker on certain issues as in the criminal courts. The Project Committee was therefore not in favour of a statutory provision for the appointment of an assessor by the tribunal as it is likely to cause confusion in practice.

³³² See the 1998 LCIA Rules article 26.3.

³³³ Compare the reservations in the response of the Law Society of the Cape of Good Hope paras 15.4 and 24 regarding the chairperson having the power to decide where there is no majority. The respondent was not able to suggest a practical alternative.

3.171 S 32(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.³³⁴

S 33 Notice of proceedings to parties and right to representation

3.172 S 32(1) of the previous draft Bill followed 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.

3.173 The LCIA Rules for international arbitrations (applying from 1 January 1998) in article 19(1) qualify 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.

3.174 The English Arbitration Act of 1996 s 34(2)(h) goes still further. It gives the tribunal the power to decide "whether and to what extent there should be oral or written evidence or submissions". This discretionary power may be restricted by the parties' agreement and is subject to the tribunal's general duty.³³⁵ After careful consideration, it was decided to follow the English approach and s 33(1) of the Draft Bill has been worded accordingly. The provision applies to submissions on the merits and on procedural issues. The change, depriving a party of its right to an oral hearing (unless this right is excluded by the parties' agreement), has been made in the interests of promoting cost-effective arbitration. The right to a hearing can be used to bully the weaker party by threatening it with a substantial costs burden. In appropriate circumstances the tribunal will be able to prevent an expensive and protracted oral application on procedural issues. Where the amounts in dispute are small a documents-only arbitration may be the most effective way to deal with the dispute even if one party wants a hearing. S 33(1) should also not be seen as creating an "all or nothing" situation. The tribunal may decide that some aspects are best dealt with orally with other aspects being dealt with on documents. The discretionary power to direct whether or not there should be a hearing must be exercised by the tribunal after carefully considering its general duty under s 33.³³⁶ It is also up to the parties to decide whether they wish to curtail the tribunal's discretion by agreement.

3.175 S 33(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,³³⁷ subject to any restrictions in the arbitration agreement. As arbitration is not

³³⁴ 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.

³³⁵ See ss 34(1) and 33. The general duty in s 33 corresponds to that of the tribunal in s 28 of the Draft Bill.

³³⁶ See the discussion of s 34(2)(h) of the English Arbitration Act in Harris B, Planterose R & Tecks J *The Arbitration Act 1996: A Commentary* Blackwell Oxford 1996 (hereafter referred to as "Harris et al") 148.

³³⁷ See however s 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.

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.

3.176 At the Cape Town workshop the problem of unequal representation of the parties and the challenges which this poses for the tribunal was discussed at length.³³⁸ The possibility of providing for no representation in certain matters unless the tribunal agrees was discussed.³³⁹ This problem raises difficult policy issues. The amount in dispute is not necessarily an indication of the complexity of the dispute. Arbitral proceedings where there is unequal representation and the tribunal's response to that situation affect both parties' perceptions as to the fairness of the process. Ultimately a more satisfactory way to address the problem may be to investigate means of making appropriate representation more available, instead of imposing statutory curbs, which must of necessity be somewhat arbitrary, on parties' right to representation. In situations where arbitration is a more cost-effective way of resolving disputes than litigation, State assistance (in circumstances where it exists for civil litigation) or privately funded legal assistance through an organisation like the Legal Resources Centre could be provided to a party in arbitration proceedings. This is an issue which should be seriously considered by arbitration service providers with a view to facilitating appropriate representation.

3.177 The manner of giving notice of the hearing is regulated by s 61 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 36(3) of the Draft Bill.

3.178 One arbitration service provider, in its response to the Discussion Paper, recommended that the parties should be able to specify an arbitral institution in their arbitration agreement which should then be able to give notice of the hearing.³⁴⁰ The objection to this proposal as it stands is that it involves a delegation of the tribunal's powers of decision, which is not normally permitted. It also reduces the tribunal's control over the hearing, which could make it difficult for the tribunal to comply with its duty in s 28(b) of the Draft Bill. There is however no objection to the specified arbitral institution giving notice as directed by the tribunal on its behalf. The Commission therefore recommends the addition of a further subsection to deal with this point, reading as follows:

"(4) The written notice referred to in subsection (2) may be given by an arbitral institution as directed by the **tribunal**."

S 34 Confidentiality of arbitral proceedings

3.179 In recent years, the confidentiality of arbitral proceedings has received the attention of the English and the Australian courts. While the privacy of the arbitration hearing has been accepted in both jurisdictions, the basis of any duty of confidentiality and the extent of the

³³⁸ This discussion was initiated by Ms Doris Ndlovu.

³³⁹ See also the written response of the Department of Corporate Services, Provincial Administration Western Cape para 5 where it is proposed that no legal or technical representation should be allowed unless the tribunal decides that it will be in the interests of justice to do so. The proposal was made because of concern about the affordability of representation for many potential parties to an arbitration.

³⁴⁰ See the response of the Arbitration Forum para 3.8.

exceptions to any such duty have been the subject of conflicting decisions.³⁴¹ Logically there seems little point in accepting an obligation of privacy unless it is coupled to an obligation of confidentiality.³⁴² 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.³⁴³

3.180 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.³⁴⁴ The Commission concluded in its Report on International Arbitration³⁴⁵ that the development of the law regarding the extent of the exceptions is likely to be influenced by the Bill of Rights in the Constitution³⁴⁶ and that it seems neither possible nor desirable to attempt to formulate these exceptions comprehensively in legislation. In England, the drafters of the Arbitration Act of 1996 concluded that the further development of the law on confidentiality of arbitration proceedings is at this stage best left to the courts.³⁴⁷ This approach was also proposed in the Discussion Paper³⁴⁸ which preceded this report.

3.181 One of the respondents to the Discussion Paper however argued that given the importance traditionally attached to confidentiality as an advantage of arbitration, the uncertainty on this matter created by Australian decisions should be clarified by legislation. After reconsidering the matter, the Commission accepted this argument and recommends the inclusion of a new section, reading as follows:

"Confidentiality of arbitral proceedings"

³⁴¹ See especially Neill P "Confidentiality in Arbitration" (1996) Vol 62 no 3(S) *Arbitration* (hereafter 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.

³⁴² "There would be little point in restricting attendance at the hearing if it were open to anyone to make public, for example in the press, or on television, an account of what was said or done at the hearing" (Bernstein et al 194).

³⁴³ See *Ali Shipping Corp v Shipyard Trogir* [1998] 2 All ER 136, discussed by Fortier L Y "The Occasionally Unwarranted Assumption of Confidentiality (1999) 15 *Arbitration International* 131-9.

³⁴⁴ 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.

³⁴⁵ See para 2.287.

³⁴⁶ See s 14 regarding the right to privacy, including the right not to have the privacy of communications infringed and s 32 concerning the right of access to information held by the state and any information held by another person which is required for the protection of any rights. S 16 on freedom of expression, which includes the freedom to receive or impart information or ideas may also be relevant. Moreover, s 34 provides that everyone has the right "to have any dispute that can be resolved by the application of law decided in a fair **public** hearing before a court or where appropriate, another independent and impartial tribunal ..." (our emphasis). Although s 34 may appear to be opposed to the principles of the privacy of the arbitration hearing and the confidentiality of the result, s 34 is subject to s 36 ("Limitation of rights").

³⁴⁷ See the 1996 Saville Report paras 9-17 and 384 and the 1997 Saville Report para 44.

³⁴⁸ See Discussion Paper 83 paras 2.29-2.30.

34. (1) Unless the **parties** otherwise agree, the **arbitral proceedings** must be held in private.
³⁴⁹

(2) Unless the **parties** otherwise agree, where the **arbitral proceedings** are held in private, the **award** and all documents created for the arbitration which are not otherwise in the public domain must be kept confidential by the **parties** and **tribunal**, except to the extent that the disclosure of such documents may be required by reason of a legal duty or to protect or enforce a legal right."
³⁵⁰

3.182 S 34(2) attempts to cover recognized exceptions³⁵¹ in general terms while leaving sufficient flexibility for the development of other appropriate exceptions by the courts.

S 35 General duty of parties

3.183 The intended function of this new provision, based on s 40 of the English Arbitration Act of 1996, has been discussed above.³⁵² No adverse comments regarding this provision were made by respondents to the Discussion Paper.

S 36 Powers of tribunal in case of party's default

3.184 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.³⁵³ If the proceedings are terminated without an award, the claimant could institute fresh proceedings on the same claim in the future. S 36(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.

3.185 The equivalent provision in the previous Draft Bill was strongly criticised by one

³⁴⁹ Compare s 14 of the New Zealand Arbitration Act of 1996. S 14(1) provides that an arbitration agreement, unless otherwise agreed by the parties, is deemed to provide that the parties shall not disclose any information relating to the arbitral proceedings or the award. S 14(2) contains two exceptions, namely where disclosure is contemplated by the Act or is made to a professional or other adviser of any of the parties.

³⁵⁰ S 34(2) is based on the LCIA Rules (1998) article 30.

³⁵¹ See n 252 above and *Ali Shipping Corp v Shipyard Trogir* above at 147e-148h for these exceptions.

³⁵² See paras 2.14-2.15 above.

³⁵³ See Butler & Finsen 160. In *Wilton v Gatonby* 1994 4 SA 160 (W) an arbitrator erroneously purported to make an award in favour of the claimant by reason of the respondent's absence without considering evidence. See also Lontos S "Case Note: Arbitration in Limbo" March 2001 *De Rebus* 58-59, regarding *Sherwood Eleven Thirty Investment CC v Robridge Construction CC* (W) case 1885/2000 unreported 13-12-2000 where arbitral proceedings were effectively stalled by the failure of the claimant to deliver a statement of claim.

respondent on three main grounds, namely the absence of a general power in the event of a party's default, the ascendancy of party autonomy, and the perceived failure to deal with default by the respondent.³⁵⁴ The second of these criticisms calls for no response.

3.186 S 36(2) deals with a particular problem, based on the light of English experience.³⁵⁵ Where the claimant institutes arbitral proceedings to the point of having the tribunal appointed, but then does nothing to substantiate its claim, despite directions from the tribunal to do so, the respondent could be severely prejudiced. Until the claim has been formulated, the respondent cannot submit its defence and then lead evidence to obtain a default award in its favour. S 36(2) deals with this narrow situation.

3.187 S 36(3), on its wording, is clearly wide enough to cover default by both the claimant and respondent. Its wording is also clearer and wider than s 15(2) of the current statute, which, from the reported case law, has worked effectively in practice.³⁵⁶ The third criticism referred to above therefore also appears to be misplaced.

3.188 Another respondent suggested that the addition of a further subsection, providing that an unprosecuted reference should lapse automatically, should be investigated.³⁵⁷ It must be conceded that the provision in the current statute providing that the tribunal's jurisdiction should lapse if an award is not made within a certain period has been changed in the Draft Bill. The time for making the award will now run from the end of the hearing and not from the moment when the dispute is referred to arbitration.³⁵⁸ The suggestion under discussion can be contrasted with article 32 of the Model Law, which provides for termination of arbitral proceedings by order of the tribunal in certain limited circumstances. Mere lapse of time is not a reason for such order. The lapsing of the proceedings would also not affect the validity of the arbitration agreement. In the Commission's view, the Draft Bill contains adequate remedies if one party is concerned by the failure of the other to comply with its statutory duty in s 35. As s 36 is a contract-out provision, arbitral institutions concerned about dormant arbitration proceedings on their books can, if so minded, make contractual provision for the lapsing of an unprosecuted referral in their own rules.

S 37 *Summoning of witnesses*

3.189 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

³⁵⁴ See the response of the Law Society of the Cape of Good Hope para 26.

³⁵⁵ In *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation* [1981] AC 909 at 983 Lord Diplock held that the claimant and the respondent have a mutual obligation to cooperate to keep the arbitration procedure moving. In the light of this decision s 13A was inserted during 1990 in the English Arbitration Act of 1950 giving the arbitral tribunal the power to strike out the claimant's claim for want of prosecution. See the 1996 Saville Report para 206 and the corresponding provision in s 41(3) of the Arbitration Act of 1996.

³⁵⁶ See eg *Shippel v Morkel* 1977 1 SA 429 (C); *Van Zijl v Von Haebler* 1993 3 SA 654 (SE) 668D-F.

³⁵⁷ See the response of the Arbitration Forum, with reference to the position regarding a stale summons in the magistrate's court.

³⁵⁸ See s 42(1) of the Draft Bill and compare s 23 of the 1965 Act. The purpose of this provision is also different: it aims to discourage delay by the tribunal rather than by the parties.

non-parties.³⁵⁹ S 35 of the previous Draft Bill therefore proposed the re-enactment of s 16 of the current statute for this purpose, with one important change. It was proposed that a party may only subpoena a witness with the permission of the tribunal or the agreement of the other parties. This proposal is consistent with the International Arbitration Bill.³⁶⁰ The proposal represented 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.³⁶¹

3.190 Several respondents to the Discussion Paper³⁶² queried the practicality of this proposal in the context of domestic arbitration. It would be difficult for the tribunal to refuse its consent to a witness being subpoenaed unless it was sufficiently informed about the issues in dispute to be able to rule that any evidence the witness could give would be clearly irrelevant. It is unlikely that the tribunal would be able to make such a decision until a comparatively late stage of the preparatory stages before the hearing. Because of the impropriety of unilateral communications between the tribunal and one of the parties, it would also usually be necessary to convene a preliminary meeting with both parties for the tribunal to consider the application for its consent, resulting in delay and expense.

3.191 The Project Committee has therefore deleted this provision from the revised Draft Bill. There is still the danger of party control over the subpoenaing of witnesses being abused. The Project Committee proposes to counter this danger in two ways. First, the tribunal has the discretion to decide whether the witness, having been subpoenaed, should actually be allowed to testify.³⁶³ Secondly, it is proposed that the tribunal should have the power to make a special order for costs, on the application of the person summoned to appear, if the tribunal finds that his or her presence at the arbitral proceedings was unnecessary or on unreasonably short notice.³⁶⁴ The Commission recommends the acceptance of these revised proposals of the Project Committee.

3.192 One respondent suggested that only the High Court should have the power to issue a subpoena,³⁶⁵ whereas the current statute also confers the power on the clerk of the magistrate's court having jurisdiction at the seat of the arbitration. The Commission rejected this proposal as it would cause unnecessary expense and inconvenience where the arbitration is being held at a venue other than a seat of the High Court.

S 38 Recording of evidence

³⁵⁹ See eg article 27 of the Model Law.

³⁶⁰ See the International Arbitration Bill sch 1 article 27(1).

³⁶¹ See the Commission's Report on International Arbitration paras 2.214-2.119; the English Arbitration Act of 1996 s 44(4).

³⁶² See the responses of the Arbitration Forum para 3.10, Adv PMM Lane SC para 13 and the Law Society of the Cape of Good Hope para 27.

³⁶³ See s 29(2)(a)(iv) of the Draft Bill and para 3.154 above.

³⁶⁴ See s 37(7) of the Draft Bill.

³⁶⁵ See the response of the Law Society of the Cape of Good Hope para 27.3.

3.193 S 38 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.

3.194 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.

3.195 There is no right of appeal against a tribunal's award, unless the parties have provided for that 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 39 Statement of case for opinion of court or counsel during arbitral proceedings

3.196 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.³⁶⁶ The amendments are designed to prevent this abuse.

3.197 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 a lawyer if both parties agree or if the tribunal, on the application of a party, so directs. Where the parties to the arbitration agree that a question should be referred to the court, the court could still refuse to decide the question if the court regards it as being either insufficiently material or academic. If the tribunal incorrectly refuses an application, this may in appropriate circumstances constitute a ground for setting aside the award under s 52 of the Draft Bill. S 20(1) of the current Act permits the tribunal to refer a question of law "at any stage before making a final award". The express reference to a "final award" could be used as the basis for an argument that a question of law could also include one which has already been decided by the tribunal in an interim award. S 39(2) of the Draft Bill now makes it clear that the section can only be used to determine a question of law before it has been decided by the tribunal.

3.198 S 20(1) of the current Act and s 37(1) of the previous Draft Bill permitted the question of law to be referred to counsel as an alternative to the court. As the reference to counsel appeared unnecessarily restrictive,³⁶⁷ the term "counsel" has now been replaced in s 39(1) of the Draft Bill by "an appropriately qualified lawyer", as defined in s 39(3). An appropriately qualified lawyer means a lawyer who has practised or worked as a member of the academic staff at a university for a cumulative period of not less than seven years. On the current wording of s 39(3) this experience as a lawyer need not have been acquired in South Africa. The parties must agree, or in the absence of such agreement the tribunal after consultation with the parties must decide whether the candidate's working experience makes him or her suitable for appointment. It is ultimately for parliament to decide whether the words "in South

³⁶⁶ See Butler (1994 *CILSA*) 141.

³⁶⁷ Compare the response to Discussion Paper 83 of the Law Society of South Africa para 16 for the suggestion that the word "counsel" should be replaced by "practising attorney or practising advocate".

Africa" should be inserted in s 39(3) before the words "for a cumulative period", thereby excluding working experience obtained in a foreign country as a substitute for working experience as a lawyer in South Africa.

3.199 The purpose of s 39(5) is to provide a stricter test for referring the question of law to the court than is currently the case to prevent the abuse of s 39 as a delaying tactic.³⁶⁸ The equivalent provision of the previous Draft Bill (s 37(3)) only applied to an application to the tribunal to refer the question of law to the court. It is however clear that an application for the point of law to be referred to an appropriately qualified lawyer could be similarly abused.³⁶⁹ The wording of s 39(5) has therefore been extended and the grounds on which the application must be refused have been modified accordingly.

3.200 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.³⁷⁰ S 39(6) of the Draft Bill only allows parties to contract out of s 39 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 refer future disputes to arbitration. The purpose of s 39(6) of the Draft Bill is to prevent standard-form arbitration agreements providing for the exclusion of section 39. By requiring an agreement to exclude s 39 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 by their particular dispute.

3.201 One respondent to the Discussion Paper, the Arbitration Forum, advocated the inclusion in the Draft Bill of a right of appeal to the courts on a question of law, in addition to s 39.³⁷¹ There was no support for this proposal from other respondents or from other delegates at the regional workshops.³⁷² Although the possibility of an appeal against an arbitral tribunal's award on a question of law was rejected by the South African courts 85 years ago,³⁷³ such a possibility is provided for by the arbitration statutes of a small minority of jurisdictions.³⁷⁴

³⁶⁸ 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 (Pty) Ltd* 1978 2 SA 124 (T) 127H-128A; Butler & Finsen 209.

³⁶⁹ See the response to Discussion Paper 83 of the Arbitration Forum para 3.11.

³⁷⁰ See Butler & Finsen 210-211.

³⁷¹ See the response of the Arbitration Forum para 4.2. A delegate from the Arbitration Forum made a similar oral submission at the Cape Town workshop. Although the written representation was not limited to questions of law, it is assumed that this was the intention. The submission was made in direct response to a statement by the Project Committee in Discussion Paper 83 para 2.23 that a right of appeal to the courts on a question of law was unnecessary.

³⁷² The possible introduction of a right of appeal to the courts on a question of law was also expressly opposed by the Association of Arbitrators in para 15 of its response to Discussion Paper 83.

³⁷³ See *Dickenson & Brown v Fisher's Executors* 1915 AD 166 at 177-81, especially at 180, where the court specifically invited the legislature to create such a right if it was thought necessary.

³⁷⁴ See Needham M J "Appeal on a Point of Law Arising out of an Award" (1999) 65 *Arbitration* 205 (hereafter referred to as "Needham") 208 for a list of countries which make no such provision.

3.202 S 69 of the English Arbitration Act of 1996³⁷⁵ provides for a right of appeal on a question of law arising out of an award either with the agreement of all the other parties to the proceedings or with the leave of the court. S 69 can be excluded by the parties in their arbitration agreement. At least one standard-form contract in the English construction industry provides for a right of appeal, which makes the leave of the court unnecessary. In such instances the right of appeal is open to abuse as a delaying tactic.³⁷⁶ In other cases where the leave of the court is necessary, statutory conditions are imposed by s 69(3) as a safeguard against abuse. Although leave is only granted in a comparatively small number of cases the application to court for leave to appeal also results in considerable preparation, expense and delay. There can also be disputes as to what is a question of law. A party using an appeal to resist enforcement will argue that the question whether there was relevant evidential material to support a finding of fact is a question of law.³⁷⁷

3.203 The Law Development Commission of Zimbabwe recommended that a right of appeal to the court of law should be available in a domestic arbitration but only if the parties so agree.³⁷⁸ This recommendation was rejected by the Zimbabwean legislature, with the result there is no right of appeal against an arbitral award to the courts under Zimbabwean law. However, the recommendation has been adopted in Kenya and Uganda.³⁷⁹ As stated above, one of the dangers of a contract-in right of appeal is its inclusion in standard-form contracts in circumstances where, objectively speaking, the amount in dispute does not justify the costs of an appeal to the courts.

3.204 The Arbitration Forum however advocates that the right of appeal should not depend on the agreement of the parties but the leave of the court. On the one hand it sees arbitration as relieving the burden on the courts in an under-resourced legal system. On the other hand, the availability of a right of appeal to the courts, in the view of the Arbitration Forum, would elevate arbitration as part of the adjudicative processes of the country.³⁸⁰ English experience has shown that applications for leave to appeal involve substantial preparation and costs and can be abused to delay enforcement of the award. The Arbitration Forum's view of arbitration as part of the adjudicative process and as a way of speeding up the incorporation of alternative dispute resolution procedures in the ordinary court processes is contrary to one of the underlying assumptions of the Draft Bill. Arbitration is a consensual process subject to such safeguards as are necessary in the public interest (see s 2(b) of the Draft Bill). A right of

³⁷⁵ The New Zealand Arbitration Act 99 of 1996 sch 2 clause 5 contains a similar provision which applies to domestic arbitrations unless the parties otherwise agree.

³⁷⁶ See Needham 206-207.

³⁷⁷ See Needham 207. See also *Betha v BTR Sarmcol, a Division of BTR Dunlop Ltd* 1998 3 SA 349 (SCA) 357 where it is stated that the interpretation to be given to a document such as a letter is not a question of fact but one of law.

³⁷⁸ Law Development Commission of Zimbabwe *Final Report on Arbitration* No 31 January 1994 10-12 and 26-28.

³⁷⁹ See the Kenyan Arbitration Act 4 of 1995 s 39 and the Ugandan Arbitration and Conciliation Act 7 of 2000 s 39.

³⁸⁰ See para 4.2 of its response. Private arbitration does envisage the possibility of an appeal to another arbitral tribunal if the parties so agree (See s 48 of the Draft Bill). In practice such appeals can be highly expensive because of the fees of the appeal tribunal. Implicit in the Arbitration Forum's arguments is a desire by the parties to avoid the courts in the first instance but to still have a right of appeal to the courts where they are dissatisfied with the result achieved by their agreed alternative to litigation.

appeal to the courts on the merits is not seen as one of the necessary safeguards in the overwhelming majority of jurisdictions.

S 40 General powers of court

3.205 S 40 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.

3.206 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 omitted³⁸¹ and the power to order security for costs, in line with the International Arbitration Bill (sch 1 article 9(2)(b)), has been expressly excluded.³⁸² 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.

3.207 S 40(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 Piller³⁸³ order in arbitration proceedings.³⁸⁴ This power is subject to the safeguards imposed by s 40(2) of the Draft Bill referred to below and must be compared with the tribunal's power in s 29(2)(b)(iv), discussed above.³⁸⁵ There is no equivalent provision in the International Arbitration Bill.

3.208 S 38(1)(d) of the previous Draft Bill empowered the court to appoint a receiver. S 38(1)(d) repeats s 21(1)(i) of the Arbitration Act of 1965. S 21(1)(i) was derived from s 12(6)(g) of the English Arbitration Act of 1950. A similar provision is retained in s 44(2)(e) of the 1996 Act. An English court may appoint a receiver to take possession of and to deal with property pending the outcome of a dispute, where the court is of the view that the property should not be in the possession of either party to the dispute until the dispute is resolved. In practice, the appointment of receivers by the English courts in the context of arbitration has been limited to partnership disputes.³⁸⁶ The South African courts have a similar power in the context of the

³⁸¹ 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.

³⁸² This power was deleted as a result of the highly critical response to the decision of the House of Lords to order security for costs in an ICC arbitration in *Copeé-Lavalin SA/NV v Ken-Ren Chemicals and Fertilizers Ltd (in liq)* [1994] 2 All ER 449. See further the Commission's Report on International Arbitration para 2.152. Compare however *Waste-Tech (Pty) Ltd v Van Zyl and Glanville NNO* 2000 2 SA 400 (SE) where an application to court under s 21(1)(a) of the Arbitration Act 42 of 1965 for security for costs in arbitration proceedings was rejected.

³⁸³ 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).

³⁸⁴ See the 1996 Saville Report para 21.4; Harris et al 179.

³⁸⁵ See para 3.161 above.

³⁸⁶ See Mustill & Boyd 330-1; Harris et al 180.

dissolution of a partnership, except that the person appointed is termed a liquidator.³⁸⁷ "Liquidator" has therefore been substituted for "receiver" in s 40(1)(d) of the Draft Bill. Because of the consensual basis of arbitration, if the partners wish the power to appoint a liquidator to be exercised by an arbitral tribunal, they should make appropriate provision in their arbitration agreement.³⁸⁸

3.209 S 40(2) imposes certain conditions before the court can grant an order under s 40(1). This provision is based on the International Arbitration Bill 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.³⁸⁹

3.210 One respondent suggested that there was no need for the court's power to be specifically circumscribed and that s 40 should contain a catch-all power to allow the court to make any order necessary for the ultimate attainment of justice between the parties.³⁹⁰ This proposal must be rejected. It is clearly contrary to one of the aims of the new domestic arbitration statute, following the Model Law and the English Arbitration Act 1996, namely balanced powers for the court, and the prevention of the abuse of these powers as a delaying tactic.³⁹¹

S 41 Offences

3.211 S 41 of the Draft Bill re-enacts s 22 of the current statute with minor amendments of a technical nature.

CHAPTER 6

The award

S 42 Time for making award

3.212 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.³⁹² 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.³⁹³ In practice, the tribunal can be

³⁸⁷ See *Robson v Theron* 1978 1 SA 841 (A); Bamford B R *The Law of Partnerships and Voluntary Associations in South Africa* 3 ed Juta Cape Town 1982 (hereafter referred to as "Bamford")105;) Henning J J & Delpont H J "Partnerships" (1997) Vol 19 1st Reissue **LAWSA** Butterworths Durban para 327.

³⁸⁸ See Bamford 105.

³⁸⁹ For a detailed discussion, see the Commission's Report on International Arbitration paras 2.140-2.158.

³⁹⁰ See the response of the Law Society of the Cape of Good Hope para 29.2.

³⁹¹ See further para 2.17 above.

³⁹² See Butler (1994 **CILSA**) 154-156 for a detailed discussion of s 23 and its origins.

³⁹³ See *Van Zijl v Von Haebler* above 664F.

prevented from making the award before the expiry of the time limit by delays which are entirely the responsibility of the parties. S 42 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 on 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 29(2)(b)(v) of the Draft Bill has no application, as it only applies to steps to be taken by the parties.

3.213 S 42 of the Draft Bill contains a number of technical refinements to the version with the Discussion Paper. First, the time limit of two months originally proposed for making the award could be entirely inappropriate in a simple arbitration and defeat the object of the section to discourage delay on the part of the tribunal in making the award.³⁹⁴ Therefore, the tribunal is now required to make the award as soon as is reasonably possible, with a 60-day³⁹⁵ time-limit being retained as the maximum period. Secondly, it is no longer necessary to provide that an extension of the period by the parties must be agreed in writing, as this is dealt with by s 6(1). Thirdly, when the parties want to fix a time for making the award, it has now been made clear that this need not be done in the original arbitration agreement, but can also be done in any subsequent agreement in writing. This could include a written agreement to use certain institutional rules, which have a time limit for making the award.³⁹⁶

S 43 Award to be in writing

3.214 As under the current statute, an award is required to be in writing and signed by all the members of the tribunal. S 43(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 43(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.

3.215 Under the existing law, the tribunal is not required to furnish reasons for the award.³⁹⁷ Following the internationally accepted standard and the position adopted in the International Arbitration Bill,³⁹⁸ the award is now required to state the reasons on which it is based, unless the parties agree that no reasons need be given or the award is an award on agreed terms.

S 44 Award on agreed terms

3.216 At least three respondents to the Discussion Paper³⁹⁹ reacted favourably to a tentative suggestion by the Project Committee⁴⁰⁰ as to the desirability of the incorporation in the Draft

³⁹⁴ See the response of the Association of Arbitrators to Discussion Paper 83 para 12.

³⁹⁵ In view of the insertion of s 1(2) dealing with how a period of days is calculated, the two-month period in the previous Draft Bill is now expressed in days.

³⁹⁶ This addresses the concern raised by Adv PMM Lane SC in his response to Discussion Paper 83 para 14.

³⁹⁷ See **Schoch NO v Bhettay** 1974 4 SA 860 (A) 865D-E; Butler (1994) **CILSA** 157-158.

³⁹⁸ See the International Arbitration Bill sch 1 article 31(2).

³⁹⁹ See the responses of the Arbitration Forum para 3.5; the Association of Arbitrators para 9 and Philip Loots para 4.

Bill of an express provision regarding an award on agreed terms, equivalent to article 30 of the Model Law.⁴⁰¹ The inclusion of this provision also facilitates the enforcement of a settlement agreement regarding a dispute subject to an arbitration agreement where the settlement is achieved by mediation before the appointment of the tribunal.⁴⁰²

3.217 The power to make an award on agreed terms may only be exercised at the request of the parties. The tribunal must also have the discretion to refuse the application if it is of the view that the provision is being abused, for example to obtain an award where the settlement is a collusive attempt to deceive a third party, like an insurer or the fiscus.⁴⁰³

3.218 The award may only be made an order of court if it is otherwise within the competence of the court to grant such an order. The court could therefore not grant an order under this section, read with section 53, enforcing a settlement agreement in respect of a matter which is not arbitrable. A magistrate's court will have jurisdiction to grant the order if it otherwise has jurisdiction.⁴⁰⁴

3.219 The suggested provision reads:

"Award on agreed terms

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

(2) An **award** on agreed terms must be made in accordance with the provisions of section 43(1) and (2) and must state that it is an **award**.

(3) An **award** referred to in subsection (2) has the same status and effect as any other **award** on the merits of the dispute and may be made an order of court under section 53 if it is otherwise within the competence of the court to grant such order."

S 45 Delivery of award

3.220 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".⁴⁰⁵ 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.⁴⁰⁶

⁴⁰⁰ See Discussion Paper 83 para 3.50.

⁴⁰¹ See also the English Arbitration Act 1996 s 51.

⁴⁰² See s 16 of the Draft Bill and para 3.100 above.

⁴⁰³ See the Commission's Report on International Arbitration para 2.233; Holtzmann H M & Neuhaus J E *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* Kluwer Deventer 1989 (hereafter referred to as "Holtzmann & Neuhaus") 823-5.

⁴⁰⁴ See s 53(6).

⁴⁰⁵ See Butler (1994 *CILSA*) 158-160, citing *Hansard House of Assembly Debates* 16 March 1965 3059.

⁴⁰⁶ See ss 32(2) and 33(2) of the Arbitration Act 42 of 1965.

3.221 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 45 of the Draft Bill therefore replaces s 25 of the current statute with a new provision on 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 54(4) for payment of its fees. The parties may agree how the award is to be delivered. Failing agreement the tribunal must deliver the award by serving copies on the parties in the manner provided by s 61 of the Draft Bill. Service must be effected without delay after the award is made, subject however to the tribunal's lien.

3.222 In the Discussion Paper,⁴⁰⁷ the Project Committee drew attention to the distinction between the making of an award and its delivery and invited comments on the need to preserve this distinction. 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 45(b)). However the tribunal has a lien on the award to secure the payment of its fees (s 54(4)), which takes priority over its duty to deliver the award (s 45). One respondent suggested that the date on which the award is delivered should be used for all purposes.⁴⁰⁸ However, even where a tribunal has a lien on its award and is not obliged to deliver it, this should not affect its obligation to make the award by compiling and signing it within the time referred to in s 42. This is because the tribunal's entitlement to a lien could be lost at any stage by a party or parties paying the fees or making the required deposit. The distinction between making and delivering the award has therefore been retained.

S 46 Interim awards and provisional orders

3.223 An interim award deals with only some of the substantive issues in dispute but is final on the issues it decides.⁴⁰⁹ 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. Interim awards can also play an important role in dealing expeditiously with part of a disputed claim referred to arbitration when it appears to the tribunal that the respondent has no defence to that part of the claim.⁴¹⁰ S 46(1)(a) of the Draft Bill therefore retains the provision on interim awards (s 26) of the current statute. Consistent with the principle of party autonomy, this power is available under both the current Act and the Draft Bill on a contract-out basis.

3.224 The English Arbitration Act of 1996 now also makes provision for "provisional awards",

⁴⁰⁷ Discussion Paper 83 para 3.133.

⁴⁰⁸ See the response of the Association of Arbitrators para 14. This proposal appears somewhat difficult to reconcile with the Association's proposal in para 12 of its response regarding the time for making the award.

⁴⁰⁹ See Butler & Finsen 175 citing s 28 of the Arbitration Act 42 of 1965 read with the definition of award in s 1. S 47 of the English Arbitration Act 1996 provides for the possibility of a tribunal making more than one award at different times and on different aspects of the dispute. The use of the term "interim award" was however deliberately avoided because it was thought to be confusing, as it suggests a temporary decision. See the 1996 Saville Report para 233; Sutton et al 253.

⁴¹⁰ See *Hayter v Nelson* [1990] 2 Lloyd's Rep 265 268-269 per Saville J; *Halki Shipping Corp v Sopex Oils Ltd* [1997] above 838j; *Halki Shipping Corp v Sopex Oils Ltd* [1998] above 41c per Henry LJ 50h per Swinton Thomas LJ.

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".⁴¹¹ It must however be noted that the term "provisional award" is only used in the heading of s 39 of the English Act, whereas the body of the section uses the expression "provisional order".⁴¹² This raises doubt as to the extent that provisions in the Act dealing with awards also apply to such orders.⁴¹³ A similar power was included in s 43(2)-(4) of the previous Draft Bill.

3.225 In terms of the previous Draft Bill following s 39 of the English Act, 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 general duties in s 27 of the previous 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".⁴¹⁴ There is no equivalent provision in the Model Law. The Commission invited comment on this subject.

3.226 Only one response was received on this point.⁴¹⁵ The respondent apparently misunderstood s 43 of the previous Draft Bill and read it as providing for both interim and provisional awards on a contract-in basis. As stated above, the current statute provides for the power to make interim awards on a contract-out basis. Provisional awards are clearly useful in certain circumstances, but are at odds with the principle that an arbitral award is usually final on the issues it decides and may not be revisited by the tribunal. The respondent however proposed that the power to make provisional awards should also be available on a contract-out basis.

3.227 While supporting the concept of a "provisional award" in the sense explained above, the Project Committee proposed a number of modifications to the section on provisional awards in the previous Draft Bill. These proposals have been accepted by the Commission. First, the term "provisional award" has been replaced by the term "provisional order" to stress that the provisions of the Draft Bill applying to awards,⁴¹⁶ including an interim award, do not apply to a provisional order. Express provision is made for a provisional order to be enforced by the court, including a magistrate's court.⁴¹⁷ Finally, especially because of the utility of the power in appropriate circumstances to counter the abuse of the arbitral process by the respondent as a delaying tactic, the power is now available to the tribunal unless the parties otherwise agree, instead of on a contract-in basis.

⁴¹¹ See the 1996 Saville Report para 202.

⁴¹² See Sutton et al 257 n 48.

⁴¹³ See Harris et al 164, who are of the opinion that as the provisional order is an order and not an award, it is not necessary for it to comply with the formalities of s 52 for the award, including that of giving reasons. Compare however Menzies I W "Award or Order?" (1999) 65 *Arbitration* 107 at 108.

⁴¹⁴ See the 1996 Saville Report para 203.

⁴¹⁵ See the response of the Law Society of the Cape of Good Hope para 30.

⁴¹⁶ See eg s 43(3) which requires an award to be reasoned, s 48 regarding the binding effect of an award, s 50 dealing with the power of the tribunal to correct errors in an award subject to certain conditions and time limits and s 52 regarding the setting aside of an award by the court.

⁴¹⁷ See s 46(2)(b) and (3).

S 47 Specific performance

3.228 This provision repeats s 27 of the current statute, with two minor modifications. First, the wording has been modified to make it clear that any written agreement⁴¹⁸ to exclude the tribunal's power to grant specific performance will suffice. The exclusion of the power does not necessarily have to be contained in the original arbitration agreement.

3.229 S 27 was recently considered in **Mervis Brothers v Interior Acoustics**.⁴¹⁹ The court accepted that the agreement to exclude the section does not have to be express. A submission to arbitration which only requires the tribunal to determine the amount owing excludes by implication the power to order specific performance of certain work.⁴²⁰ The court also stated that before exercising the power, the tribunal should at least signal the change in direction to the parties and "procure their consent thereto so that all issues thus raised can be fully canvassed".⁴²¹ The court's reference to the parties' consent must be understood against the background of its acceptance of an implied agreement to exclude the power. In the absence of such agreement, it is in any event strongly arguable that the tribunal would breach its duty to act fairly under s 28(1)(a) of the Draft Bill, if the tribunal were to exercise this power on its own initiative without first asking the parties for their views. In the light of these considerations the second modification is to provide expressly that the tribunal may only exercise this power on the application of a party.

S 48 Award to be binding

3.230 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.⁴²² S 48 of the Draft Bill makes it clear that the parties by agreement can only create a right of appeal to another arbitral tribunal. S 48 is however subject to a court's power to review an award under s 52 of the Draft Bill.

3.231 The request by one respondent that the Draft Bill be amended to include the possibility of a tribunal's award being taken on appeal to the courts is discussed elsewhere in this report.⁴²³

S 49 Interest on amount awarded

3.232 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

⁴¹⁸ See s 6(1) of the Draft Bill.

⁴¹⁹ 1999 3 SA 607 (W).

⁴²⁰ At 612B and 614G-H.

⁴²¹ At 612G.

⁴²² See **Goldschmidt v Folb** 1974 1 SA 576 (T) 576G-577D and **Blaas v Athanassiou** 1991 1 SA 723 (W) 724C-I.

⁴²³ See para 2.23 and the discussion of s 39 at paras 3.201-3.204 above.

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. Two potential problems were identified in the Discussion Paper regarding this section.

3.233 The first concerned the interaction between this provision and s 2A of the Prescribed Rate of Interest Act 55 of 1975. S 2A(2)(b) provides that unless the parties otherwise agree an unliquidated claim, once determined by an arbitrator, bears interest from the date the claimant commences arbitral proceedings.⁴²⁴ S 2A is therefore subject to any agreement between the parties on the subject of interest. Where it does apply, the special provision in s 2A(2)(b) relating to interest on unliquidated claims will override the general provision on interest in the arbitration statute.⁴²⁵ No problems regarding the interaction of the two provisions are therefore anticipated. In the context of the arbitration of contractual claims it must also be noted that s 49 of the Draft Bill will only apply where the contract contains no provision on interest and the tribunal is not asked to deal with interest in its award.

3.234 The second problem is the meaning of the term "date of the award". As pointed out above,⁴²⁶ there is a distinction between the making of the award (see ss 42 and 43) and its delivery to the parties (s 45). Two respondents submitted that interest should run under s 49 from the date the award is made rather than the date of its delivery.⁴²⁷ However, it must be borne in mind that in terms of the Draft Bill the tribunal must make its award as soon as is reasonably possible (s 42(1)) and deliver it forthwith unless it is entitled to withhold delivery by virtue of its lien (s 45). In practice the most likely cause of a delay between the making of the award and its delivery will be the tribunal's reliance on its lien. The claimant can obtain interest on the award as soon as it has removed the basis for the tribunal relying on its lien.⁴²⁸ The wording of s 49 has therefore been amplified to specify that interest runs from the date of the delivery of the award.

S 50 Power of tribunal to correct errors in award and make additional award

3.235 S 50 deals with three situations. The tribunal is first given the power to correct certain errors in its award, so that the award correctly reflects its original intention. Secondly it may correct ambiguities in the award and thirdly it may make an additional award in respect of a claim presented in the arbitral proceedings but omitted from the award. This additional award must be distinguished from a further or fresh award under s 51, discussed below. S 30 of the existing statute only deals with the first situation. Article 33 of the Model Law permits all three possibilities, but the second (clarification) is only available on a contract-in basis. S 47 of the previous Draft Bill provided for all three possibilities on a contract-out basis, but only the first

⁴²⁴ See the further qualifications in s 2A(2)(a) as to when interest starts to run.

⁴²⁵ The Project Committee also decided not to recommend the repetition of s 2A(2)(b) in the Draft Bill for the convenience of lay arbitrators, as there are other provisions in statutes which also apply to arbitral proceedings which it is not proposed to repeat (eg s 13(1)(f) of the Prescription Act 68 of 1969).

⁴²⁶ See para 3.222 above.

⁴²⁷ See the responses of the Arbitration Forum para 3.12 and the Law Society of the Cape of Good Hope para 31.

⁴²⁸ See the response of the Association of Arbitrators para 14. A possible counter-argument relates to the situation where the tribunal's claim for fees in the view of the claimant is excessive. The claimant could still however pay the fees as claimed to obtain the award, but then take the fees on taxation. See para 3.261 below on the effect of s 54(1).

two could be exercised by the tribunal on its own initiative. Having considered submissions by respondents to the Discussion Paper,⁴²⁹ the Project Committee decided that s 47 was unnecessarily complex. It is therefore proposed that unless the parties otherwise agree, all three possibilities should be available, either on the application of a party or on the tribunal's own initiative. However, before exercising any of these powers, the tribunal must first give the parties a reasonable opportunity to make representations. This is also the approach in s 57 of the English Arbitration Act 1996. Certain aspects of the section are now discussed in more detail.

3.236 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.⁴³⁰ S 50(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.⁴³¹ This power to correct genuine ambiguities is not intended to open up an avenue for disguised appeals on the merits. The power under s 50(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.

3.237 S 50(1)(b) gives the tribunal, on the application of a party or on its own initiative, 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 52(4) of the Draft Bill.

3.238 One respondent to the Discussion Paper was in favour of this power of correction being extended to permit a tribunal to correct an obvious error of law or fact in its award, subject to certain safeguards to prevent abuse.⁴³² This proposal is completely out of line with international standards and undermines the finality of an arbitral award. Moreover as s 50 is a contract-out provision, there is nothing to prevent an arbitral institution wishing to provide for a wider power of correction to incorporate such a provision in its own rules.

S 51 Remittal of award by the parties

3.239 The Draft Bill drastically curtails the power of the court to remit an award to the tribunal compared to the position under s 32 of the current statute.⁴³³ The court's power to remit an arbitral award is now contained in s 52(4) of the Draft Bill. S 51(1)-(3) retain the provisions of s 32(1) 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

⁴²⁹ See eg the response of the Law Society of the Cape of Good Hope para 32.

⁴³⁰ See Butler (1994 *CILSA*) 160-161.

⁴³¹ 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.

⁴³² See the response of the Arbitration Forum para 3.13.

⁴³³ See the commentary on s 52(4) of the Draft Bill in para 3.250 below.

application for the enforcement of the award.

3.240 S 50(1)(b), discussed above, permits the tribunal to make an "additional" award in respect of a claim presented in the arbitral proceedings but omitted from the award, either on application of a party or on its own initiative. S 50(1) envisages what is in effect a joint written application by the parties to the tribunal for a further award or a fresh award. A fresh award differs from an additional or further award, in that it takes the place of the previous award. One possible example of a fresh award is where new evidence has been discovered which was not available during the arbitration, is probably true and if true would have had a material effect on the outcome of the arbitration.⁴³⁴ A further or additional award exists in addition to a previous award, which retains its efficacy. A "further" award in the context of s 51 is a wider concept than an additional award under s 50, in that it could relate to a claim covered by the arbitration agreement which was *not* presented in the arbitration.

3.241 One respondent is of the view that s 51 in its current form is unworkable in that "it is inconceivable that any party who would be prejudiced by reconsideration of the award, would lend its agreement to remittal of the award".⁴³⁵ The Commission concedes that extensive use of s 51 is unlikely. However, a party may agree where the potential prejudice is seen as the lesser of two evils, for example where the award is, in terms of the agreed arbitration rules, subject to a right of appeal to another arbitral tribunal consisting of three arbitrators. Such appeals are notoriously expensive, bearing in mind the professional fees of the appellate tribunal. In these circumstances remittal may seem an attractive option in an attempt to avoid an appeal. S 51 may also be seen as a way of avoiding the costs and delays of a contested court application relating to the award.⁴³⁶ The same respondent also suggested that remittal should only be allowed on application to the tribunal, which would then have to decide on the most appropriate forum.⁴³⁷ This alternative was considered but rejected by the Project Committee, because it would once again be open to abuse by undermining the finality of the award and its prompt enforcement.

3.242 Section 51(4), regarding formal requirements for and delivery of the award, has been added to the current provisions in s 32 partly to facilitate the operation of sections 52(3) and 53(4) of the Draft Bill, regarding periods for which certain grounds for attacking awards or resisting enforcement of awards are available.

S 52 Application for setting aside as exclusive recourse against award

3.243 The Commission recommends 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

⁴³⁴ See **Seton Co v Silveroak Industries Ltd** 2000 2 SA 215 (T) 229I, in the context of a claim in an arbitration which was allegedly tainted by fraud. Under the current Act the court can remit an award to the tribunal under s 33(2) where additional evidence has been discovered after the publication of the award. See **Benjamin v Sobac South African Building and Construction (Pty) Ltd** 1989 4 SA 940 (C) 963 applying the guidelines formulated in **Colman v Dunbar** 1933 AD 141 at 161-162; Butler & Finsen 287-288. The **Benjamin** case will have to be reconsidered if the more restricted role for remittal envisaged by s 52(4) of the Draft Bill is accepted by the legislature.

⁴³⁵ See the response of the Law Society of the Cape of Good Hope to Discussion Paper 83 para 33.2.

⁴³⁶ Eg in circumstances where it is alleged that the award was tainted by fraud but that the evidence of fraud was unknown to the tribunal and the unsuccessful party until after the award. See n 342 above.

⁴³⁷ See the response of the Law Society of the Cape of Good Hope para 33.3-33.4.

court (ss 32 and 33) should be replaced by new provisions based on the Model Law. Following the order of the Model Law, s 52 of the Draft Bill deals with setting aside, and s 53 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.

3.244 The main reason for the Commission's recommendation is the following problem with the 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 six 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.⁴³⁸ 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.

3.245 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.⁴³⁹ (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.

3.246 On the other hand, as part of the price paid for court support for 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.⁴⁴⁰

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

⁴³⁸ See Butler & Finsen 274.

⁴³⁹ See the discussion in *Van Zijl v Von Haebler* above 658J-659J.

⁴⁴⁰ See the UNCITRAL Commission Report A/40/17 of 21/08/1985 para 274 in Holtzmann & Neuhaus 997.

give effect to the New York Convention.⁴⁴¹ 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.

3.248 S 52 of the Draft Bill follows article 34 of the Model Law, as adapted for the International Arbitration Bill, with certain stylistic changes, which attempt to make it more compatible with the language of the Draft Bill as a whole. In substance, it does not differ appreciably from the grounds for setting aside available under s 33 of the 1965 Act,⁴⁴² but furthers the goal of parallelism between the domestic and international arbitration statute.⁴⁴³

3.249 The proposals received general support at the regional workshops,⁴⁴⁴ the main discussion point being the period within which an application for setting aside an award should be brought. The period for bringing applications for setting aside, except in the case of fraud or corruption,⁴⁴⁵ was initially shortened from three months under the Model Law to six weeks of delivery of the award following the current statute, as being more appropriate for domestic arbitration. In the light of the discussion at the regional workshops this period has now been shortened to 30 days.⁴⁴⁶ Where an award has been corrected or substituted under s 50 or 51, the 30 days runs from delivery of the corrected or substituted award by virtue of ss 50(5) and 51(4).⁴⁴⁷

3.250 S 52(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.⁴⁴⁸ The English courts extended this concept to include "procedural mishaps" which would not have justified setting aside.⁴⁴⁹ 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.⁴⁵⁰ 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

⁴⁴¹ See ss 17-22 of the International Arbitration Bill.

⁴⁴² See the Commission's Report on International Arbitration para 2.261.

⁴⁴³ See para 2.24 above.

⁴⁴⁴ The provision was also specifically supported by the Law Society of the Cape of Good Hope in its written response to Discussion Paper 83 para 34.

⁴⁴⁵ This distinction in the case of fraud and corruption is in line with the approach in the International Arbitration Bill sch 1 article 34(3): See para 2.264 of the Commission's Report on International Commercial Arbitration. Compare the written response of Brian Pringrove, who favours a six-week time limit from the delivery of the award for all applications for setting aside.

⁴⁴⁶ See s 52(3) of the Draft Bill and compare s 1(3) as to how this period is calculated. The Association of Arbitrators in para 16 of its response supported the retention of the six-week period. This was however against the trend at the regional workshops.

⁴⁴⁷ This is consistent with the approach in the International Arbitration Bill sch 1 article 34(3).

⁴⁴⁸ See Butler & Finsen 287-289.

⁴⁴⁹ See eg *King v Thomas McKenna Ltd* [1991] 1 All ER 653 (CA); Butler & Finsen 289.

⁴⁵⁰ See the 1996 Saville Report paras 281 and 282.

serious irregularity that would justify setting aside.

3.251 S 52(5) adopts the partial definition of "public policy" inserted in the proposed South African version of the Model Law. The wording of the version in the Draft Bill has been simplified, with only one apparent change to the substance. The reference to public policy is no longer qualified as being limited to the public policy of South Africa.⁴⁵¹ This qualification in article 34(2)(b) of the Model Law was repeated from the New York Convention and chosen in preference to international public policy.⁴⁵² As the Draft Bill will have limited application to international arbitration,⁴⁵³ this qualification appears unnecessary.

3.252 Recent court decisions on public policy stress that the concept should be interpreted narrowly for purposes of setting aside an award or refusing enforcement in view of the firmly established principle of the finality of arbitral awards.⁴⁵⁴ In a case concerned with a domestic arbitration, **Zimbabwe Electricity Supply Authority v Maposa**⁴⁵⁵ Gubbay CJ stated:

"In my opinion the approach to be adopted is to construe the public policy defence, as being applicable to either a foreign or a domestic award, restrictively in order to preserve and recognise the basic objective of finality in all arbitrations and to hold such defence applicable only if some fundamental principle of morality or justice is violated." ⁴⁵⁶

S 53 Enforcement of award by court and refusal of enforcement

3.253 The more fundamental changes to the existing law recommended by the Commission are to be found in s 53 of the Draft Bill, which will replace s 31 of the 1965 Act. S 53(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 53(3) retains a useful power derived from s 31(2) of the current Act, enabling the court to correct minor and obvious errors of a technical nature in the award, before ordering enforcement.

3.254 S 53(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

⁴⁵¹ See s 52(2)(b)(ii) and (5).

⁴⁵² See Holtzmann & Neuhaus 919.

⁴⁵³ See paras 3.24 and 3.27 above.

⁴⁵⁴ See **Seton Co v Silveroak Industries Ltd** above 229C-D; **Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd** [1998] 2 Lloyd's Rep 111 (QB), [1999] 2 Lloyd's Rep 65 (CA). The **Westacre** judgments have in fact been criticised for giving too much weight to the public policy in favour of sustaining international arbitration awards and too little to the public policy of discouraging international commercial corruption. See Rogers A & Kaley M "The Impact of Public Policy in International Commercial Arbitration" (1999) 65 **Arbitration** 326-334.

⁴⁵⁵ Supreme Court of Zimbabwe Case No SC 114/99 21-12-1999 (unreported) 21.

⁴⁵⁶ The court also concluded at 23-24 that an award will not be contrary to public policy merely because the reasoning or conclusions of the arbitrator are wrong in fact or in law. "Where however the reasoning or conclusion in an award goes beyond mere faultiness or incorrectness and constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or accepted moral standards that a sensible and fair minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award, then it would be contrary to public policy to uphold it."

domestic arbitration.⁴⁵⁷ 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.

3.255 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,⁴⁵⁸ by distinguishing between the less serious grounds for setting aside, which a party must prove⁴⁵⁹ 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.⁴⁶⁰ In the context of the Draft Bill, s 49(5) gives a partial definition of public policy for this purpose, to include serious procedural irregularities, 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. There was no adverse comment on this proposal at the regional workshops and it was supported by one respondent as a very practical expedient for discouraging dilatory tactics.⁴⁶¹

3.256 Unlike article 36(1)(a)(v) of the Model Law, s 53(4) of the Draft Bill presently makes no reference to the situation where an award has already been set aside under s 52. The reason is that in a domestic context,⁴⁶² once the award has been set aside there is no award to enforce.

3.257 Section 53(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.

3.258 One matter of major concern at the regional workshops was the need for an expedited enforcement procedure. S 31(1) of the current statute refers to the enforcement of the award on application "to a court of competent jurisdiction". The qualification of the word "court" in this way, which does not occur elsewhere in the Act, may have been an indication of an intention to expand the usual definition of "court" in s 1 to include a magistrate's court. However, in

⁴⁵⁷ See the translation by the German Institution of Arbitration (DIS) and the German Federal Ministry of Justice in "The New German Arbitration Law" (1998) 14 *Arbitration International* 1 at 15.

⁴⁵⁸ Article 1060 applies to the enforcement of domestic awards. Compare article 1061 which applies the New York Convention to foreign awards.

⁴⁵⁹ See s 49(2)(a) of the Draft Bill corresponding to article 34(2)(a) of the Model Law.

⁴⁶⁰ See s 49(2)(b) of the Draft Bill corresponding to article 34(2)(b) of the Model Law.

⁴⁶¹ See the response of the Law Society of the Cape of Good Hope para 35.

⁴⁶² See the Law Commission's Report on International Arbitration para 3.9 n 12 regarding the position in an international context.

practice it is accepted that a magistrate's court does not have jurisdiction to enforce an arbitral award on application, with the result that it is necessary to proceed by summons to enforce an arbitral award in the magistrate's court.⁴⁶³ This problem has been rectified by s 53(6) which defines "court" for purposes of s 53 to include a magistrate's court with jurisdiction.

3.259 The Commission recommends that further attention should be given to the creation of an expedited enforcement procedure by means of appropriate court rules. However, it must be borne in mind that this procedure would in terms of the New York Convention also apply to the enforcement of foreign arbitral awards.⁴⁶⁴

CHAPTER 7

Remuneration of tribunal and costs

S 54 Remuneration of arbitrators

3.260 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.

3.261 S 54(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 having previously agreed 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 54 is to make it clear that only the agreed tariff of fees cannot be attacked on taxation. The fees are therefore subject to reduction on taxation where they are excessive.

3.262 In ***Miller v Kirsten***⁴⁶⁵ 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. The second change in s 54 of the Draft Bill is the insertion of s 54(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.

⁴⁶³ See Erasmus H J & Van Loggerenberg D E ***Jones & Buckle: The Civil Practice of the Magistrates' Courts in South Africa*** 9 ed Juta Cape Town 1996 73-74.

⁴⁶⁴ See the New York Convention article III, the second sentence of which provides: "There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards." "Conditions" in this part of article III refers to rules of procedure, rather than conditions for enforcement of the award. See Van den Berg 259.

⁴⁶⁵ 1917 TPD 489 at 491. See also Butler & Finsen 90.

S 55 *Costs of arbitral proceedings*

3.263 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.⁴⁶⁶

3.264 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.⁴⁶⁷ In line with the position in the International Arbitration Bill (sch 1 article 31(6), s 55(3) 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.

3.265 S 55(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.

3.266 S 55(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 current 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.⁴⁶⁸

S 56 *Power to limit recoverable costs*

3.267 S 56 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.⁴⁶⁹ The potential benefits of the section have been described as follows:⁴⁷⁰

"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

⁴⁶⁶ See *Harlin Properties (Pty) Ltd v Rush & Tomkins (SA)(Pty)Ltd* 1963 1 SA 187 (D) 198A-B; *Kathrada v Arbitration Tribunal* 1975 2 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).

⁴⁶⁷ See especially Christie R H "Arbitration: Party Autonomy or Curial Intervention II: International Commercial Arbitrations" (1994) 111 *SALJ* 360 at 367; Butler (1994) *CILSA* 143; Butler & Finsen 278 n 160.

⁴⁶⁸ See s 60 and the 1996 Saville Report para 267.

⁴⁶⁹ See para 2.13 above. See also Butler (1998) 17-19 for a more detailed discussion of s 65 of the English Act.

⁴⁷⁰ See Butler (1998) 18-19.

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."

3.268 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.⁴⁷¹

3.269 There was enthusiastic support for this provision in principle at the workshops, particularly among construction industry arbitrators. It is not a cure-all for too expensive arbitrations. A respondent, who regards an adverse award as a reasonably strong possibility would not necessarily be deterred by a cost-capping order as the respondent will be expecting to pay costs. The cost-capping order could actually work in favour of such a respondent. The cost-capping power should therefore be used in conjunction with the tribunal's other powers to discharge the tribunal's duty under s 28(1)(b) of the Draft Bill. Certainly the legal team of the claimant will have to take this provision seriously in planning its strategy.

3.270 The presence of the provision is also indicative of the legislature's determination to break the culture of lawyers, charging on a time basis, having insufficient regard to the duration of the proceedings relative to the amount in dispute.⁴⁷² In the words of Lord Irvine: "[P]ublic cynicism at lawyers and the undue length and complexity of our court procedures causes the great majority of the public to see lawyers representing no more than an old-style vested interest."⁴⁷³ The same is equally true of the role of many lawyers and claims consultants in arbitration proceedings.

3.271 Only one written negative response to this proposal was received. The respondent was concerned that the provision will "inevitably impact upon the quality of the process to the possible detriment of both parties".⁴⁷⁴ It is probably fair to say that this response is from the perspective of a party representative. The answer is that too often excessive emphasis on quality results in the expense of the service being out of proportion to the amount in dispute.⁴⁷⁵

3.272 At the Pretoria workshop it was suggested that the wording limiting the tribunal's power to cap costs to a "specified amount" was too narrow. The Commission recommends that the power should be extended to permit costs to be limited in another appropriate manner, for

⁴⁷¹ See Freeman R, Edwards J M & Cox A **London Arbitration Scheme** Chartered Institute of Arbitrators London 1998.

⁴⁷² Compare Bernstein R "Arbitration at the Crossroads" (1995) 61 **Arbitration** 77 (hereafter referred to as "Bernstein") at 80.

⁴⁷³ Lord Irvine of Lairg "Keynote Address to the Law Society of England and Wales Annual Conference, Cardiff, 18 October 1997" (1998) 64 **Arbitration** 246 at 252. Lord Irvine delivered the address in his capacity as Lord Chancellor.

⁴⁷⁴ The response of Philip Loots to Discussion Paper 83 para 7.

⁴⁷⁵ Bernstein 80.

example to a hearing of a specified duration. The wording of s 56(1) has been amplified accordingly.

S 57 Costs of legal proceedings

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

CHAPTER 8

Consumer arbitration agreements

S 58 Consumer arbitration agreements

3.274 The Arbitration Act of 1965 contains no provisions 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 agreement⁴⁷⁶ 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.⁴⁷⁷

3.275 Earlier in this report, it is proposed that the general discretionary power of the court not to enforce the arbitration agreement should be omitted from the new Act.⁴⁷⁸ The general 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. The possible retention of a discretionary power to exclude arbitration as a means of consumer protection, where a consumer has signed a standard-form consumer contract containing an arbitration clause, is discussed below.⁴⁷⁹

3.278 Party autonomy, as a fundamental principle of arbitration law, is based on true consent. In the case of a consumer transaction, the danger however exists that true consent can be undermined by the fact that the parties are in an unequal bargaining position and the weaker party is prejudiced by the use of standard-form contracts imposed by the stronger party.⁴⁸⁰ The

⁴⁷⁶ See the Arbitration Act 42 of 1965 ss 3(2) and 6.

⁴⁷⁷ See s 35(6) and compare s 55(7) of the Draft Bill, discussed in para 3.266 above.

⁴⁷⁸ See the commentary on s 9 in paras 3.53-3.56 above.

⁴⁷⁹ See para 3.299 below.

⁴⁸⁰ See Butler D W "Consumer Arbitrations: A South African and International Perspective" Unpublished paper presented at the *Dispute Resolution and Cross Border Trade Conference* held by the Association of Arbitrators (Southern Africa) Sandton 15 September 2000 (hereafter referred to as "Butler (Consumer Arbitrations)") 5.

policy considerations underlying consumer protection measures in an arbitration statute have been summarised as follows:

"The objection to an arbitration clause in the small print of a consumer contract is that it excludes the consumer's right to take the dispute to court. The average consumer is unlikely to read the clause. If he does read it he will probably not understand its implications and if he does object to its inclusion he is unlikely to be able to buy the goods or acquire the service without accepting the clause. If the consumer is dissatisfied with the supplier's performance he may be without an effective remedy because the costs of the arbitration would be out of proportion to the amount in dispute. However, the problem of arbitration clauses imposing onerous costs is not the only objection. Consumers may want to go to the courts to publicise the complaint, to test an issue of principle, or simply because they have more confidence in the court system than in the arbitration scheme. The consumer's choice should be respected.⁴⁸¹ The confidentiality of arbitration and the fact that an arbitrator's award does not constitute a binding precedent are therefore other potential disadvantages of arbitration for the consumer."⁴⁸²

3.279 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 the other party can enforce it against the consumer.⁴⁸³

3.280 In addition to the protection provided by section 58 of the Draft Bill, the restrictions on the contents of arbitration agreements to refer future agreements to arbitration in s 39(6) and s 55(7) provide additional protection to consumers against the dangers of arbitration clauses in standard-form contracts. S 39(6) prevents parties contracting out of the right to refer a question of law to the court or a lawyer for an opinion until the dispute has arisen.⁴⁸⁴ S 55(7) prohibits the parties from agreeing that each party shall bear his or her own costs, irrespective of the outcome of the arbitration, until the dispute has arisen.

3.281 The question whether consumers should be protected against the abuse of arbitration clauses in consumer contracts and, if so, the form this protection should take were certainly among the most controversial of the proposals for a new domestic arbitration statute contained in Discussion Paper 83.⁴⁸⁵ Both the original version⁴⁸⁶ and the revised version used at the Cape Town and East London workshops⁴⁸⁷ evoked strong comments from arbitration service providers and from consumers. The diversity of the responses is illustrated by the fact that the

⁴⁸¹ See Howells G G "Consumer Arbitration Agreements Act 1988" (1989) 10 *Company Lawyer* (hereafter referred to as "Howells (1989)") 20; NZLC R20 par 239.

⁴⁸² Butler (Consumer Arbitrations) 5.

⁴⁸³ 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). See further para 3.285 below.

⁴⁸⁴ See para 3.200 above.

⁴⁸⁵ S 55 of the Draft Bill in Discussion Paper 83.

⁴⁸⁶ This proposal involved the imposition of additional formalities for consumer arbitration agreements. See paras 3.295-3.296 below.

⁴⁸⁷ The revised proposal in essence provided for arbitration at the election of the consumer. In terms of the proposal, the election had to be made once the dispute had arisen. See also paras 3.297-3.298 below.

Arbitration Forum has "no difficulties with" the contents of the original version,⁴⁸⁸ whereas it was strongly criticised by AFSA.⁴⁸⁹ The Forum however has strong reservations about the revised version.

3.282 The Project Committee has carried out further research as a basis for revised proposals. The following aspects will now be considered: the application of consumer protection provisions to contracts concluded by local consumers with foreign suppliers; a comparative survey of relevant legislation in other jurisdictions; practical and policy issues which must be borne in mind when drafting provisions in an arbitration statute concerning consumer protection; the various options for statutory protection and other relevant issues.

Interaction between the Domestic Arbitration Bill and the proposed International Arbitration Bill

3.283 It has been argued that the inclusion of consumer protection provisions in a new domestic statute would pose hidden traps for foreign traders, because their existence would not appear from the proposed International Arbitration Bill.⁴⁹⁰ This argument is based on a misconception of the sphere of application of the UNCITRAL Model Law as incorporated in the International Arbitration Bill. As appears from its title, the Model Law only applies to international **commercial** arbitration, which excludes consumer contracts.⁴⁹¹ This means that transactions entered into by a local consumer with a foreign supplier will in any event be subject to the Domestic Arbitration Bill. The foreign trader doing business with a South African consumer will therefore be governed by the new domestic arbitration legislation even if the proposed s 58 is omitted in its entirety. A definition of "consumer" in the domestic statute will however provide additional clarity on the term "commercial" in the Model Law.

Brief comparative survey

3.284 Countries which have recently imposed restrictions on the use of arbitration for consumer disputes in the interests of consumer protection include members of the European Community, particularly Germany and England, New Zealand and, in Africa, Zimbabwe.

3.285 New Zealand, Germany and Zimbabwe are all jurisdictions which apply the UNCITRAL Model Law to both domestic and international arbitrations.⁴⁹² All three countries impose

⁴⁸⁸ See the Arbitration Forum's response to Discussion Paper 83 para 3.17. The main concern expressed by the Association of Arbitrators in its response to Discussion Paper 83 para 17 concerned the definition of "consumer" in the context of an arbitration clause in a construction contract, which would only be enforceable at the option of the consumer.

⁴⁸⁹ The whole of AFSA's response to Discussion Paper 83 was directed against the original version of s 55 of the previous Draft Bill. In AFSA's view the original s 55 would import untold trouble in practice and severely limit the use of arbitration as a viable process of dispute resolution. In AFSA's view it would also not provide effective consumer protection.

⁴⁹⁰ See AFSA's response to Discussion Paper 83 para 6(iv).

⁴⁹¹ See the footnote to article 1(1) of the Model Law, which explains the term "commercial" while intentionally omitting any reference to consumer contracts. See further the Commission's Report on International Arbitration para 2.105; Holtzmann & Neuhaus 34; Second Working Group Report A/CN.9.232 par 32 (quoted in Holtzmann & Neuhaus at 48).

⁴⁹² See para 2.03 above.

additional formalities for consumer arbitration agreements to render those agreements enforceable. In New Zealand, if a consumer enters into a contract containing an arbitration clause, the arbitration agreement will only be enforceable against the consumer if the consumer, "by separate written agreement, certifies that, having read and understood the arbitration agreement, the consumer agrees to be bound by it".⁴⁹³ In the absence of waiver, non-compliance will result in the arbitration agreement being treated as invalid.⁴⁹⁴ The New Zealand Law Commission was of the view that this approach provided a reasonable degree of commercial certainty, ensured a reasonable degree of informed consent to arbitration and provided a broad approach⁴⁹⁵ to protect genuine and uninformed consumers.⁴⁹⁶ New Zealand chose the path of imposing additional formalities for the arbitration agreement in the case of consumer contracts notwithstanding the fact that it is one of the few jurisdictions in the world with an arbitration statute which will also recognise and enforce oral arbitration agreements.⁴⁹⁷

3.286 In Germany, an arbitration agreement to which a consumer is party must be personally signed by the parties. In the absence of notarial certification, the arbitration agreement must also be contained in a separate document. The consumer who subsequently enters upon the merits of the dispute in the arbitration proceedings will however be taken to have waived any reliance on non-compliance with the formalities.⁴⁹⁸

3.287 Zimbabwe adopted a slightly different approach. A matter concerning a consumer contract⁴⁹⁹ is declared not to be capable of determination by arbitration, unless the consumer has agreed to arbitration by way of a separate agreement.⁵⁰⁰ In the absence of a separate agreement, consumer disputes are therefore not arbitrable. An award obtained against a Zimbabwean consumer inside or outside Zimbabwe where the formalities for the arbitration agreement have not been complied with will be unenforceable.⁵⁰¹ It is not clear whether non-compliance can be waived by the consumer.⁵⁰²

⁴⁹³ This separate agreement must also disclose, if that be the case, that all or any of the provisions of the Second Schedule to the Act do not apply to it. As stated above, New Zealand is a Model Law jurisdiction, with the Model Law applying to both international and domestic arbitration. The Second Schedule contains certain additional provisions, which apply on a contract-in basis to international arbitrations held in New Zealand and on a contract-out basis to domestic arbitrations: see the Arbitration Act 1996 s 6.

⁴⁹⁴ See the Arbitration Act 1996 s 11(1), (4) and (5); Williams 9-10.

⁴⁹⁵ As opposed to specific restrictions on the use of arbitration in the (New Zealand) Insurance Law Reform Act of 1977 s 8.

⁴⁹⁶ NZLC R20 par 245.

⁴⁹⁷ See the Arbitration Act of 1996 First Schedule article 7(1).

⁴⁹⁸ See s 1031(5) of the German Arbitration Act, an English translation of which is published in (1998) 14 *Arbitration International* 1-18.

⁴⁹⁹ As defined in the Consumer Contracts Act 6 of 1994 s 1. See further para 3.306 below.

⁵⁰⁰ See the Arbitration Act 6 of 1996 s 4(2)(f).

⁵⁰¹ Sch 1 article 36(1)(b). The court can raise the issue of arbitrability on its own initiative.

⁵⁰² Sch 1 article 4 provides for waiver by parties of provisions of the Model Law from which they may derogate. S 4 of the Act is not part of the Model Law. Normally, restrictions on arbitrability cannot be waived. However, s 4(2)(f) does not render consumer disputes absolutely non-arbitrable, but allows them to be referred to arbitration subject to a condition.

3.288 The position regarding the regulation of consumer arbitration agreements in England since 1988 can be summarised as follows.⁵⁰³ Between 1988 and 1995,⁵⁰⁴ consumer arbitration agreements were regulated by the Consumer Arbitration Agreements Act of 1988. An arbitration clause in a consumer contract was basically unenforceable unless the consumer gave his or her written consent to arbitration after the dispute arose.⁵⁰⁵ Essentially, this was a provision for arbitration at the option of the consumer. Since 1996, in terms of the Arbitration Act read with the Unfair Terms in Consumer Contracts Regulations,⁵⁰⁶ a standard-form arbitration clause in a consumer contract is likely to be regarded as unfair, with the result that it will not be enforced by the court. The regulations provide that an unfair term in a contract between a consumer and a supplier will not be binding on the consumer.⁵⁰⁷ It therefore appears that the requirement of a formal written consent by the consumer after the dispute arose, as the usual prerequisite for the enforcement of the arbitration agreement, has been replaced by an objective assessment of whether or not the arbitration clause may be regarded as unfair. This assessment will have to be made by the court or by the arbitral tribunal, depending on the circumstances in which the issue is raised.⁵⁰⁸ The primary reason for the change was to enable the United Kingdom to comply with its obligation to implement the EC's Unfair Terms in Consumer Contracts Directive of 1993.

*Principles to be borne in mind when drafting statutory provisions on consumer arbitration*⁵⁰⁹

3.289 First, the provisions must contain balanced protection for the interests of consumers, with due regard to the legitimate concerns of traders and arbitration service providers.⁵¹⁰

3.290 Secondly, the provisions must promote legal certainty. There must therefore be a reasonable degree of clarity as to who are consumers and what contracts are consumer

⁵⁰³ For a more detailed discussion see Merkin R *Arbitration Law* Lloyd's of London Press London 1992 (Hereafter referred to as "Merkin") paras 1.41-1.48, 21.90-21.92; Butler (Consumer Arbitrations) 3-5.

⁵⁰⁴ The Unfair Terms in Consumer Contracts Regulations 1994 (SI 1994/3159) took effect on 1 July 1995 and therefore applied together with the Consumer Arbitration Agreements Act, 1988 until the latter was repealed by the Arbitration Act of 1996.

⁵⁰⁵ Consumer Arbitration Agreements Act s 1.

⁵⁰⁶ The current regulations, the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083), are contained in Merkin Appendix A App A-204 – App A-211.

⁵⁰⁷ Reg 8(1). As the arbitration clause is severable, the rest of the contract will continue to bind both parties (reg 8(2)).

⁵⁰⁸ If the consumer takes a dispute arising from the contract to court, the other party may apply to court under the Arbitration Act 1996 s 9 for a stay of the court proceedings so that the dispute can be referred to arbitration. The consumer could then contend that the arbitration clause is unfair and should therefore be treated as inoperative. Where the supplier refers the dispute to arbitration, it is conceivable that the consumer could challenge the arbitral tribunal's jurisdiction on the basis of the regulations, where the arbitration agreement takes the form of a clause in a standard-form contract, which has not been individually negotiated. The arbitrator would then normally have to decide the jurisdictional issue in the first instance under s 31.

⁵⁰⁹ See Butler (Consumer Arbitrations) 6.

⁵¹⁰ Arbitration service providers are trying to encourage suppliers of goods and services, who have not traditionally employed arbitration, to make use of it, for example banks. Banks however are not going to be attracted to arbitration if consumer protection measures in practice simply give debtors a new delaying tactic to avoid payment.

contracts. The consequences of non-compliance with the consumer protection provisions should also be clear from both the supplier's and the consumer's perspective.

3.291 Thirdly, the consumer protection provisions must take into account current and future commercial requirements, for example in relation to growth of electronic commerce and consumer contracts entered into on the Internet.

3.292 Fourthly, the imposition of greater formalities for consumer arbitration agreements is not objectionable in principle, as contended by one respondent.⁵¹¹ The requirement of writing for the statutory recognition and enforcement of arbitration agreements is already more onerous than the formalities for most commercial contracts, where writing is not required. Moreover, in modern arbitration law, the arbitration clause is treated as a separate agreement, severable from the contract in which it is contained.⁵¹²

3.293 Finally, special provisions for consumer arbitration agreements merely emphasise the right of the consumer to take disputes to court and the need to protect consumers against being coerced into an arbitration agreement where the consumer is in a clearly unequal bargaining position. Such provisions are therefore not a vote of no-confidence in arbitration.⁵¹³ The protection should therefore underpin party autonomy by ensuring that there is genuine and informed consent on the part of the consumer.

The alternative options

3.294 There are at least four⁵¹⁴ basic methods which could be considered for providing consumer protection in an arbitration statute of general application.

The imposition of additional formalities

3.295 This was the option originally proposed by the Project Committee and one that has been used in certain other jurisdictions.⁵¹⁵ The purpose of requiring a separate written agreement signed by the consumer is to ensure that the consumer is made aware of the arbitration clause in

⁵¹¹ Compare AFSA's response to Discussion Paper 83 para 3.

⁵¹² See eg the UNCITRAL Model Law article 16(1) and para 3.136 above regarding s 26 of the Draft Bill.

⁵¹³ Compare AFSA's response to Discussion Paper 83 para 2, which contends that the clumsy insistence on formalism in s 55 of the previous Draft Bill discredits arbitration in the market place.

⁵¹⁴ See further Butler (Consumer arbitrations) 6-10. The Government Administration Committee in New Zealand, when examining the Draft Bill submitted by the Law Commission considered other possibilities besides the option which was ultimately adopted. One of these was to require the disclosure of prescribed information to the consumer regarding the effect of the arbitration agreement. This option was rejected because of the difficulty of devising a form of words which gives an accurate and neutral account of the advantages and disadvantages of arbitration. Another option which could possibly be considered is the prohibition of arbitration for consumer disputes where the amount in dispute is less than the prescribed amount, for example the maximum jurisdiction of the Small Claims Court. The principle justification for this option is that for disputes involving less than a certain amount private arbitration, because of the costs involved, is not economically viable. However, at this level the parties will not normally have legal representation, thereby reducing the costs. It should therefore be open to the parties to select private arbitration if they wish to do so, after considering the cost implications. (See Butler (Consumer arbitrations) 9-10.)

⁵¹⁵ See para 3.285 above.

a standard-form contract. In principle, this clause could be on the same piece of paper as the main contract, as long as it is identified by a separate signature.

3.296 This method has the advantage of certainty from the perspective of the supplier and arbitration service providers. The arbitration clause will be enforceable against the consumer as long as the additional formalities are complied with. The proposal evoked a mixed response and was much discussed at the regional workshops. From the discussion at the workshops, it appears that the most serious difficulty with this method is the question whether it actually does, in the words of the New Zealand Law Commission "ensure a reasonable degree of informed consent to arbitration ... to protect genuine and uninformed consumers".⁵¹⁶ The consumer may sign the clause while still unsure what it actually entails or because the consumer urgently needs the goods or services, which will not be provided unless the consumer signs.⁵¹⁷ The requirement of an arbitration clause specifically signed by the consumer also creates difficulties in the context of consumer contracts concluded electronically.

Arbitration at the option of the consumer

3.297 This method is currently used in South Africa in the Short-term Insurance Rules,⁵¹⁸ was used in England prior to the commencement of the 1996 Act⁵¹⁹ and was the method adopted in the revised version of section 55 of the previous Draft Bill.⁵²⁰ This method does more than the first method to ensure an informed consent to arbitration on the part of the consumer. The main problem with this method is the question whether it can be adapted to give adequate protection to the legitimate interests of the supplier and arbitration service providers.⁵²¹

⁵¹⁶ NZLC R20 par 245.

⁵¹⁷ This problem was raised by Professor Van Kerken at the Pretoria workshop.

⁵¹⁸ The Policyholder Protection Rules (Short-term Insurance) made under s 55 of the Short-term Insurance Act 53 of 1998 were published in GG 20277 of 9 July 1999. Part IV of the Rules deals with **void** provisions, which include any provision to the extent that it provides expressly or by implication "that in the event of any dispute arising under the policy, the dispute can only be resolved by means of arbitration" (see rule 9(1)(d)). A clause giving the insured the election of using arbitration would therefore appear to be outside this prohibition.

⁵¹⁹ See para 3.281 n 395 above.

⁵²⁰ This version read as follows:

- "(1) An **arbitration agreement** regarding a dispute in relation to a contract entered into by a person as a consumer, is only enforceable against the consumer if the consumer certifies in writing after the dispute has arisen that the consumer agrees to be bound by the agreement.
- (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) A provision in an **arbitration agreement** entered into by a consumer before or after the dispute has arisen which entitles the other **party** to appoint the **tribunal** unilaterally is void."

⁵²¹ Compare the response to Discussion Paper 83 of the Arbitration Forum para 3.17. See also the response by the Association of Arbitrators para 17. The Association cited the example of a contract between a small building contractor and a wealthy person for the construction of a private residence. The contractor may be in a weaker bargaining position than the client and would be at a distinct disadvantage in not knowing whether an arbitration clause in the contract would actually be enforceable against the consumer. See also

3.298 This method results in uncertainty for the supplier who will only know whether the arbitration clause is enforceable once the dispute has arisen. The use of this method in the new domestic arbitration legislation could therefore discourage sectors, which have not traditionally used arbitration, like banks, from using arbitration. The consumer could possibly also abuse the opportunity of choosing the forum as a delaying tactic. It would also be necessary to provide for a mechanism as to how the consumer's election is deemed to be made where the consumer is the respondent and ignores a letter of demand. It appears unfair to expect the non-consumer to waste time and costs in one forum if the consumer could then force the non-consumer to proceed in another.

Arbitration unless the court otherwise directs

3.299 This method is currently available, at least in theory, under the existing Arbitration Act.⁵²² However, the Project Committee was well aware that high litigation costs are an effective deterrent against consumers making use of this power.⁵²³ The existence of this power is also against the clear trend in modern arbitration legislation towards reducing the court's supervisory powers at least until after the award is made.⁵²⁴

3.300 The approach of giving the court a discretion not to enforce the arbitration clause in a consumer contract is nevertheless in line with that recommended by the Law Commission to unreasonable, unconscionable or unreasonable contract terms in general.⁵²⁵ This system is also in effect available in England, where a consumer would be able to argue that the court should not stay court proceedings in favour of arbitration, where a standard-form arbitration clause qualifies as an unfair term.⁵²⁶

3.301 However, on both dogmatic and practical grounds, a discretionary power for the court to nullify the arbitration clause in a consumer contract should, in the view of the Project Committee, be considered only as a last resort.

The application of a statutory "cooling off" period

the response of Prof LF van Huyssteen para 3: he regards this option as being destructive of the arbitration process.

⁵²² See s 3(2) regarding the High Court's general discretion, on the application of a party and on good cause shown, not to enforce an arbitration agreement.

⁵²³ See Discussion Paper 83 para 3.163.

⁵²⁴ See the UNCITRAL Model Law article 5; English Arbitration Act 1996 s 1(c). One of the justifications for this trend has been characterised by a senior English judge as "one stop adjudication" (See Hoffmann LJ in **Harbour Assurance Co UK Ltd v Kansa General International Assurance Co Ltd** [1993] 3 All ER 897 (CA) at 915c).

⁵²⁵ See SA Law Commission **Report on Unreasonable Stipulations and the Rectification of Contracts** April 1998 (hereafter referred to as "SALC Report (1998)") par 2.4.5.1 and the Draft Bill in Annexure A s 1, which gives the High Court the power to render unreasonable, unconscionable or oppressive contracts inoperative. These proposals are directed at contracts in general and are not restricted to consumer contracts (see par 2.7.4.4. of the report.)

⁵²⁶ See para 3.286 above.

3.302 This possibility involves allowing the consumer to withdraw from the arbitration clause within a certain period of the contract being concluded (say 10 days), by giving written notice to that effect to the supplier.⁵²⁷ Once the period has expired the arbitration clause becomes binding. This approach was supported by one respondent to Discussion Paper 83 and received some support at one of the regional workshops.⁵²⁸ The Commission is not aware of it being used in arbitration legislation in any other jurisdiction. This solution would provide certainty from the supplier's perspective after the expiry of the cooling-off period. It also addresses the problem of the imposed arbitration clause where the consumer has little choice but to enter into the main contract,⁵²⁹ but objects to the standard printed arbitration clause. The length of the cooling-off period must also be sufficiently long for a consumer contract with a foreign supplier. The acceptability of this method may also depend on a sufficiently restrictive definition of consumer, which successfully identifies those consumers who are genuinely uninformed and in need of protection. This aspect is discussed below.⁵³⁰

3.303 The Commission therefore recommends that this option should be adopted and proposes that s 58(1) of the Draft Bill should provide as follows:

"(1) Where a consumer enters into an **arbitration agreement** to refer future disputes arising from or in relation to a consumer contract to arbitration, the consumer may cancel that **arbitration agreement** by giving written notice to the other party within ten days of entering into it."

3.304 This method may have to be coupled with certain additional formalities for it to work effectively. If the contract is concluded on the supplier's standard terms, without the consumer having had sight of those terms,⁵³¹ the consumer's "cooling off" period should only start to run from when the supplier had furnished the consumer with a copy of those terms.⁵³² It may also be necessary to impose an obligation on the supplier to draw the attention of potential consumers to the existence of the protection.⁵³³ This is necessary to ensure that consumers are aware of their rights. S 58(5)-(7) of the Draft Bill give effect to these recommendations:

"(5) Where the **arbitration agreement** referred to in subsection (1) is a clause in a consumer contract or is contained in a document referred to in the contract, the other party must furnish the consumer with a copy of the document containing the arbitration agreement.

(6) The other party must inform the consumer of his or her right under subsection (1) at the time when the arbitration agreement is concluded or when furnishing the copy of the document referred to in subsection (5).

(7) The ten-day period referred to in subsection (1) only commences once the other party has complied with the provisions of subsections (5) and (6)."

⁵²⁷ An example of this sort of provision is contained in s 13 of the Credit Agreements Act 75 of 1980.

⁵²⁸ See para 8 of AFSA's response to Discussion Paper 83. It was also suggested by a participant at the East London workshop. It was considered but rejected without discussion by the New Zealand Law Commission in its report (see NZLC R20 par 245).

For example, a contract for the hire of a rental car urgently required for holiday transport from the airport.

⁵³⁰ See para 3.307 below.

⁵³¹ Compare the UNCITRAL Model Law article 7(2) and the Draft Bill s 6(4).

⁵³² Providing the consumer with a web-site reference should arguably not be sufficient for this purpose.

⁵³³ Compare Howells (1989) 21.

Other issues in drafting consumer protection provisions

3.305 There are five aspects which especially require attention. The first is the definition of the concept "consumer". The second concerns the choice of law applicable to consumer arbitration agreements. The third is whether or not the legislation regarding consumer arbitration agreements should operate retrospectively. Fourthly, the consequences of non-compliance with the consumer protection provisions must be considered. Finally the application of proposed legislation on unreasonable, unconscionable or oppressive contract terms must be considered.

Refinement of the concept "consumer"

3.306 The definition must be wide enough to cover "genuine and uninformed consumers"⁵³⁴ but clear enough to protect the interests of suppliers and arbitration service providers. The New Zealand Arbitration Act defines a consumer as a person who enters a contract otherwise than in trade where the other party to the contract enters into that contract in trade. The definition in the previous Draft Bill⁵³⁵ was closer to the former English definition, in that it defined a consumer as a person who enters a contract otherwise than in the course of business, where the other party enters into the contract in the course of business.⁵³⁶ The expression "course of business" has been the subject of judicial interpretation.⁵³⁷ A degree of regularity has to be established before it can be said that the activity was an integral part of the business and so carried on in the course of that business although a one-off adventure in the course of trade would be in the course of business.⁵³⁸ The current English definition of a consumer refers to a "natural person who ... is acting for purposes outside his trade, business or profession", when contracting with a seller or supplier. A seller or supplier is defined as a natural or legal person who is acting for purposes relating to his trade, business or profession.⁵³⁹

3.307 The precise wording of the definition will have to be carefully chosen. Is a professional who buys a painting for his consulting rooms as a visually attractive tax deduction and investment entering into a transaction in the course of his profession or outside of his profession? The Gauteng consumer legislation defines "consumer" with reference to the intended use of the relevant goods or services by the consumer. A consumer is any "natural person to whom any commodity is offered, supplied or made available *where the person does not intend to apply the commodity for the purposes of resale, lease, the provision of services or*

⁵³⁴ See NZLC R20 para 245.

⁵³⁵ S 55(1) in Discussion Paper 83 at 93.

⁵³⁶ See the Consumer Arbitration Agreements Act 1988 s 3(1). (For the current position, see the text below). The Zimbabwe Consumer Contracts Act 6 of 1994 s 2 adopts a similar approach. It defines a consumer contract as "a contract for the sale or supply of goods or services or both, in which the seller or supplier is dealing in the course of business and the purchaser or user is not". Contracts regarding the sale or lease of immovable property and contracts of employment are expressly excluded.

⁵³⁷ See eg **R & B Customs Brokers Co Ltd v United Dominions Trust Ltd** [1988] 1 WLR 321 (CA). The decision has been criticised (see Howells G G "The Businessman and Consumer Protection" (1988) 9 **Company Lawyer** 138-141, but is still regarded as a correct reflection of the current law (see Merkin par 1.44 n 1).

⁵³⁸ **R & B Customs Brokers Co Ltd v United Dominions Trust Ltd** above 330-331.

⁵³⁹ See the Unfair Terms in Consumer Contracts Regulations 1999 reg 3(1).

the manufacture of goods for gain" (our italics).⁵⁴⁰ The intention of a person is logically relevant in deciding whether or not that person is acting for purposes outside his or her trade, business or profession. However, excessive stress on this intention is arguably unfair from the perspective of the supplier. It is also perhaps relevant to inquire whether the supplier was reasonably aware that the other party is a consumer.

3.308 The English Arbitration Act specifically includes a juristic person in addition to a natural person in its definition of a consumer.⁵⁴¹ In contrast, the basic definition of "consumer" in the recent consumer protection legislation in Gauteng is restricted to natural persons.⁵⁴² This gives greater certainty in the application of the definition. Nevertheless many persons use companies, trusts and close corporations for transactions outside their business or profession. However it can also be argued that persons with sufficient sophistication to use these vehicles for conducting their private affairs are in less need of protection. Moreover, the directors of a company, the members of a close corporation and the trustees of a trust (a quasi-juristic person) in any event have certain duties when entering into contracts. The Commission therefore recommends that the definition of a consumer should be restricted to natural persons.

3.309 Another point requiring consideration is whether the definition should have a quantitative component with reference to the amount involved. Simply put, should the consumer protection provisions be restricted to contracts involving a certain amount, while recognising that claims for damages arising out of the contract could exceed that amount? The possibility of a quantitative limit was considered but rejected in New Zealand,⁵⁴³ although it has been used and is still used, not particularly effectively, in England.⁵⁴⁴ The Commission nevertheless recommends that a quantitative limit should be introduced.⁵⁴⁵ Where a contract is for a substantial amount, a party has less excuse for agreeing to arbitration before first considering the consequences and, if necessary, getting appropriate professional advice before entering into the arbitration agreement. It is therefore proposed that the application of s 58 should be restricted to arbitration agreements relating to contracts where the total consideration payable by the consumer does not exceed R50 000. Total consideration in this context is defined in s 58(4) as excluding interest, finance charges and agent's commission. It would however include VAT. The Minister is empowered to adjust the amount of R50 000 by means of regulations.⁵⁴⁶

⁵⁴⁰ See the Consumer Affairs (Unfair Business Practices) Act 7 of 1996 in *Provincial Gazette Extraordinary* 435 of 1997 s 2(1)(a). "Commodity" is defined in s 1 to include services, but excluding those due in terms of a contract of employment. S 2(1)(b) also includes an investor within the definition of a consumer.

⁵⁴¹ S 90.

⁵⁴² See the Consumer Affairs (Unfair Business Practices) Act 7 of 1996 in *Provincial Gazette Extraordinary* 435 of 1997 s 2(1)(a) and (b). The definition of consumer can conceivably be extended to certain juristic persons by notice in the *Provincial Gazette* (see s 2(1)(c) and (2)).

⁵⁴³ See NZLC R20 paras 244-5.

⁵⁴⁴ See Merkin par 21.92 regarding the effect of s 91 of the English Arbitration Act 1996.

⁵⁴⁵ This will also address the fears of the Association of Arbitrators regarding consumer contracts in the construction industry. See para 17 of its response to Discussion Paper 83.

⁵⁴⁶ See ss 58(3) and 59(a).

3.310 In the light of the above considerations, s 58(3) of the Draft Bill has been revised to define a consumer as follows:

"(3) For purposes of subsection (1) a consumer is a natural person who enters into a contract while acting for purposes outside his or her trade, business or profession with another party acting for purposes relating to his or her trade, business or profession, if the total consideration payable by the consumer does not exceed the amount of R50 000 or such other amount as may from time to time be prescribed by regulation."

The restrictions on the parties' choice of law

S 55(3) of the previous Draft Bill read as follows:

"(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."

3.311 The wording of this provision, which was based on the New Zealand Arbitration Act⁵⁴⁷ caused some confusion among respondents to the Discussion Paper.⁵⁴⁸

3.312 The restriction in s 55(3) of the Draft Bill of the previous Draft Bill was not intended to restrict the parties' choice of law to govern their substantive rights. The intention is to protect South African consumers from being deprived of their protection by a choice of procedural law: for example an arbitration clause providing for a documents-only arbitration in New York in respect of an Internet transaction. Basically, South African law should apply to the arbitration agreement, irrespective of the parties' choice of law regarding the main contract. In terms of the doctrine of severability, there is logically no objection to the main contract and the arbitration agreement being subject to different national systems. The restriction effectively stops the supplier depriving the consumer of the statutory protection by selecting a national law of a country other than South Africa to apply to the main contract.

3.313 If the consumer duly exercises the consumer's statutory right to withdraw from the arbitration agreement within the cooling-off period, both the arbitration agreement⁵⁴⁹ and an award,⁵⁵⁰ which is made pursuant to that agreement in arbitral proceedings outside South Africa will be unenforceable in court proceedings in South Africa.

3.314 It is therefore proposed that the restriction on choice of law should be clarified to read as follows:

⁵⁴⁷ See the New Zealand Arbitration Act 99 of 1996 s 11(3).

⁵⁴⁸ See the responses of AFSA para 6(iv) and the Law Society of the Cape of Good Hope paras 37.6 –37.7.

⁵⁴⁹ See the Draft Bill s 9(2) and the International Arbitration Bill s 19(4) read with sch 1 article 8.

⁵⁵⁰ See the International Arbitration Bill s 21(1)(a)(ii) and compare s 21(b)(ii). The latter provision, following the New York Convention article V(1)(a) determines the validity of the arbitration agreement with reference to the place of arbitration, if the parties have not chosen the applicable law. A South African court could arguably decide not to enforce a foreign arbitral award made against a South African consumer in breach of s 58 of the Draft Bill as being contrary to public policy.

"(8) Subsection (1) applies to every **arbitration agreement** entered into by a consumer in South Africa ... notwithstanding a provision in the **arbitration agreement** to the effect that it is governed by a law other than South African law."⁵⁵¹

The avoidance of retrospective operation

3.315 Arbitration legislation is traditionally retrospective in that it applies to arbitration agreements concluded before the coming into force of a new arbitration statute, providing arbitration proceedings under the agreement have not yet commenced at that date.⁵⁵² The same general rule is proposed in s 63(2) of the Draft Bill. The New Zealand legislature made no exception in the case of consumer arbitration agreements with the result that agreements made under the previous law would no longer be enforceable.⁵⁵³ This could be unnecessarily prejudicial to the interests of suppliers and arbitration service providers. It is therefore recommended that an exception be made regarding retrospective application to exclude consumer arbitration agreements. S 58(8) has been worded accordingly.

The consequences of non-compliance

3.316 The consequences of non-compliance with provisions for consumer protection will depend on the form which these provisions take.⁵⁵⁴ S 55(5) of the original version in Discussion Paper 83 intentionally did not make the arbitration agreement void if the additional formalities were not complied with. The intention was to give the consumer the opportunity to abide by the arbitration clause, notwithstanding non-compliance with the extra formalities, if the consumer perceived this to be to his or her advantage.

3.317 The approach adopted in this report entitles the consumer to withdraw from the arbitration agreement for a certain period. If the consumer exercises this right the arbitration agreement will be terminated. The supplier is required to draw the consumer's attention to the existence of the right to withdraw by s 58(6). If the supplier does so and the consumer does not give written notice of withdrawal from the arbitration agreement within the prescribed period, the court will be bound by s 9 of the Draft Bill to uphold the arbitration agreement, were the consumer to ignore the arbitration clause and to take a dispute relating to the consumer contract straight to court.

*Exemption of arbitration agreements from proposed legislation on unreasonable, unconscionable or oppressive contract terms*⁵⁵⁵

3.318 The Law Commission has previously recommended that the High Court should have the power to render unreasonable, unconscionable or oppressive contracts inoperative.⁵⁵⁶ This

⁵⁵¹ Compare the English Arbitration Act of 1996 s 89(3).

⁵⁵² See for example the Arbitration Act 42 of 1965 s 42(3).

⁵⁵³ See the Arbitration Act s 19(1) and Williams 10, but compare the circumstances referred to in s 19(3).

⁵⁵⁴ See paras 3.296, 3.298 and 3.301 above.

⁵⁵⁵ See Butler (Consumer Arbitrations) 13-14.

power, if accepted by the legislature, will be of general application. Arbitration agreements are not yet included in the list of exemptions in respect of which the power would not apply.⁵⁵⁷ There are however strong practical and policy considerations for exempting arbitration agreements from this proposed legislation. First, the court's power, particularly as it is not limited to consumer contracts, could be abused as a delaying tactic by challenging the enforceability of the arbitration clause.⁵⁵⁸ Secondly, the Draft Bill has as one of its founding principles that the object of arbitration is to promote the fair resolution of disputes by arbitral tribunals without unnecessary delay or expense.⁵⁵⁹ Certain other provisions of the Bill are specifically designed to achieve this end.⁵⁶⁰ This consideration is already a strong argument in favour of the exemption of arbitration agreements from any general legislation on unfair contract terms. The argument will be considerably strengthened by the inclusion of s 58 in the new arbitration legislation. S 58 is intended as an effective method for protecting consumers in an unequal bargaining position from being compelled to refer a dispute to arbitration in a situation where the arbitration agreement is not based on the consumer's informed consent, freely given.

3.319 The Commission therefore recommends that in the event of legislation on unreasonable contract terms being enacted, arbitration agreements should be expressly excluded from the operation of such legislation.⁵⁶¹

CHAPTER 9

Miscellaneous provisions

S 59 Regulations

3.320 This is a new provision with no equivalent in the previous Draft Bill. The making of regulations in terms of the powers conferred on the Minister of Justice under this section is not a prerequisite to the commencement of the legislation. The powers are rather aimed at facilitating the operation of certain of its provisions in practice.

3.321 The Minister, after consultation with the Minister of Trade and Industry, is empowered to determine the maximum amount of consideration which will render a consumer contract subject to the provisions of s 58. Pending such determination, the maximum amount stipulated

⁵⁵⁶ See para 3.* above regarding the SALC Report (1998). The High Court will not have exclusive jurisdiction, as this would undermine access to justice (See para 2.7.4.1 of the report).

⁵⁵⁷ See the SALC Report (1998) paras 2.7.4-2.7.5 and the Draft Bill in Annexure A s 3. Foreign arbitration agreements will however probably be exempted by virtue of Article II of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (see s 3(2)(d) of the Draft Bill).

⁵⁵⁸ See the SALC Report (1998) par 2.7.4.4. One of the considerations was the difficulty of drafting a satisfactory definition of "consumer". The danger of the legislation being used as a delaying tactic would be increased by the proposed extended powers of a court on appeal (see the Draft Bill s 1(2)).

⁵⁵⁹ See the Draft Bill s 1(a) and para 3.17 above.

⁵⁶⁰ See particularly s 28 on the duties of the arbitral tribunal, s 29-31 regarding the powers of the tribunal to give effect to those duties and s 35 regarding the duty of the parties. See para 3.18 above for further examples.

⁵⁶¹ This could be done by incorporating an additional exception in s 3(2) of the Draft Bill in Annexure A to the Commission's report on unreasonable stipulations in contracts (SALC Report (1998)).

in s 58(3), namely R50 000, will apply.

3.322 Parties to an arbitration are in principle free to choose who they wish to arbitrate their dispute, subject to the restriction that an arbitrator must be a natural adult person.⁵⁶² This makes it inappropriate that the Minister should have a general power to make regulations as to the training which all persons must undergo before they may be appointed as arbitrators. It may nevertheless prove desirable that certain minimum standards be imposed for persons who wish to qualify for appointment as arbitrators or mediators by the specified authority.⁵⁶³ S 59(b)(i) gives the Minister the necessary power to make regulations for this purpose after consultation with the specified authority. There was also support from one respondent for a statutory Code of Conduct for arbitrators,⁵⁶⁴ although another respondent supported the view that the arbitration industry should be self-regulating.⁵⁶⁵ If self-regulation proves ineffectual, the Minister may lay down a Code of Conduct for arbitrators by regulation after consultation with the specified authority, without it being necessary to amend the statute.

S 60 Waiver of right to object

3.323 This is a new provision based on the International Arbitration Bill (Schedule 1 article 4) and the English Arbitration Act of 1996 s 73. The purpose of the provision is to avoid belated and unfair objections to non-compliance with certain requirements for the arbitral proceedings where the objector either knew of the non-compliance it seeks to raise or through the exercise of reasonable diligence could have known of the non-compliance. The provision applies to non-mandatory provisions of the arbitration statute or a provision of the arbitration agreement.

3.324 The section operates if three conditions are met.⁵⁶⁶ First, it must be shown that there has been non-compliance with a non-mandatory provision of the Act or a requirement of the arbitration agreement. Secondly, following s 73 of the English Arbitration Act, it must be shown that the party against whom waiver is sought knew or through reasonable diligence ought to have known of that provision. In contrast article 4 of the Model Law requires the innocent party to establish that the party against whom waiver is sought actually knew of the objection. The Saville Committee justified the departure from the Model Law as it might be difficult or impossible for the innocent party to do this.⁵⁶⁷ Thirdly, the party against whom waiver is sought must have failed, where no specific time limit is set, to object without undue delay.

3.325 S 60 furthermore only operates against a party who proceeds with the arbitration, while

⁵⁶² See the definition of "tribunal" in s 1 of the Draft Bill.

⁵⁶³ In terms of ss 20(1) and 14(1) of the Draft Bill.

⁵⁶⁴ See the response of R van der Merwe para 9.

⁵⁶⁵ See the response of the Arbitration Forum para 4.3 although the Forum is of the view that the specified authority could have a consultative role to act as an incentive to ensure that arbitral institutions adhere to accepted standards. Compare the response of R van der Merwe para 7, for the view that arbitration service providers should only be allowed to operate if accredited through a process stipulated by legislation.

⁵⁶⁶ See Holtzmann & Neuhaus 197-200.

⁵⁶⁷ See the English Arbitration Act of 1996 s 73(1) and the 1996 Saville Report para 297.

being aware or should have been aware of non-compliance with the relevant provision.⁵⁶⁸ The provision therefore cannot be used against a party to an arbitration agreement who has taken no part in the proceedings. A person who disputes the jurisdiction of the tribunal cannot be compelled to take part in the arbitral proceedings, as this begs the question as to whether or not the objection has any substance. The party through non-participation runs the risk of an adverse award, but still retains the right to challenge that award through lack of jurisdiction.⁵⁶⁹

S 61 Service

3.326 This section replaces s 37 of the current statute. The most important changes are those in s 61(5), (6) and (7) which are aimed at avoiding expense and delay resulting from unnecessary court applications. S 61(1) also encourages the parties to agree on methods of service, which could include electronic means of communication.

3.327 One respondent to Discussion Paper 83 regarded the proposed requirements as too lenient, particularly in the case of the document initiating arbitration proceedings. It was suggested that this document should be served by the same methods stipulated in the High Court Rules for commencing proceedings in the High Court, except that service need not be effected by the sheriff.⁵⁷⁰ This suggestion was rejected by the Project Committee for a number of reasons. It undermines the principle of party autonomy and equates arbitration with privatised litigation. Moreover, a document initiating arbitration proceedings takes a variety of forms and may consist of a request by the claimant to an arbitration service provider to appoint the tribunal. In any event, for purposes of empowering the tribunal to make an award against a respondent taking no active part in the proceedings, the crucial document is the document notifying the respondent of the hearing itself.⁵⁷¹ The tribunal must satisfy itself that this notice has been served as stipulated by the Act before proceeding to make a default award.

S 62 Extension of periods fixed by or under this Act

3.328 This section of the Draft Bill is based on s 79 of the English Arbitration Act of 1979 and replaces s 38 of the current statute. S 38 was recently considered by the court in **Kroon Meule CC v Wittstock t/a JD Distributor; Wittstock t/a J D Distributors v De Villiers**.⁵⁷² The court held that the applicant had failed to establish good cause under s 38 in that his modest chances of success in his application for setting aside the award did not outweigh his inadequate explanation for failing to exercise timeously his remedies under the Act. This test for "good cause" under s 38 of the current statute does not appear to differ substantially from the more specific limits on the court's discretion proposed in s 62(3) of the Draft Bill and discussed below.

⁵⁶⁸ For example by appearing at a hearing or communicating with the tribunal. See Seventh Secretarial Note A/CN.9/264 (of 25 March 1985) quoted in Holtzmann & Neuhaus 209.

⁵⁶⁹ See the 1996 Saville Report paras 295 and 298. The English Arbitration Act protects the rights of a person who takes no part in the proceedings in a separate section, s 72.

⁵⁷⁰ See the response of the Arbitration Forum to Discussion Paper 83 para 3.16.

⁵⁷¹ See ss 33(2) and 36(3) of the Draft Bill. The notice must therefore be given by the tribunal or by an arbitral institution as directed by the tribunal (s 33(4)).

⁵⁷² 1999 3 SA 866 (E) 874H-876B.

3.329 S 62 is a non-mandatory provision which may be excluded in the arbitration agreement. The general power in s 62 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 11. The general power may only be exercised by the court if any arbitral process⁵⁷³ for extending the time limit has been exhausted and if a substantial injustice will otherwise occur. The Saville Committee envisaged that in view of the limitations, the power will rarely be exercised. It therefore concluded that the power can properly be described as supporting the arbitral process.⁵⁷⁴

S 63 Repeal of Arbitration Act of 1965 and transitional provisions

3.330 The proposed transitional arrangements are contained in s 63(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. The transitional provisions in the current statute (s 42(2) and (3)) were substantially the same. Possible concerns about the retrospective application of the legislation to an arbitration under an existing arbitration agreement appear to overlook this fact as well as two other considerations. First, arbitration clauses in long-term contracts could result in the current Act applying to new arbitrations in terms of such clauses many years after its repeal. Secondly, the envisaged period of notice before the commencement of the Draft Bill referred to in the discussion of s 64 below will give parties to existing arbitration agreements time to vary their agreements in the light of the Draft Bill if they consider this to be necessary.

3.331 It may be necessary to consider applying the new legislation regarding the enforcement or setting aside of awards to existing awards or awards made after the legislation takes effect but in arbitration proceedings still subject to the existing law. Compare s 28(3) of the International Arbitration Bill, 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 64(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 64 Short title and commencement

3.332 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.

⁵⁷³ See the tribunal's power under s 29(2)(b)(v) of the Draft Bill. An arbitral institution may have the power in terms of the agreed rules applying to the arbitration.

⁵⁷⁴ See the 1996 Saville Report para 309.

ANNEXURE A

**SIXTH DRAFT:03 MARCH 2000
REPUBLIC OF SOUTH AFRICA**

INTERNATIONAL ARBITRATION BILL

(As introduced in the National Assembly as a section 75 Bill)(explanatory summary of the Bill
published in Gazette No. of September 1999) (the English text is the official text of the Bill)

(MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

[B - 2000]

REPUBLIEK VAN SUID-AFRIKA

..... WETSONTWERP

(Soos ingedien in die Nasionale Vergadering as 'n artikel 75 wetsontwerp) (verduidelikende
opsomming van wetsontwerp in Staatkoerant No. Van September 1999 gepubliseer) (Die
Afrikaanse teks is die amptelike vertaling van die wetsontwerp)

(MINISTER VAN JUSTISIE)

[B - 2000]

020399SE

GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.
_____ Words underlined with a solid line indicate insertions in existing enactments.

B I L L

To provide for the incorporation of the Model Law on International Commercial Arbitration, as adopted by the United Nations Commission on International Trade Law, into South African law for international commercial arbitration; to provide for the recognition and enforcement of foreign arbitral awards; to provide for the incorporation of the Convention on the Settlement of Investment Disputes between States and Nationals of other States into South African law; to repeal the Recognition and Enforcement of Foreign Arbitral Awards Act, 1977 (Act No. 40 of 1977); to amend the Protection of Business Act, 1978 (Act No. 99 of 1978); and to provide for matters connected therewith.

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

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CHAPTER 1

GENERAL PROVISIONS

Definitions

- 1.** In Chapters 2 and 3 of this Act, unless inconsistent with the context—
- (a)* "arbitration agreement" means an arbitration agreement referred to in Article 7 of the Model Law and includes:
 - (i)* an arbitration clause contained in or incorporated by reference in a bill of lading; and
 - (ii)* an agreement between the parties otherwise than in writing which refers to terms that are in writing;
 - (b)* "conciliation" includes mediation and "conciliator" includes a mediator; and
 - (c)* "the Model Law" means the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as adapted in Schedule 1 to this Act.

Interpretation

2. (a) The English text of this Act, the Model Law and the Conventions contained in Schedules 3 and 4 prevails, where an inconsistency between the English and Afrikaans texts exists.

(b) A word or expression used in chapter 2 and in the Model Law bears the same meaning as it has in the Model Law , unless inconsistent with the context.

Objects of Act

3. The objects of the Act are to—
- (a) encourage the use of arbitration as an agreed method of resolving international commercial and investment disputes;
 - (b) implement the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985 for international commercial arbitrations, subject to the provisions of this Act;
 - (c) facilitate the recognition and enforcement of certain arbitration agreements and arbitral awards;
 - (d) provide for the settlement of certain international investment disputes; and
 - (e) give effect to the obligations of the Government of South Africa under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) and the Convention on the Settlement of Investment Disputes between States and Nationals of other States (1965), the English texts of which are set out in Schedules 3 and 4 of this Act.

Exclusion of Act 42 of 1965

4. (1) The Arbitration Act, 1965 (Act No. 42 of 1965) is not applicable to an arbitration agreement, arbitral award or reference to arbitration covered by this Act but section 2 of the Arbitration Act, 1965 applies for purposes of chapter 3 of this Act.

Act binds State

5. This Act binds the State and applies to any arbitration in terms of an arbitration agreement to which the State is a party.

CHAPTER 2

INTERNATIONAL COMMERCIAL ARBITRATION

Model Law to have force of law

6. The Model Law is enacted into law in the Republic, subject to this Act.

Matters subject to international commercial arbitration

7. (1) For purposes of this chapter, any international commercial 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—

- (i) such a dispute is not capable of determination by arbitration under any law of South Africa; or
- (ii) the arbitration agreement is contrary to the public policy of South Africa.

(2) Arbitration is not to be excluded solely on the ground that an enactment confers jurisdiction on a court or other tribunal to determine a matter falling within the terms of an arbitration agreement.

Interpretation of Model Law

8. The material to which an arbitral tribunal or a court may refer in interpreting this Chapter and the Model Law includes the documents referred to in Schedule 2 to this Act.

Immunity of arbitrators and arbitral institutions

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

(2) An arbitral or other institution, authority or person specified in article 6(2) or (3) of the Model Law or designated or requested by the parties, or another arbitral institution to appoint an arbitrator is not liable for any act or omission in the discharge of that function or any other function in relation to an arbitration unless the act or omission is shown to have been done in bad faith.

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

(4) The provisions of this section apply with the changes required by the context to—

- (a) the employees of an arbitrator or person; or
- (b) the officers and employees of an arbitral or other institution, authority or person referred to in subsection (2).

Consolidation of arbitral proceedings and concurrent hearings

10. (1) The parties to an arbitration agreement may agree that—

- (a) the arbitral proceedings be consolidated with other arbitral proceedings; or
- (b) concurrent hearings be held,

on such terms as may be agreed.

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

Right to conciliation process

11. Parties to an arbitration agreement may refer a dispute covered by the arbitration agreement to conciliation, before or after referring the dispute to arbitration, subject to the terms of the 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 authority specified in Article 6(2) of the Model Law must, on the application of any party to the agreement, appoint a conciliator who has 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) a party may not object to the appointment of such person as an arbitrator, or to that person's conduct of the arbitral proceedings, solely on the ground that such person has previously acted as a conciliator in connection with some or all of the matters referred to arbitration;
- (b) the conciliator must, where confidential information has been obtained by a conciliator from a party during conciliation proceedings, and before proceeding to act as arbitrator, 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 the conciliator refuses to act as arbitrator an arbitrator subsequently appointed is not first required to act as a conciliator unless the parties otherwise agree.

(3) (a) If the conciliation proceedings fail to produce a settlement acceptable to the parties within three months calculated from the date the conciliation proceedings started, or such other period agreed to by the parties, the conciliation proceedings must terminate, unless a contrary intention appears in the arbitration agreement.

(b) For purposes of paragraph (a), conciliation proceedings are regarded as having started on the date when the conciliator is appointed, but if the conciliator is appointed by name in the agreement, the conciliation proceedings are regarded as having started on the date when the conciliator receives written notice of the dispute.

(4) The provisions of section 9 apply, with the changes required by the context, to—

- (a) an arbitrator acting as conciliator, or the employees of such arbitrator; and
- (b) the authority referred to in subsection (1) and its officers and employees.

Power of arbitral tribunal to act as conciliator

13. (1) If all parties to any arbitral proceedings consent in writing and no party subsequently withdraws his or her 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, with the changes required by the context, to an arbitrator resuming arbitral proceedings after acting as conciliator under this section.

(4) A party may not object to the conduct of arbitral proceedings by an arbitrator solely on the ground that the arbitrator has previously acted as a conciliator in accordance with this section.

Settlement agreement

14. (1) Where the parties to an arbitration agreement settle their dispute by means of conciliation before the appointment of an arbitral tribunal and enter into a settlement agreement in writing such settlement agreement is enforceable in the Republic as an arbitral award on agreed terms.

(2) Articles 35 and 36 of the Model Law apply, with the changes required by the context, to the enforcement of such settlement agreement.

Resort to arbitral proceedings

15. Despite any agreement to the contrary, a party to an arbitration agreement engaged in conciliation proceedings is not precluded from commencing arbitration proceedings if that party is of the opinion that such a step is necessary for the preservation of his or her rights.

Application of UNCITRAL Conciliation Rules

16. The parties to an arbitration agreement who intend to settle their dispute by conciliation may, subject to this Act, agree to use the UNCITRAL Conciliation Rules set out in Schedule 5 to this Act.

CHAPTER 3

RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Definitions

17. In this Chapter, unless inconsistent with the context—

(i) "certified copy" means a copy authenticated in a manner in which foreign documents may be authenticated to enable them to be produced in any court;

- (ii) "Convention" means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, the English text of which is set out in Schedule 3 to this Act;
- (iii) "court" means a magistrate's court or a provincial or local division of the High Court of South Africa;
- (iv) "foreign arbitral award" means an arbitral award made in the territory of a state other than the Republic.

Determination of place of arbitration

18. For purposes of this Chapter, an award is deemed to be made at the place of arbitration determined in terms of articles 20(1) and 31(3) of the Model Law.

Recognition and enforcement of arbitration agreements and foreign arbitral awards

19. (1) Arbitration agreements and foreign arbitral awards must be recognised and enforced in the Republic as required by the Convention, subject to the provisions of this Chapter.

(2) A foreign arbitral award is binding between the parties to that foreign arbitral award, and may be relied upon by those parties by way of defence, set-off or otherwise in any legal proceedings.

(3) A foreign arbitral award must, on application, be made an order of court and may then be enforced in the same manner as any judgment or order of court, subject to the provisions of sections 20, 21 and 22.

(4) The provisions of article 8 of the Model Law apply, with the necessary changes, to arbitration agreements referred to in subsection (1).

Evidence to be produced by party seeking recognition or enforcement

20. A party seeking the recognition or enforcement of a foreign arbitral award must produce—

- (a) (i) the original foreign arbitral award and the original arbitration agreement in terms of which that award was made, authenticated in a manner in which foreign documents may be authenticated to enable them to be produced in any court; or
- (ii) a certified copy of that award and of that agreement; and
- (b) a sworn translation of the arbitration agreement or arbitral award authenticated in a manner in which foreign documents may be authenticated for production in court, if the agreement or award is in a language other than one of the official languages of the Republic,

but the court may accept other documentary evidence regarding the existence of the foreign arbitral award and arbitration agreement as sufficient proof in appropriate circumstances.

Refusal of recognition or enforcement

21. (1) A court may only refuse to recognise or enforce a foreign arbitral award if—

- (a) the court finds that—
 - (i) a reference to arbitration of the subject-matter of the dispute is not permissible under the law of the Republic; or
 - (ii) the enforcement of the award is contrary to public policy of the Republic; or
- (b) the party against whom the award is invoked, proves to the satisfaction of the court that—
 - (i) a party to the arbitration agreement had no capacity to contract under the law applicable to that party;
 - (ii) the arbitration agreement is invalid under the law to which the parties have subjected it, or where the parties have not subjected it to any law, the

arbitration agreement is invalid under the law of the country in which the award was made;

- (iii) he or she did not receive the required notice regarding the appointment of the arbitrator or of the arbitral proceedings or was otherwise not able to present his or her case;
- (iv) the constitution of the arbitration tribunal or the arbitration procedure was not in accordance with the relevant arbitration agreement or, if the agreement does not provide for such matters, the law of the country in which the arbitration took place;
- (v) 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 terms of the reference to arbitration but if the decisions on matters referred to arbitration can be separated from those matters not so referred, that part of the award which contains decisions on matters referred to arbitration may be recognised or enforced by a court under section 19; or
- (vi) the award is not yet binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.

(2) A court where recognition or enforcement is sought, may—

- (a) adjourn its decision pending the outcome of the application; and
 - (b) on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security,
- if an application to set aside or suspend an award has been made to a competent authority referred to in subsection (1)(b)(vi).

Savings

22. The provisions of this chapter do not affect any other right to rely upon or to enforce a foreign arbitral award, including the right conferred by article 35 of the Model Law.

CHAPTER 4

SETTLEMENT OF INTERNATIONAL INVESTMENT DISPUTES

Definitions

- 23.** In this Chapter, unless inconsistent with the context—
- (i) "award" means an award rendered pursuant to the Convention and includes any decision pursuant to the Convention—
 - (a) interpreting, revising or annulling any award; and
 - (b) regarding costs which under the Convention is to form part of the award;
 - (ii) "Centre" means the International Centre for Settlement of Investment Disputes established in terms of Article 1 of the Convention;
 - (iii) "Contracting State" means a State which has ratified or acceded to the Convention and includes a territory to which the Convention applies in terms of Article 70;
 - (iv) "Convention" means the Convention on the Settlement of Investment Disputes between States and Nationals of Other States which was opened for signature in Washington on 18 March 1965, the English text of which is set out in Schedule 4 to this Act.

Application of Convention to South Africa

- 24.** (1) Articles 18 and 20 to 24 and Chapters II to VII of the Convention have the force of law in the Republic.
- (2) The Arbitration Act, 1965 (Act No. 42 of 1965), or Chapters 2 and 3 of this Act do not apply to a dispute within the jurisdiction of the Centre or to an award made under the Convention.

Recognition and enforcement of awards

25. An award is enforceable as if it were a final judgment of the High Court after it has been duly registered with the High Court.

Designation of High Court

26. The High Court is designated as a competent court for purposes of Article 54 of the Convention.

Proof of application of Convention

27. A certificate signed by the Minister of Foreign Affairs and stating that a State is, or was at the time specified, a Contracting State to the Convention is sufficient proof of the facts stated.

CHAPTER 5**TRANSITIONAL AND OTHER PROVISIONS****Transitional provisions**

28. (1) Chapter 2 of this Act applies to international commercial arbitration agreements whether entered into before or after the commencement of Chapter 2 of this Act and to every arbitration under such an agreement but this section does not apply to arbitral proceedings which commenced before Chapter 2 of this Act came into force.

(2) For purposes of this section, the date of commencement of the arbitration proceedings is the date upon which the parties agree as the date on which the

arbitral proceedings commenced or failing such agreement, on the date of receipt by the respondent of a request for the dispute to be referred to arbitration.

(3) Chapters 2 and 3 of this Act apply to every arbitral award whether made before or after the date of commencement of such Chapters, but—

(a) proceedings for the enforcement of an arbitral award under the Recognition and Enforcement of Foreign Arbitral Awards Act, 1977 (Act No. 40 of 1977); or

(b) proceedings for the enforcement, setting aside or remittal of an award under the Arbitration Act, 1965 (Act No. 42 of 1965),

which commenced before Chapters 2 and 3 of this Act came into force, continue until concluded as if Chapters 2 and 3 of this Act had not commenced.

Repeal or amendment of laws

29. The laws referred to in Schedule 6 are repealed or amended to the extent set out in the third column of Schedule 6.

Short title and commencement

30. This Act is called the International Arbitration Act, 2000 and comes into force on a date fixed by the President by proclamation in the *Gazette*.

ANNEXURE B

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:

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CHAPTER 1

(Notes:

- In the footnotes "the previous Draft Bill" refers to the Draft Arbitration Bill in Discussion Paper 83.
- References in the footnotes to the International Arbitration Bill are to the version approved by the State Law Adviser and not to the version contained in the Law Commission's Report.)

General Provisions

Definitions⁵⁷⁵

1(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 submitted to arbitration in terms of an **arbitration agreement**;
- (ii) **"arbitration agreement"** means an agreement as defined in section 6(2);
- (iii) **"award"** includes an interim award;
- (iv) **"claim"** includes a counterclaim and **"claimant"** includes a claimant in reconvention;
- (v) **"court"** means any High Court having jurisdiction or a court having jurisdiction by virtue of an Act of Parliament referred to in section 3;⁵⁷⁶
- (vi) **"juristic person"** includes a partnership, voluntary association, trust or stiging;
- (vii) **"mediation"** includes conciliation and **"mediator"** includes a conciliator;⁵⁷⁷
- (viii) **"party"**, in relation to an arbitration agreement or **arbitral proceedings**, means a party to the agreement or proceedings, 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.
- (ix) **"specified authority"** means the authority specified by the Chief Justice in terms of section 20(6);⁵⁷⁸
- (x) **"tribunal"** means an arbitral tribunal comprising the arbitrator or arbitrators, who are natural adult persons, acting as such under an arbitration agreement;

(2) When any particular number of days is prescribed by this Act for any purpose, the period excludes the first and includes the last day, unless the last day happens to fall on a Saturday, Sunday, or on any public holiday, in which case the period also excludes such

⁵⁷⁵ This section replaces s 1 of the Arbitration Act 42 of 1965. Compare s 2 of the previous Draft Bill. The definition of "arbitration agreement" has been moved to s 6, for the reason appearing from the comment on that section. (See footnote 14 below.)

⁵⁷⁶ The revised definition of "court" is intended to cover problems posed by private arbitrations under the Labour Relations Act 66 of 1995. The problem is arguably in any event adequately addressed by s 3 below.

⁵⁷⁷ The term "mediation" has been used instead of "conciliation" in ss 13-16, in contrast to the position in the previous Draft Bill.

⁵⁷⁸ The revised definition of "specified authority" gives effect to a suggestion by the Law Society of South Africa. It is implicit in the definition's current form that different institutions could be specified for the domestic and international arbitration statutes.

day.⁵⁷⁹

(3) Unless the **parties** otherwise agree, subsection (2) also applies to calculating a period of time agreed to by them in relation to the arbitration.⁵⁸⁰

General Principles

2⁵⁸¹ 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 independent and impartial **tribunal**⁵⁸² without unnecessary delay or expense;
- (b) the **parties** to an **arbitration agreement** may agree how their disputes are to be resolved, subject only to such safeguards as are necessary in the public interest;
- (c) in matters governed by this Act the **court** must not intervene except as provided by this Act.

Application of Act

3(1)⁵⁸³ Subject to subsection (2),⁵⁸⁴ this Act applies to every arbitration under any law passed before or after the commencement of this Act, as if that other law were an **arbitration agreement**, unless that other law is an Act of Parliament and excludes or is inconsistent with this Act.

(2) This Act does not apply to an **arbitration agreement**, **arbitral proceedings** or **award** which is subject to the International Arbitration Act, 2001 (no ? of 2001).

Act binds State

4.⁵⁸⁵ This Act binds the State and 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.

Matters subject to arbitration

⁵⁷⁹ The new subsection (2) is based on s 4 of the Interpretation Act 33 of 1957, except that if the period would otherwise end on a Saturday, that Saturday must also be excluded. The provision is included so that non-lawyers using the statute can interpret it without the need to refer to the Interpretation Act. The provision does not apply to the calculation of periods fixed by the parties, tribunal, or institutional rules. Compare s 78 of the English Arbitration Act of 1996.

⁵⁸⁰ Subsection (2) only applies to periods of days stipulated in terms the Draft Bill itself. The parties may also stipulate time-limits by agreement or by incorporating rules with such time-limits. Subsection (3) therefore extends the same method of calculation to these periods, unless the parties (or the rules) stipulate a different method. All periods in the Draft Bill relate to days. Subsection (3) is more widely worded and can also be applied to periods stipulated in weeks or months.

⁵⁸¹ S 2 is a new provision, which was previously s 1 of the previous Draft Bill, based on the English Arbitration Act 1996 s 1.

⁵⁸² S 1(a) of the English Arbitration Act refers to an impartial tribunal. The requirement that the tribunal must also be independent is consistent with s 22(1)(a) below, the International Arbitration Bill sch 1 article 12(1) and the Constitution of the Republic of South Africa, Act 108 of 1996 s 34.

⁵⁸³ S 3 is based on s 40 of the Arbitration Act 42 of 1965 and corresponds to s 3 of the previous Draft Bill, although the wording has been simplified. Compare the International Arbitration Bill s 4.

⁵⁸⁴ S 3(1) must also be read with s 63.

⁵⁸⁵ S 4 corresponds to s 39 of the Arbitration Act 42 of 1965. Compare s 5 of the International Arbitration Bill, which omits the qualification at the end of s 4. This appears appropriate in that the said bill only applies to international commercial arbitrations.

5 (1)⁵⁸⁶ 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 minor child of the marriage.

(2)⁵⁸⁷ 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 –

- (a) such a dispute is not capable of determination by arbitration under any other law of South Africa; or
- (b) the **arbitration agreement** is contrary to public policy of South Africa.

(3) Arbitration is not to be excluded solely on the ground that an enactment confers jurisdiction on a court or other tribunal to determine a matter falling within the terms of an **arbitration agreement**.

CHAPTER 2

The Arbitration Agreement

Definition of arbitration agreement and related matters

6 (1)⁵⁸⁸ This Act only applies where the **arbitration agreement** is in writing and any other agreement between the parties is effective for purposes of this Act only if it is in writing.

(2) "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.⁵⁸⁹

(3) An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters or a means of telecommunication which provides a record of the agreement, or in an exchange of statements of claim and defence in which the existence of

⁵⁸⁶ S 5(1) is based on s 2(a) of the Arbitration Act 42 of 1965 with an added qualification, so as not to exclude all arbitrations concerning matrimonial property disputes. See further the report paras 3.28-3.30.

⁵⁸⁷ S 5(2) and (3) follow s 7 of the International Arbitration Bill, which replaces s 2(b) of the Arbitration Act 42 of 1965 for international arbitrations. The amendments made to s 5(2) and (3) follow the wording adopted by the State Law Adviser in the International Arbitration Bill.

⁵⁸⁸ In the process of revising the previous Draft Bill, references to the term "arbitration agreement" have been intentionally reduced to avoid possible confusion. Agreement between the parties on many matters relating to the arbitration procedure may be reached after the arbitration agreement (often a clause in the main contract) was concluded. The expression "unless the arbitration agreement otherwise provides" which comes from the 1965 Act is misleading in that it suggests that an agreement between the parties on procedural matters is only effective if it is contained in the arbitration agreement. The expression has therefore been replaced where appropriate by "unless the parties otherwise agree". However, because of the impact of party autonomy on the powers of the tribunal, it appears advisable that subsequent agreements between the parties affecting the arbitration proceedings must also be in writing in the interests of certainty. Therefore the definitions of "arbitration agreement" and an agreement in writing have been moved from the definitions section of the previous Draft Bill (now s 1) to this section and a new subsection (1) added, which is based on s 5(1) of the English Arbitration Act of 1996.

⁵⁸⁹ The definition of an arbitration agreement in s 6(2), (3) and (4) is based on that in the International Arbitration Bill s 1(a) and sch 1 article 7.

an agreement is alleged by one party and not denied by another.

(4) 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.

Binding effect of arbitration agreement

7 An **arbitration agreement** is not capable of being terminated except by the consent of all the **parties** in writing, unless the **arbitration agreement** otherwise provides, and subject to the provisions of section 9.⁵⁹⁰

Effect of death or legal disability of a party

8(1)⁵⁹¹ Unless the parties otherwise agree, an **arbitration agreement** or any appointment of an arbitrator thereunder is not terminated by –

- (a) the death, or sequestration or placing under curatorship of the estate of any **party** thereto, or,
- (b) if such **party** be a juristic person, by the winding-up of the juristic person or the placing of the juristic person under judicial management.

(2) Should an event referred to in subsection (1)(a) or (b) occur after any dispute has been submitted to arbitration, all steps in connection with the arbitration must be stayed, subject to any order that the **court** may make and subject to subsection (3), pending the appointment of the appropriate representative.⁵⁹²

(3) Notwithstanding the provisions of any law regarding the staying or suspension of civil proceedings upon an event referred to in subsection 1(a) or (1)(b),⁵⁹³ the appropriate representative must serve notice of his or her appointment on the other **parties** and on the **tribunal** (if appointed) as soon as is reasonably possible and in any event within 21 days of the representative's appointment, whereupon any **arbitral proceedings** which have already commenced must continue, subject to the right of the other **party**, if the **claimant**, to withdraw the **claim** and to any directions the **tribunal** may give.

(4) Subsections (2) and (3) apply with the changes required by the context if the office of the appropriate representative becomes vacant after any dispute has been submitted to arbitration.

(5) For purposes of subsections (2) and (4), a dispute is deemed to have been submitted 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 submitted to the arbitrator so named or designated.⁵⁹⁴

⁵⁹⁰ S 7, re-enacts s 3(1) of the Arbitration Act 42 of 1965 with one modification, which did not appear in s 6 of the previous Draft Bill. In conformity with s 6(1) above and in the interests of certainty, an agreement terminating the arbitration agreement is now also required to be in writing. As appears from the report para 3.42, this would not prevent a party waiving his or her right to rely on the arbitration agreement in appropriate circumstances.

⁵⁹¹ S 8 is a revised version of s 7 of the previous Draft Bill. The latter followed s 4 of the Draft Bill submitted by the Association of Arbitrators in 1994 and replaced ss 4 and 5 of the Arbitration Act 42 of 1965.

⁵⁹² See subsection (8) for the definition of "appropriate representative".

⁵⁹³ Compare s 359 of the Companies Act 61 of 1973 regarding the suspension of civil proceedings if a company is placed under liquidation.

⁵⁹⁴ S 8(5) is based on s 1(2) of the Draft Bill submitted by the Association of Arbitrators in 1994. It appeared in the definitions section as s 1(3) of the previous Draft Bill, but as it only applies to s 8, it has been moved to that section.

(6) Any period of time fixed by or under this Act which is interrupted by any stay or suspension resulting from the application of subsections (2), (3) and (4) is extended by the unexpired portion of the period so fixed.

(7) Nothing in this section affects the operation of any law or the common law⁵⁹⁵ by virtue of which any right of action is extinguished by the death of any person.

(8) For purposes of this section, an appropriate representative means an executor, administrator, curator, trustee, liquidator or judicial manager, as the case may be.

Stay of legal proceedings where there is an arbitration agreement

9(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 submitted to arbitration, any party to such legal proceedings may at any time after giving notice of intention to defend or oppose but before delivering any pleadings or taking any other steps in the proceedings, apply to that **court** for a stay of the proceedings.⁵⁹⁶

(2) On any application under this section, the **court** must 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.⁵⁹⁷

(3) For purposes of subsection (1), the commencement of legal proceedings includes the institution of a counterclaim.⁵⁹⁸

(4) Failure to reply to a demand for performance of a contractual obligation or to respond to steps to refer a matter covered by an **arbitration agreement** to arbitration or failure to comply with a time-limit referred to in section 11 does not render the agreement inoperative or incapable of being performed for purposes of subsection (2).⁵⁹⁹

(5) If the **court** refuses to stay the legal proceedings, 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**.⁶⁰⁰

Reference of interpleader issue to arbitration

⁵⁹⁵ Compare the wording of s 91A(2)(a) of the Companies Act: "any other law, the common law". See too the Interpretation Act 33 of 1957 s 2: "'law' means any law ('wet') ... or other enactment".

⁵⁹⁶ S 9, which corresponds to s 8 of the previous Draft Bill, amends s 6 of the Arbitration Act 42 of 1965 in line with the 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.

⁵⁹⁷ The phrase "null and void, inoperative or incapable of being performed" comes from Article II of the New York Convention of 1958 and has been retained in the equivalent provision of the Model Law, article 8. It has been suggested that the word "inoperative" would cover those cases where the arbitration agreement has ceased to have effect. This could occur where, as a result of the parties taking their dispute to court, the issue has become *res judicata*. The words "incapable of being performed" would apply to cases where the arbitration cannot effectively be set in motion, for example the case where the arbitral clause is too vaguely worded or the situation where the sole arbitrator named in the agreement refuses to accept appointment. See further the report, para 3.73.

⁵⁹⁸ The new-subsection (3) was inserted to cover a point dealt with in s 9(1) of the English Arbitration Act.

⁵⁹⁹ The new subsection (4) deals with the issue raised by the Arbitration Forum in para 3.3(ii) of its submissions. It also deals with the interaction between s 9 and s 11 of the Draft Bill. See paras 3.71-3.72 and 3.74 of the report.

⁶⁰⁰ The new subsection (5) is based on s 9(5) of the English Arbitration Act of 1996. It is desirable to have such a provision for the sake of consistency, if s 10(2) of the Draft Bill, based on s 10(2) of the English Arbitration Act of 1996, is retained.

10(1)⁶⁰¹ 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**.

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

11(1)⁶⁰² Where an **arbitration agreement**⁶⁰³ provides that a claim or defence 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,⁶⁰⁴ the **court** 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.

(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 were outside the reasonable contemplation of the **parties** when they agreed to the provision and 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.

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

Consolidation

12(1)⁶⁰⁵ The **parties** to an **arbitration agreement** may agree that -

- (a) **arbitral proceedings** be consolidated with other **arbitral proceedings**, or
- (b) concurrent hearings be held;

⁶⁰¹ S 10, which corresponds to s 9 of the previous Draft Bill, is 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.

⁶⁰² S 11, which corresponds to s 10 of the previous Draft Bill, amends s 8 of the Arbitration Act 42 of 1965, following recommendations by the Association of Arbitrators in s 8 of its Draft Arbitration Bill of 1994 and s 12 of the English Arbitration Act of 1996.

⁶⁰³ Both s 8 of the current Act and s 12(1) of the English Arbitration Act 1996 apply only to an arbitration agreement to refer future disputes to arbitration. The scope of s 11(1) has been expanded to apply to the situation where the arbitration agreement was only entered into after the dispute arose. S 11 could be useful where the agreement concluded after the dispute has arisen provides for a multi-stage dispute resolution process.

⁶⁰⁴ See para 3.77 of the report regarding the reference to other proceedings.

⁶⁰⁵ S 12(1) and (2) are a new provision, corresponding to s 10(1) and (2) of the previous Draft Bill, following s 10 of the Draft International Arbitration Act.

on such terms as they may agree.

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

(3) Despite subsection (2), unless the **parties** otherwise agree the **tribunal**

- (a) may on the application of a **party**, or
- (b) must if a **court** so directs under its rules,⁶⁰⁶

allow one or more third persons to be joined in the **arbitral proceedings**, if any such third person has consented to joinder in writing.

(4) The **tribunal** may thereafter make a single **award** or separate **awards** in respect of all the parties to the arbitration.⁶⁰⁷

CHAPTER 3

Mediation pursuant to an arbitration agreement

Right to mediation process

13 Parties to an **arbitration agreement** may, subject to the terms of the agreement, refer a dispute covered by it to **mediation** before or after referring the dispute to arbitration.⁶⁰⁸

Appointment of mediator

14 (1)⁶⁰⁹ In any case where an **arbitration agreement** provides for the appointment of a **mediator** -

- (a) by the **parties**, and the **parties** are unable to agree on a **mediator**; 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; or
- (c) where the method provided by the **arbitration agreement** for appointing a mediator fails or is inoperative;⁶¹⁰

⁶⁰⁶ Rule 11 of the High Court Rules on consolidation deals only with the consolidation of court proceedings. This subsection envisages that court rules could be amended to empower the court (as defined in s 1 above) to order a non-party to be joined to pending arbitral proceedings, with that person's consent.

⁶⁰⁷ S12(3) and (4) are a contract-out provision, with no equivalent in the previous Draft Bill, based on article 22(1)(h) of the LCIA Rules. The addition will only be effective in addressing the problem of multi-party disputes, to the extent that non-parties to the original arbitration agreement consent to be joined in the arbitration. Compare article 1045 of the Netherlands Arbitration Act and see further paras 3.84-3.88 of the report, where the further alternatives considered by the Project Committee are also discussed.

⁶⁰⁸ S 13 is a new provision, with no equivalent in the previous Draft Bill, following s 11 of the International Arbitration Bill.

⁶⁰⁹ S 14, corresponding to s 12 of the previous Draft Bill, is based on s 12 of the International Arbitration Bill. The changes compared to the previous draft are mainly to give effect to changes proposed by the State Law Adviser to the International Arbitration Bill.

⁶¹⁰ S 14(1)(c) has no equivalent in the International Arbitration Bill. It would, for example apply in a situation where the appointing authority specified in the arbitration agreement has ceased to exist.

unless the parties otherwise agree the chairperson of the **specified authority** must, on the application of any **party** to the agreement, appoint a **mediator** with the same powers as if that **mediator** had been appointed in terms of the agreement.

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

- (a) a party may not object to the appointment of such person as an arbitrator, or to that person's conduct of the **arbitral proceedings**, solely on the ground that such person has previously acted as a **mediator** in connection with some or all of the matters referred to arbitration;
- (b) the **mediator** must, where a party has chosen to disclose⁶¹¹ confidential information to the **mediator** during **mediation** proceedings, and before proceeding to act as arbitrator, disclose to all other parties to the **arbitral proceedings** as much of that information as the **mediator** considers material to the **arbitral proceedings**;
- (c) if the **mediator** refuses to act as an arbitrator, any other person appointed as an arbitrator is not first required to act as a **mediator** unless the parties otherwise agree.

(3)(a) If the **mediation** proceedings fail to produce a settlement acceptable to the **parties** within 28 days from the date the **mediation** proceedings started, or such other period agreed to by the **parties**, the **mediation** proceedings must terminate, unless the **parties** otherwise agree.

(b) For purposes of paragraph (a), **mediation** proceedings are regarded as having started on the date when the **mediator** is appointed, but if the **mediator** is appointed by name in the **arbitration agreement**, the **mediation** proceedings are regarded as having started on the date when the **mediator** receives written notice of the dispute.

(4) The provisions of section 25 apply with the changes required by the context to –

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

⁶¹¹ The change in the wording from the previous version is to dispel the possible misconception that the mediator has inquisitorial powers to obtain information.

Power of arbitrator to act as mediator

15 (1)⁶¹² 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 **mediator**.

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

- (a) may communicate with the **parties** to the **arbitral proceedings** collectively or separately; and
- (b) must, subject to subsection (3), treat information obtained as **mediator** from a **party** to the **arbitral proceedings** as confidential unless that **party** otherwise agrees.

(3) The provisions of section 14(2)(b) apply with the changes required by the context to an arbitrator resuming **arbitral proceedings** after acting as **mediator** under this section.

(4) A **party** may not object to the conduct of **arbitral proceedings** by an arbitrator solely on the ground that the arbitrator has previously acted as a **mediator** in accordance with this section.

Settlement agreement

16 (1)⁶¹³ Where the **parties** to an **arbitration agreement** settle their dispute by means of **mediation** or otherwise before the appointment of the **tribunal** and enter into a settlement agreement in writing, that agreement is enforceable⁶¹⁴ as an **award** on agreed terms.⁶¹⁵

(2) Section 53 applies, with the changes required by the context, to the enforcement of a settlement agreement.

CHAPTER 4

The arbitral tribunal

Number of arbitrators

17 (1)⁶¹⁶ The number of arbitrators to form the **tribunal** may be agreed by the **parties**.

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

⁶¹² S 15, corresponding to s 13 of the previous Draft Bill, is a new provision based on s 13 of the International Arbitration Bill.

⁶¹³ S 16 is a new provision, corresponding to s 14 of the previous Draft Bill, based on s 14 of the International Arbitration Bill. The changes from the previous draft are mainly to take account of changes recommended by the State Law Adviser to the equivalent provision of the International Arbitration Bill.

⁶¹⁴ See the report para 3.100 as to why, unlike the equivalent provision of the International Arbitration Bill, there is no reference to the award being enforceable in the Republic.

⁶¹⁵ See s 44 regarding an award on agreed terms.

⁶¹⁶ S 17, corresponding to s 16 of the previous Draft Bill, is based on the International Arbitration Bill sch 1 article 10 and the English Arbitration Act of 1996 s 15(1) and (3). Compare s 10 of the Arbitration Act 42 of 1965. See para 3.108 of the report as to why s 16(3) of the previous Draft Bill, based on the English Arbitration Act of 1996 s 15(2) was deleted.

Appointment of arbitrators

18 (1)⁶¹⁷ The **parties** may agree on 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 20.

Power to appoint in case of default

19 (1)⁶¹⁸ Where an **arbitration agreement** provides for a **tribunal** of two or more arbitrators, one to be appointed by each **party**, and any **party** fails to appoint an arbitrator in terms of the agreement 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 that period, the other **party** may, subject to subsection (3), appoint that arbitrator, and the **award** of the **tribunal** so constituted binds all **parties** as if it had been appointed by agreement.

(3) The 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.

Power of specified authority to appoint an arbitrator

20 (1)⁶¹⁹ 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

⁶¹⁷ S 18, corresponding to s 17 of the previous Draft Bill, is based largely on s 16 of the English Arbitration Act of 1996 and replaces s 11(1) of the Arbitration Act 42 of 1965.

⁶¹⁸ S 19, corresponding to s 18 of the previous Draft Bill, 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.

⁶¹⁹ S 20, corresponding to s 19 of the previous Draft Bill, 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 International Arbitration Bill sch 1 articles 6(2)-(4) and 11.

(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** must 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, must 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 19(3) is not subject to appeal.

(5) An arbitrator appointed by the chairperson of the **specified authority** has the same powers as an arbitrator appointed in terms of the **arbitration agreement**.

(6) The **specified authority** is an appropriate authority specified by the Chief Justice by notice in the *Government Gazette*.⁶²⁰

(7) If the chairperson of the **specified authority** fails to perform a function in terms of this section or sections 14(1) and 19(3) 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**.

(8) Pending the designation of a **specified authority**, the functions referred to in sections 14(1), 19(3) and 20(1) must be performed by the Chief Justice, or such other judge as may be nominated by him or her.

⁶²⁰ Compare the similar power conferred on the Chief Justice by the International Arbitration Bill sch 1 article 6(2).

Revocation of arbitrator's mandate

21 (1)⁶²¹ The mandate of an arbitrator may not be revoked except:

- (a) by the agreement of the **parties** in writing;⁶²² or
- (b) by an arbitral or other institution or person vested by the parties with the power of revocation.⁶²³

(2) Nothing in this section affects the power of the chairperson of the **specified authority** to terminate an arbitrator's appointment under section 19(3) or the power of the **court** to remove an arbitrator from office under section 22.

Power of court to remove arbitrator

22 (1)⁶²⁴ A **party** to **arbitral proceedings** may (upon notice to the other **parties**, to the arbitrator concerned and to all other members 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 **arbitral proceedings** 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

⁶²¹ S 21, corresponding to s 20 of the previous Draft Bill, is a 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 International Arbitration Bill sch 1 article 14(1).

⁶²² Subsection 20(1) of the previous Draft Bill, derived from s 23(1) of the English Arbitration Act of 1996, created the impression that the parties could agree to confer a power on a party to revoke an arbitrator's mandate unilaterally. Such a power could clearly be abused. It is therefore a permissible restriction on party autonomy that the mandate can only be revoked with the agreement of the parties or by the arbitral institution in whom that power has been vested.

⁶²³ Subsection 20(3) of the previous Draft Bill was based on s 23(4) of the English Arbitration Act of 1996. It created an exception to the requirement that the revocation of an arbitrator's mandate must be in writing in the case where the parties terminate their arbitration agreement. The exception became redundant as a result of the provision in s 7(1) of this Draft Bill, which in any event requires the termination of the arbitration agreement by the parties to be in writing.

⁶²⁴ This section, corresponding to s 21 of the previous Draft Bill, 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.

respect to the arbitrator's entitlement (if any) to fees or expenses, or the repayment of any fees or expenses already paid.⁶²⁵

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

(6) Except in the case of an order against an arbitrator under subsection (4),⁶²⁶ a decision by the **court** under this section is not subject to appeal.

Resignation of arbitrator

23 (1)⁶²⁷ 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 such agreement, 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 the relief referred to in subsection (2)(a) on such terms as the court deems fit.

Filling of vacancy

24 (1)⁶²⁸ 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

⁶²⁵ The provision on costs in s 22(4) follows s 13(3) of the 1965 Act – compare the Arbitration Forum's submissions para 3.6. See further para 3.125 of the report.

⁶²⁶ The right of appeal is only available where costs or a reduction in fees are ordered against an arbitrator under subsection (4). The decision of the court to remove an arbitrator under subsection (1) is not subject to appeal. This change was made to address concerns regarding the possible constitutionality of the exclusion of the right of appeal, even where an arbitrator suffers financial loss in respect of work already performed. See further para 3.126 of the report.

⁶²⁷ S 23, corresponding to s 22 of the previous Draft Bill, is a new provision based on s 25 of the English Arbitration Act of 1996.

⁶²⁸ S 24, corresponding to s 23 of the previous Draft Bill, 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 International Arbitration Bill sch 1 article 15.

provisions apply:

- (a) the provisions of sections 18 and 20 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.

Immunity of arbitrators and arbitral institutions

25 (1)⁶²⁹ 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 with the changes required by the context to -

- (a) the employees of an arbitrator; and
- (b) the officers and employees of an arbitral or other institution or person referred to in this section.

CHAPTER 5

Conduct of arbitral proceedings

Competence of tribunal to rule on its own jurisdiction

26 (1)⁶³⁰ Unless the **parties** otherwise agree a **tribunal** may at the instance of a **party** 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 must be treated as an agreement independent of and severable from the other terms of that

⁶²⁹ S 25, corresponding to s 24 of the previous Draft Bill, is a new provision, following s 9 of the International Arbitration Bill.

⁶³⁰ S 26, corresponding to s 25 of the previous Draft Bill, is a new provision, based on the International Arbitration Bill sch 1 article 16 and s 5(2)-(6) of the Draft Bill submitted by the Association of Arbitrators in 1994.

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) A plea that the **tribunal** has no jurisdiction must be raised not later than the submission of a statement of defence, but a **party** is not precluded from raising such plea by reason of his or her participation in the appointment of the **tribunal**.

(4) A **party** who asserts that the **tribunal** is exceeding its jurisdiction must do so 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**, but if the **tribunal** makes a preliminary ruling that it has jurisdiction, a party opposed to such ruling may within fourteen 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.

(8) For purposes of subsection (3), a statement of defence includes a statement of defence to a counterclaim.

(9) The **tribunal** may admit an objection later than the time specified in subsection (3) or (4) if it considers the delay to be justified.⁶³¹

Determination of preliminary point of jurisdiction by court

27 (1)⁶³² The **court** may on the application of a **party** determine any question as to the jurisdiction of the **tribunal**.

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

- (a) all the other **parties** to the **arbitral proceedings** agree; 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**, must 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**.

⁶³¹ Subsection (9) is based on s 31(3) of the English Arbitration Act of 1996 and is intended to simplify the wording of subsections (3) and (4).

⁶³² S 27, corresponding to s 26 of the previous Draft Bill, is a new provision based on s 32 of the English Arbitration Act of 1996.

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

General duty of tribunal

28 (1)⁶³³ 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.

General powers of tribunal

29 (1)⁶³⁴ Unless the parties otherwise agree, the **tribunal** may conduct the arbitration in such manner as it deems fit.

(2) The **tribunal** may -

- (a) unless the **parties** otherwise agree -
 - (i) from time to time determine the time when and the place where the **arbitral proceedings** must be held or proceed;
 - (ii) decide how the issues in dispute are to be defined and for this purpose to require the **parties** to deliver 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 such statements or particulars;
 - (iii) administer oaths to, or take the affirmations of, the **parties** and witnesses appearing to give evidence;
 - (iv) subject to section 33(1) ⁶³⁵ decide whether any and if so what questions should be put to and answered by the **parties** and their

⁶³³ S 28, corresponding to s 27 of the previous Draft Bill, is a new provision based on the English Arbitration Act 1996 s 33; compare the UNCITRAL Model Law articles 18 and 19(2).

⁶³⁴ This section, corresponding to s 28 of the previous Draft Bill, replaces s 14(1) and (2) of the Arbitration Act 1996. In the light of responses to Discussion Paper 83, it has been rearranged to commence with the tribunal's general power. Following the wording of s 34(1) of the English Arbitration Act, it is made clear that this power is subject to the parties' right to agree any matter, whether in the arbitration agreement or in a subsequent written agreement. Compare the new s 6(1) above.

⁶³⁵ The purpose of the cross-reference is to direct the tribunal's attention specifically to its discretion to decide whether there should be hearing at all or whether the arbitration should be conducted on documents only, unless the parties have agreed to exclude this discretion.

witnesses and when and in what form this should be done;⁶³⁶

- (v) receive evidence given by affidavit;
 - (vi) decide on the language or languages to be used in the arbitral proceedings;
 - (vii) receive evidence given through an interpreter; and
 - (viii) carry out any inspection which the **arbitral proceedings** may require.⁶³⁷
- (b) on the application of any **party**, unless the **parties** otherwise agree -⁶³⁸
- (i) require any **party** to make discovery of documents by way of affidavit or by answering interrogatories on oath and to produce such documents for inspection;⁶³⁹
 - (ii) require any **party** to allow inspection of any goods or property involved in the arbitration, which is in that **party's** possession or under that **party's** control or to allow any physical examination required for the **arbitral proceedings**; ⁶⁴⁰
 - (iii) order any **party** to take such interim measures as the **tribunal** may consider necessary for the protection of the subject matter of the dispute;
 - (iv) 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
 - (v) 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;

(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.

⁶³⁶ S 29(2)(a)(iv) is based on s 34(2)(e) of the English Arbitration Act of 1996 and simplifies the comparable provisions of the previous draft, while emphasizing tribunal control over evidence. Control over the calling of witnesses is to be exercised at the hearing, rather than by requiring the tribunal's consent before a witness can be subpoenaed, as proposed in s 35 of the previous Draft Bill.

⁶³⁷ The wording of s 29(2)(a)(viii) and (b)(ii) has been widened to meet the needs of personal injury cases.

⁶³⁸ Para (iii) of the previous draft, providing for evidence on commission, has been scrapped, as the tribunal itself can take evidence outside the Republic. See para 3.163 of the report. A commission would only be required in the absence of voluntary cooperation by the witness concerned. Therefore the court has the power to appoint a commissioner – see s 40(1)(f) below.

⁶³⁹ Consideration was given to moving this provision to subsection 2(a) so that the power to order discovery could be exercised by the tribunal on its own initiative. This could however encourage an unnecessarily interventionist approach by the tribunal. The previous draft, following s 14(1)(a)(i) of the 1965 Act, provided for discovery 'subject to any legal objection'. S 30(a) of the Draft Bill makes it clear that arbitration is not subject to the ordinary rules of evidence in civil proceedings. However, all the tribunal's powers regarding the admission and production of evidence are subject to the tribunal's general duty in s 28 to act fairly – see s 28(2). A direction for the production and inspection of privileged communications would clearly be in breach of this duty.

⁶⁴⁰ See the footnote to s 29(2)(a)(viii) above for the reason for the addition.

Power of tribunal to consider evidence

30 ⁶⁴¹ Unless the **parties** otherwise agree, the **tribunal** may -

- (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.

Special powers of tribunal

31 (1) ⁶⁴² If the **parties** so agree, the **tribunal** must⁶⁴³ 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 **parties** otherwise agree, the **tribunal** may, on the application of the respondent at any stage of the **arbitral proceedings**, order a **claimant**⁶⁴⁴ to provide appropriate security for costs (including additional security) and may stay the **arbitral proceedings** pending compliance with such order.

(3) The tribunal may exercise its power under subsection (2) if the **claimant** is a **juristic person** and there are reasonable grounds for believing that the **juristic person**, or if it is being wound up, its liquidator, will be unable to pay the costs of the respondent if the respondent is ultimately successful in his or her defence.⁶⁴⁵

(4) Unless the **parties** otherwise agree, 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 55(6) applies with the changes required by the context.

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

(6) Where the **tribunal** calls an expert witness in terms of subsection (5), it may require a party to give the expert witness any relevant information, or to produce or to provide access

⁶⁴¹ This section, comparable to s 29 of the previous Draft Bill, is a new provision based on s 15 of the Draft Bill submitted by the Association of Arbitrators in 1994; compare the International Arbitration Bill sch 1 article 19(1) and the English Arbitration Act of 1996 s 34(1)(f) and (g).

⁶⁴² This section, corresponding to s 30 of the previous Draft Bill, is a new provision based on ss 16 and 14(1)(a)(v) and (4) of the Draft Bill submitted by the Association of Arbitrators in 1994, the International Arbitration Bill sch 1 articles 28(3)-(4) and 26 and the English Arbitration Act of 1996 ss 37 and 38(3).

⁶⁴³ Where the parties agree to the tribunal having this power, the tribunal is under a duty to exercise it and its application is not merely optional.

⁶⁴⁴ S 1 defines "claimant" to include a respondent as a claimant in reconvention.

⁶⁴⁵ The court has the power to order security for costs against a juristic person in court proceedings in certain circumstances (see the Companies Act 61 of 1973 s 13 and the Close Corporations Act 69 of 1984 s 8). This power does not apply to arbitral proceedings (see s 40(1)(c) below). Subsection (3) provides in effect that the tribunal may order security for costs against a juristic person in arbitral proceedings in the same circumstances where a court may do so in court proceedings.

to any relevant documents, goods or other property for inspection by the expert.

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

32 (1)⁶⁴⁶ Where a **tribunal** comprises two arbitrators, decisions must be taken unanimously.

(2) Unless the **parties** otherwise agree, where a **tribunal** comprises more than two arbitrators, any decision 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 **parties** otherwise agree, for purposes of subsections (1) and (2), where the arbitrators, or a majority of them, do not agree in their **award**, their decision must 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.

Notice of proceedings to parties and right to representation

33 (1) Unless the **parties** otherwise agree, the **tribunal** must decide whether to hold hearings for the presentation of oral evidence or argument or both, or whether the proceedings are to be conducted on the basis of documents only.⁶⁴⁷

(2)⁶⁴⁸ Subject to subsection (1), the **tribunal** must give to every **party** to the **arbitral proceedings** written notice of the time when and place where the proceedings will be held, and every such **party** is entitled to appear before the **tribunal** personally or, unless the **parties** agree otherwise, by any representative⁶⁴⁹ 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.

(4) The written notice referred to in subsection (2) may be given by an arbitral institution as directed by the **tribunal**.⁶⁵⁰

Confidentiality of arbitral proceedings

34 (1)⁶⁵¹ Unless the **parties** otherwise agree, the **arbitral proceedings** must be held in private.

⁶⁴⁶ This section, corresponding to s 31 of the previous Draft Bill, amends s 14(3) and (4) of the Arbitration Act 42 of 1965: compare s 17 of the Draft Bill submitted by the Association of Arbitrators in 1994.

⁶⁴⁷ This section corresponds to s 32 of the previous Draft Bill. S 33(1) departs from the Model Law and the International Arbitration Bill sch 1 article 24(1). The tribunal now has the discretionary power to decide whether a hearing should be held or whether the arbitration should be conducted on a documents-only basis, unless the parties otherwise agree. A party therefore no longer has a right to require a hearing in the absence of an agreement for a documents-only arbitration. The change is in line with s 34(1)(h) of the English Arbitration Act 1996 and has the object of promoting cost-effective arbitration.

⁶⁴⁸ S 33(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.

⁶⁴⁹ Subsections (2) and (3) make it clear that a party may choose whether or not to have legal or other representation. See further paras 3.175-3.176 of the report, where the possibility of limits on the right to representation is discussed. One justification for such restrictions would be to deal with concerns about the problem of unequal representation in arbitration proceedings.

⁶⁵⁰ Subsection (4) addresses the concern raised in the submission of the Arbitration Forum para 3.8. See further para 3.178 of the report.

⁶⁵¹ This section is a new provision added subsequent to Discussion Paper 83. Compare s 14 of the New Zealand Arbitration Act of 1996.

(2) Unless the **parties** otherwise agree, where the **arbitral proceedings** are held in private, the **award** and all documents created for the arbitration which are not otherwise in the public domain must be kept confidential by the **parties** and **tribunal**, except to the extent that the disclosure of such documents may be required by reason of a legal duty or to protect or enforce a legal right.⁶⁵²

General duty of parties

35 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.⁶⁵³

Powers of tribunal in case of party's default

36 (1)⁶⁵⁴ The **parties** may agree on the powers of the **tribunal** in case of a **party's** failure to do anything necessary for the proper and expeditious conduct of the arbitration.

(2) Unless the **parties** otherwise agree, if the **tribunal** is satisfied that there has been unreasonable and inexcusable delay on the part of the **claimant**⁶⁵⁵ 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 respondent,

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

(3) Unless the **parties** otherwise agree, 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**.

⁶⁵² Subsection (2) is based on the LCIA Rules (1998) article 30.

⁶⁵³ S 35, corresponding to s 33 of the previous Draft Bill, is a new provision based on the English Arbitration Act 1996 s 40.

⁶⁵⁴ This section, corresponding to s 34 of the previous Draft Bill, 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 International Arbitration Bill sch 1 article 25.

⁶⁵⁵ S 1 defines "claimant" to include a respondent bringing a claim in reconvention.

Summoning of witnesses

37 (1)⁶⁵⁶ 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** in the same manner and subject to the same conditions as if the proceedings were a civil action pending in the court having jurisdiction in the area in which the arbitral proceedings are being or are about to be held.

(2) 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.

(3) 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.

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

(5) 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 apply with the changes required by the context 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.

(6) On the application of any **party**, 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.

(7) On the application of a person summoned under this section, the **tribunal** may make a special order for costs, including the reasonable disbursements of that person, against the **party** who caused that person to be summoned if the **tribunal** finds that his or her presence at the **arbitral proceedings** was unnecessary or on unreasonably short notice.⁶⁵⁷

⁶⁵⁶ S 37, corresponding to s 35 of the previous Draft Bill, re-enacts s 16 of the Arbitration Act 42 of 1965; with a new provision in subsection (7). Compare the English Arbitration Act 1996 s 43(2) and the International Arbitration Bill sch 1 article 27.

⁶⁵⁷ The current international standard is to require tribunal control over a subpoena for a witness, instead of allowing a party to do so unilaterally. S 35(2) of the previous draft Bill therefore required the consent of the tribunal or the other parties before a subpoena could be issued. This Draft Bill attempts to achieve the same results by other means. The new subsection (7) is a deterrent against the abuse of the party's unilateral power. The tribunal could also prevent the witness, once subpoenaed, giving evidence or exclude the evidence. See the revised s 29(2)(a)(iv) of the Draft Bill above and para 3.189-3.191 of the report.

Recording of evidence

38 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** may agree or, failing such agreement, as the **tribunal** may from time to time direct after consultation with the **parties**.⁶⁵⁸

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

39 (1)⁶⁵⁹ A **tribunal** may, on the application of any **party**, and must, if the **parties** so agree, refer a question of law arising in the course of the arbitral proceedings for the opinion of the court or of an appropriately qualified lawyer.⁶⁶⁰

(2) The question of law must be referred before the **tribunal** deals with it in an **award** and must be formulated by the **tribunal** after consultation with the **parties**.

(3) For purposes of subsection (1) an appropriately qualified lawyer means a lawyer who –

- (a) has practised as an advocate or attorney; or
- (b) has worked as a member of the academic staff of a university;⁶⁶¹

for a cumulative period of not less than seven years and who is agreed to by the parties, or failing such agreement is appointed by the **tribunal** after consultation with the parties, with due regard to the appointee's experience, impartiality and independence.

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

(5) The **tribunal** in exercising its discretion under subsection (1) must not grant an application for a question of law to be referred if it considers that the application is not in good faith or is made to cause delay.⁶⁶²

(6) The **parties** may exclude an 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**.

General powers of court

40 (1)⁶⁶³ The **court** has the same power as it has for the purposes of proceedings before that **court** to make

⁶⁵⁸ S 38, corresponding to s 36 of the previous Draft Bill, re-enacts s 17 of the Arbitration Act 42 of 1965.

⁶⁵⁹ This section, corresponding to s 37 of the previous Draft Bill, replaces s 20 of the Arbitration Act 42 of 1965. It has been drafted after considering s 23 of the Draft Bill submitted by the Association of Arbitrators in 1994 and the English Arbitration Act 1996 s 45.

⁶⁶⁰ Subsection (1) of the draft in Discussion Paper 83 contained an ambiguity inherited from s 20 of the current statute. It is conceivable that the tribunal could rule on the question of law in an interim award and a party could then apply for the question to be referred to court or to counsel. This possibility was not intended. See also the new subsection (2).

⁶⁶¹ As currently worded subsection 3(b) would also include a lawyer who has worked at a foreign university. See further para 3.198 of the report. Subsection (3) would also include a lawyer who has retired from active practice or from an academic position after working for the requisite period. The lawyer would still have to be appropriately qualified by reason of that lawyer's experience to give an opinion under this section.

⁶⁶² See para 3.199 of the report for a discussion of the changes to this subsection.

⁶⁶³ S 40, corresponding to s 38 of the previous Draft Bill, follows sch 1 articles 9(2)-(5) and 27(b)(i) of the 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.

- (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 liquidator; or⁶⁶⁴
- (e) an order 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**; or
- (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) is not subject to appeal.

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

Offences

41 (1)⁶⁶⁵ 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

⁶⁶⁴ S 40(1)(d) repeats s 21(1)(i) of the Arbitration Act of 1965. S 21(1)(i) was derived from s 12(6)(g) of the English Arbitration Act of 1950. A similar provision is retained in s 44(2)(e) of the 1996 Act. In South African law, it is however more appropriate to refer to a liquidator rather than to a receiver. See para 3.208 of the report.

⁶⁶⁵ This section, corresponding to s 39 of the previous Draft Bill, 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.

- (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 the penalties imposed by section 30(4) of the Supreme 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.

CHAPTER 6

The award

Time for making award

42 (1)⁶⁶⁶ The **tribunal** must, unless the **parties** otherwise agree, make its **award** as soon as is reasonably possible and in any event⁶⁶⁷ within 60 days of either the completion of the hearing or receipt of all the **parties'** submissions by the **tribunal**, as the case may be or before any later date to which the **parties** may otherwise agree.

(2) 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.

Award to be in writing

43 (1)⁶⁶⁸ The **award** must be in writing and signed by all the members of the **tribunal**.

(2)⁶⁶⁹ If the **tribunal** comprises more than one arbitrator, the signatures of the majority of the members of the **tribunal** are sufficient, provided that the reason for any omitted signature is stated.

(3) The **award** must state the reasons on which it is based, unless the parties otherwise agree⁶⁷⁰ or the **award** is an **award** on agreed terms under section 44.

⁶⁶⁶ This section, corresponding to s 40 of the previous Draft Bill, replaces s 23 of the Arbitration Act 42 of 1965. The changes are based on those recommended in s 26 of the Draft Bill submitted by the Association of Arbitrators in 1994. There is no equivalent to this provision in the Model Law. S 50 of the English Arbitration Act of 1996 empowers the court to extend a time fixed by the parties, without otherwise setting a time for delivering the award.

⁶⁶⁷ The addition of the words "as soon as is reasonably possible and in any event" supports the purpose of the section, which is to avoid delay on the part of the tribunal in making the award. See further para 3.212-3.213 of the report.

⁶⁶⁸ S 43, corresponding to s 41 of the previous Draft Bill, replaces s 24 of the Arbitration Act 42 of 1965.

⁶⁶⁹ The wording of subsections (2) and (3) corresponds to the equivalent provisions of the International Arbitration Bill sch 1 article 31(1) and (2).

⁶⁷⁰ This provision was originally proposed in s 27 of the draft Bill submitted by the association of Arbitrators in 1994.

Award on agreed terms

44 (1)⁶⁷¹ If, during **arbitral proceedings**, the **parties** settle the dispute, the **tribunal** must terminate the proceedings and, if requested by the **parties** and not objected to by the **tribunal**, record the settlement in the form of an **award** on agreed terms.

(2) An **award** on agreed terms must be made in accordance with the provisions of section 43(1) and (2) and must state that it is an award.

(3) An award referred to in subsection (2) has the same status and effect as any other award on the merits of the dispute and may be made an order of court under section 53 if it is otherwise within the competence of the **court** to grant such order.

Delivery of award

45⁶⁷² Subject to section 54(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 parties otherwise agree, the **award** must be delivered to the **parties** forthwith by service of copies of the **award**.

Interim awards and provisional orders

46 (1)⁶⁷³ Unless the **parties** otherwise agree, a **tribunal** –

- (a) may make an interim **award** at any time within the period allowed for making an **award** including an order to make an interim payment of costs;⁶⁷⁴
- (b) 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 provisional order for the disposition of property, the payment of money and costs.⁶⁷⁵

(2) Any order under subsection (1)(b) –

- (a) may be subject to such terms and conditions as the **tribunal** considers just;
- (b) is subject to the **tribunal's** final adjudication and the **tribunal's** final **award** must take account of it;

⁶⁷¹ This section, which has no equivalent in the previous Draft Bill, is a new provision based on the International Arbitration Bill sch 1 article 30; see also the English Arbitration Act 1996 s 51.

⁶⁷² S 45, corresponding to s 42 of the previous Draft Bill, 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.

⁶⁷³ S 46 replaces s 43 of the previous Draft Bill. S 46(1)(a) substantially repeats s 26 of the Arbitration Act 42 of 1965.

⁶⁷⁴ If s 42 were to be omitted from this Draft Bill, it will be necessary to amend s 46(1)(a) by deleting the words "at any time within the period allowed for making an award".

⁶⁷⁵ S 46(1)(b) provides for the possibility of an order on a provisional basis regarding aspects of the merits of the dispute, in circumstances which would not justify an interim award. An interim award is final on what it decides. S 46(1)(b) and (2)(a) are derived from s 39 of the English Arbitration Act of 1996 but contain substantial differences. See further paras 3.224-227 of the report.

- (c) may be made an order of **court** (which is not subject to appeal) and may then be enforced in such manner as the **court** may order.

(3) For purposes of subsection (2)(c), "court" includes a magistrate's court with jurisdiction.⁶⁷⁶

Specific performance

47 Unless the **parties** otherwise agree, a **tribunal** may, on application,⁶⁷⁷ order specific performance of any contract in any circumstances in which the **court** would have power to do so.⁶⁷⁸

Award to be binding

48 Subject to the provisions of this Act, an **award** is final and not subject to appeal and each **party** must abide by and comply with the **award** in accordance with its terms, unless the parties agree to a right of appeal to another **tribunal**.⁶⁷⁹

Interest on amount awarded

49 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 delivery of the **award** and at the same rate as a judgment debt.⁶⁸⁰

Power of tribunal to correct errors in award

50 (1)⁶⁸¹ Unless otherwise agreed by the **parties**, a **tribunal**, whether on the application of a **party** or on its own initiative, may

- (a) correct in any **award** any clerical mistake or any error arising from any accidental slip or omission or may clarify an ambiguity or uncertainty in the **award**; or
- (b) make an additional **award** with respect to claims presented in the proceedings but omitted from the **award**.

⁶⁷⁶ See s 53(6), which contains a similar provision regarding the enforcement of arbitral awards.

⁶⁷⁷ The words "on application" have been added to make it clear that the power cannot be exercised by the tribunal on its own initiative, particularly without prior consultation with the parties, as this could result in the parties being taken by surprise: see *Mervis Brothers v Interior Acoustics* 1999 3 SA 607 (W) 612G.

⁶⁷⁸ This section, corresponding to s 44 of the previous Draft Bill, re-enacts s 27 of the Arbitration Act 42 of 1965 with two minor amendments; compare s 48 of the English Arbitration Act 1996.

⁶⁷⁹ This section, corresponding to s 45 of the previous Draft Bill, replaces s 28 of the Arbitration Act 42 of 1965. The substantive changes were 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.

⁶⁸⁰ S 49, corresponding to s 46 of the previous Draft Bill, repeats s 29 of the Arbitration Act 42 of 1965; compare the International Arbitration Bill sch 1 article 31(5) and the English Arbitration Act 1996 s 49. See para 3.234 of the report as to why it was decided that interest under this section should run from the date of delivery of the award, rather than the date on which the award was made.

⁶⁸¹ S 50, corresponding to s 47 of the previous Draft Bill, amends s 30 of the Arbitration Act 42 of 1965. Compare s 33 of the Draft Arbitration Bill submitted by the Association of Arbitrators in 1994, article 33 of the UNCITRAL Model Law and s 57 of the English Arbitration Act 1996. There are two main changes compared with the previous Draft Bill. First, the power to make an additional award may be exercised by the tribunal on its own initiative and not just on the application of a party. Secondly, the tribunal must also give the parties the opportunity to make representations before correcting an error in the award or clarifying an ambiguity.

(2) An application made by a **party** under subsection (1) must be made within 15 days of the delivery of the **award**.

(3) A correction, clarification or additional **award** under subsection (1) must, unless the **parties** otherwise agree, be made within 30 days of the delivery of the **award**.⁶⁸²

(4) Before exercising its powers under subsection (1), the **tribunal** must first give the **parties** a reasonable opportunity to make representations.

(5) A corrected, clarified or additional **award** under this section must comply with sections 43 and 45.

Remittal of award by the parties

51 (1)⁶⁸³ The **parties** to **arbitral proceedings** may within 30 days after the delivery of the **award**, 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 thirty days of⁶⁸⁴ 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 43 and 45.

Application for setting aside as exclusive recourse against award

52 (1)⁶⁸⁵ 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 agreement is not valid under the law to which the parties have

⁶⁸² The time-limits stipulated in subsections (2) and (3) are considerably shorter than those in s 57 of the English Arbitration Act. It must nevertheless be remembered that the latter also applies to international arbitrations. Moreover s 50 of this Bill is not intended to provide a basis for reviewing an award. Parties should be able to ascertain quickly whether or not the provision applies.

⁶⁸³ S 51, corresponding to s 48 of the previous Draft Bill, replaces s 32(1) 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). See also s 52(4) below.

⁶⁸⁴ The three-month period referred to in the previous draft of subsection (2) comes from s 32(3) of the 1965 Act. It is unreasonably long bearing in mind the time limit for making the award in s 42 of the current draft.

⁶⁸⁵ S 52, corresponding to s 49 of the previous Draft Bill, replaces s 33 of the Arbitration Act 42 of 1965 and is based on the International Arbitration Bill sch 1 article 34.

- subjected it or, failing any indication thereon, under the law of South Africa; or
- (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the **arbitral proceedings** or was otherwise unable to present that **party's** case; or
- (iii) the **award** deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the **award** which contains decisions on matters not submitted to arbitration may be set aside; or
- (iv) the composition of the **tribunal** or the procedure was not in accordance with the agreement of the **parties**, unless the agreement was in conflict with a provision of this Act from which the **parties** cannot derogate, or, failing 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 determination by arbitration under the law of South Africa; or
 - (ii) the award is in conflict with ~~the~~ public policy.

(3) An application for setting aside an **award** must be made within thirty days 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 (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) An award in conflict with public policy includes –
- (a) an award made in breach of the tribunal's duty under section 28 such as to cause substantial injustice to the applicant; or
 - (b) an award induced or affected by fraud or corruption.⁶⁸⁶

Enforcement of award by court and refusal of enforcement

53 (1)⁶⁸⁷ Any **party** may apply to a court of competent jurisdiction after 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

⁶⁸⁶ The change in wording of this subsection simplifies that of the previous draft without changing the substance.

⁶⁸⁷ S 53 corresponds to s 50 of the previous Draft Bill. S 53(1)-(3) are based on s 18(2) of the International Arbitration Bill and s 31(2) of the Arbitration Act 42 of 1965.

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)⁶⁸⁸ An application under subsection (1) may be refused on a ground referred to in subsection 52(2)(b) at any time, but a ground referred to in subsection 52(2)(a) must not be taken into account if the party opposing the enforcement of the **award** has allowed the thirty-day period referred to in section 52(3) to expire without bringing an application for the setting aside of the **award**.

(5)⁶⁸⁹ If an application for setting aside has been made under section 52, 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 52 and may also, on the application of the **party** claiming enforcement of the **award**, order the other **party** to provide appropriate security.

(6) For purposes of this section, "court" includes a magistrate's court with jurisdiction.

CHAPTER 7

Remuneration of tribunal and costs

Remuneration of arbitrators

54 (1)⁶⁹⁰ Any **party** 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 must be taxed by the taxing master of the **court**, but if the tariff of such fees has previously been fixed by agreement between the arbitrator and the **parties**, that tariff is not 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 is 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 of 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 such payment.

(5)⁶⁹¹ The **parties** are jointly and severally liable to arbitrators for the fees and expenses recoverable under this section.

Costs of arbitral proceedings

⁶⁸⁸ This subsection is based on the German Arbitration Act of 1998 article 1060(2), pertaining to domestic awards.

⁶⁸⁹ This subsection follows the International Arbitration Bill sch 1 article 36(2).

⁶⁹⁰ S 54 corresponds to s 51 of the previous Draft Bill. S 54(1)-(4) amends s 34 of the Arbitration Act 42 of 1965 as recommended by the Association of Arbitrators in s 37 of its Draft Arbitration Bill of 1994.

⁶⁹¹ This subsection is a new provision based on s 28(1) of the English Arbitration Act of 1996.

55 (1)⁶⁹² Unless the parties otherwise agree, the **award** of costs in connection with the **arbitral proceedings** and **award** is in the discretion of the **tribunal**, which must, if it awards 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 **arbitral proceedings** may within ten 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)⁶⁹³ 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 52.

(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 parties otherwise agree, the taxing master of the **court** 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 parties otherwise agree, 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 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** must in any event pay that **party's** own costs or any part thereof, is void.

Power to limit recoverable costs

56 (1)⁶⁹⁴ 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, a hearing of a specified duration or in some other appropriate manner.

(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.

⁶⁹² This section, which corresponds to s 52 of the previous Draft Bill, re-enacts s 35 of the Arbitration Act 42 of 1965 with minor amendments.

⁶⁹³ This subsection is consistent with the International Arbitration Bill sch 1 article 30(6).

⁶⁹⁴ This section, which corresponds to s 53 of the previous Draft Bill, is a new provision based on the English Arbitration Act of 1996 s 65. The fact that the tribunal may vary a direction indicates that the tribunal's decision can be revisited if circumstances so require. It is clear from the concluding portion of s 56(1) that the direction capping costs need not necessarily be expressed with reference to an amount of money.

Costs of legal proceedings

57 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.⁶⁹⁵

CHAPTER 8

Consumer arbitration agreements

Consumer arbitration agreements⁶⁹⁶

58 (1) Where a consumer enters into an **arbitration agreement** to refer future disputes arising from or in relation to⁶⁹⁷ a consumer contract to arbitration,⁶⁹⁸ the consumer may cancel that **arbitration agreement** by giving written notice⁶⁹⁹ to the other party within ten days⁷⁰⁰ of entering into it.

(2) The other party is not entitled to impose any penalty as a result of the consumer cancelling the **arbitration agreement**.⁷⁰¹

(3) For purposes of subsection (1) a consumer is a natural person⁷⁰² who enters into a contract while acting for purposes outside his or her trade, business or profession with another party acting for purposes relating to his or her trade, business or profession,⁷⁰³ if the total consideration payable by the consumer does not exceed the amount of R50 000 or such other amount as may from time to time be prescribed by regulation.⁷⁰⁴

(4) For purposes of subsection (3), the total consideration excludes interest, finance charges and agent's commission.

(5) Where the **arbitration agreement** referred to in subsection (1) is a clause in a consumer contract or is contained in a document referred to in the contract, the other party must furnish the consumer with a copy of the document containing the arbitration

⁶⁹⁵ This section, corresponding to s 54 of the previous Draft Bill, re-enacts s 36 of the Arbitration Act 42 of 1965.

⁶⁹⁶ This is a new provision, with no equivalent in the Arbitration Act 42 of 1965. The version contained in s 55 of the previous Draft Bill, was based on s 11 of the New Zealand Arbitration Act 99 of 1996. This section provides additional formalities for an arbitration clause contained in a contract with a consumer, by requiring that the consumer confirm his or her acceptance of the arbitration clause by a separate signature. In the light of various objections received, it is proposed to replace this requirement by providing a "cooling off" period during which the consumer can withdraw from the arbitration clause without affecting the validity of the main contract. See further paras 3.274-3.304 of the report.

⁶⁹⁷ It is questionable whether the phrase "arising from" as opposed to "in relation to" covers a dispute relating to the initial validity of the original consumer contract. "Arising from" arguably implies that there must be a valid consumer contract, hence the additional wording.

⁶⁹⁸ The cooling-off period applies not only to an arbitration clause contained in a consumer contract, but also to an arbitration agreement contained in a separate document, as long as that agreement is entered into before the dispute arises.

⁶⁹⁹ S 13(1) of the Credit Agreements Act 75 of 1980 requires the written notice to be delivered or sent by pre-paid registered mail. This is too restrictive, bearing in mind the wide range of consumer arbitration agreements covered by s 55.

⁷⁰⁰ See s 1(2) of the Draft Bill as to how this period is calculated. S 13 of the Credit Agreements Act uses a "cooling off" period of five days. However, as the International Arbitration Bill only applies to *commercial* arbitrations, s 58 will, for example, apply to international consumer transactions entered into by South African consumers with foreign suppliers on the Internet. A five-day period is too short for international consumer transactions.

⁷⁰¹ This subsection aims to prevent the consumer being discouraged from exercising his or her right to cancel the arbitration clause by the merchant imposing contractual penalties. The imposition of a penalty would include depriving the consumer of some contractual benefit (eg a discount) if the consumer cancels the arbitration agreement.

⁷⁰² Restricting consumers to natural persons promotes greater certainty. More sophisticated persons contracting through a juristic person or trust are also arguably in less need of protection.

⁷⁰³ The definition of a consumer in s 58(3) is based on the definition in the English Unfair Terms in Consumer Contracts Regulations 1999 reg 3. See further paras 3.306-3.310 of the report.

⁷⁰⁴ In terms of s 59(a) of the Draft Bill.

agreement.⁷⁰⁵

(6) The other party must inform the consumer of his or her right under subsection (1) at the time when the arbitration agreement is concluded or when furnishing the copy of the document referred to in subsection (5).

(7) The ten-day period referred to in subsection (1) only commences once the other party has complied with the provisions of subsections (5) and (6).⁷⁰⁶

(8) Subsection (1) applies to every **arbitration agreement** entered into by a consumer in South Africa after the commencement of this Act notwithstanding a provision in the **arbitration agreement** to the effect that it is governed by a law other than South African law.⁷⁰⁷

(9) For purposes of subsection (8), an **arbitration agreement** is entered into by a consumer in South Africa if the consumer is in South Africa at the time when the **agreement** is entered into.

CHAPTER 9

Miscellaneous provisions

Regulations

59 ⁷⁰⁸ The Minister of Justice may make regulations –

- (a) after consultation with the Minister of Trade and Industry, determining the maximum amount of consideration which makes a contract subject to section 58;
- (b) after consultation with the **specified authority** –
 - (i) determining the training of arbitrators and **mediators** to enable them to qualify for appointment by the chairperson of the **specified authority**;
 - (ii) prescribing the maximum fees payable to arbitrators in respect of certain classes of disputes;⁷⁰⁹

⁷⁰⁵ S 6(2)(b) of the Draft Bill would allow the parties to conclude a valid arbitration agreement by reference to a document containing the merchant's standard terms, even if it was not made clear that those terms included an arbitration clause. This subsection, read with subsection (7), is therefore intended to ensure that the consumer's period of grace to withdraw from the arbitration agreement only starts to run from when the consumer could reasonably be aware of the existence of the arbitration agreement. See further para 3.304 of the report.

⁷⁰⁶ Subsections (6) and (7) endeavour to ensure that the consumer's right to terminate the arbitration agreement within the cooling-off period is not made ineffective through the consumer being unaware of that right. See further para 3.315 of the report.

⁷⁰⁷ This subsection recognises the severability of an arbitration clause contained in a contract from that contract. The law applicable to the arbitration agreement could therefore differ from that applicable to the consumer contract. The subsection does not attempt to dictate to parties contracting on the Internet which law should govern that contract. It only excludes contrary provisions of another national arbitration law for purposes of the cancellation or enforcement of the arbitration agreement in South Africa. S 63(2) of the Draft Bill, consistent with s 42(3) of the Arbitration Act 1965, applies the new Act to arbitration agreements entered into before the commencement of the new Act. S 58(8) creates an exception in the case of arbitration agreements covered by s 55. The reasons for the exception are contained in **para 3.*** of the report.

⁷⁰⁸ This is a new provision with no equivalent in the previous Draft Bill.

⁷⁰⁹ S 59(b)(ii) tries to avoid detracting from the right of the parties to choose whom they regard as suitable arbitrators subject to the conditions imposed by the definition of tribunal in s 1.

- (iii) prescribing a code of conduct for arbitrators; and
- (c) generally as to any matter which he or she considers necessary or expedient to prescribe in order to achieve the purposes of this Act.⁷¹⁰

Waiver of right to object

60 (1)⁷¹¹ A **party** who knows or who ought reasonably to know 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 as required by subsection (2), is deemed to have waived that **party's** right to object.

(2) The objection referred to in subsection (1) must be raised without undue delay, but if a time-limit is provided for raising the objection, it must be raised within that period.

Service⁷¹²

61 (1) Unless the **parties** agree to service by electronic or other means, any notice or document may be served -

- (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.

(3) The provisions of this section do not apply to the service of documents in **court** proceedings.

(4) 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.

(5) A **party** to the **arbitration agreement** may only apply to **court** under subsection (4) above after exhausting any available arbitral process for dealing with the matter.

(6) An order by the **court** under subsection (4) above is not subject to appeal.

Extension of periods fixed by or under this Act

⁷¹⁰ S 59(c) is based on s 10(1)(o) of the Close Corporations Act 69 of 1984.

⁷¹¹ This section, corresponding to s 56 of the previous Draft Bill, is a new provision based on the International Arbitration Bill sch 1 article 4 and the English Arbitration Act of 1996 s 73.

⁷¹² S 61 corresponds to s 57 of the previous Draft Bill. Compare the 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.

62 (1)⁷¹³ Subject to section 11, 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.

Repeal of Arbitration Act of 1965 and transitional provisions

63 (1)⁷¹⁴ The Arbitration Act, 1965 (Act 42 of 1965) is hereby repealed.

(2)⁷¹⁵ Subject to section 3 and to subsection (3), this Act applies in relation to an **arbitration agreement** whether entered into before or after the commencement of this Act, and to every arbitration under that agreement.

(3) Notwithstanding subsection (2), this Act does not apply to any **arbitral proceedings** which commenced before this Act comes into force.

(4) For purposes of subsection (3), the date of commencement of **arbitral proceedings** is the date upon which the **parties** agree as the date on which the arbitral proceedings commenced or, failing such agreement, the date of receipt by the respondent of a request for the dispute to be referred to arbitration.

Short title and commencement

64 (1)⁷¹⁶ This Act is called the Arbitration Act, 2001.

(2) This Act will come into force on a date fixed by the President by Proclamation in the *Gazette*.

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⁷¹³ S 62, corresponding to s 58 of the previous Draft Bill, is based on s 79 of the English Arbitration Act of 1996 and replaces s 38 of the Arbitration Act 42 of 1965.

⁷¹⁴ S 63 corresponds to s 59 of the previous Draft Bill.

⁷¹⁵ Subsections (2)-(4) are based on the International Arbitration Bill s 28(1)-(2). Subsections 2) and (3) correspond to s 42(2) and (3) of the Arbitration Act 42 of 1965, which also applied the 1965 Act retrospectively to arbitration proceedings commencing after the commencement of the Act pursuant to an arbitration agreement entered into before commencement of the Act.

⁷¹⁶ S 64 corresponds to s 60 of the previous Draft Bill.

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 1***General Provisions*

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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;

(d) 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

- (d) that the applicant has exhausted any available arbitral process for obtaining an extension of time; and
- (e) 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
- (f) 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** on agreed terms in accordance with section 48, 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)(v), 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 shall 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 **awards** 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 27(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 D**LIST OF PERSONS WHO ATTENDED THE WORKSHOPS****PRETORIA: 20 SEPTEMBER 1999**

1.	Ahier, Mr T B C	Walker Ahier Holtzhauzen Eng Consultants CC
2.	Asprey, Mr N	First Rand Bank Ltd
3.	Bapela, Mr S W	DPSA
4.	Bekker, Adv L	Pretoria Bar Association/AFSA
5.	Binnington, Mr C D	Association of Arbitrators of Southern Africa
6.	Bozhoff, Mr G	Department of Sport & Recreation
7.	Brink, Mr W	Association of SA Quantity Surveyors
8.	Calitz, Ms K	Vista
9.	Chivwindi, Mr M B	University of the North
10.	De Klerk, Mr A	Transnet Ltd
11.	Demetriou, Ms S	SAIA
12.	Dhadha, Ms E	Cosatu
13.	Faris, Prof J A	UNISA
14.	Finsen, Mr E	Association of Arbitrators
15.	Gilfillan, Ms K	AFSA
16.	Govender, Ms G	Dept of Minerals and Energy
17.	Grobler, Ms A	Banking Council of SA
18.	Heystek, Mr A	Nedcor Bank Ltd
19.	Hurter, Mr E	UNISA
20.	Klopper, Mr G	Siemens Ltd
21.	Knowles, Ms K	Regional Land Claims Commission
22.	Krull, Mr W	AHI/ Deloitte & Touche
23.	Lombard, Ms I	CSIR
24.	Maseka, Mr J	The Law Society of Bophuthatswana
25.	Maseko, Prof J M	National Senior Commissioner: CCMA
26.	Mayisela, Mr N T	Dept of Environmental Affairs & Tourism
27.	Mdakane, Ms T	Black Sash Gauteng

28.	Mhangwani, Mr P	Commission on Restitution of Landrights
29.	Mokhonoana, Mr M B	University of the North
30.	Moloto, Mr T P	NALSSA
31.	Mooi, Mr F	Attorney
32.	Mudau, Mr S	National Department of Agriculture
33.	Ndakane, Ms T	Black Sash Trust
34.	Neethling, Ms L	DPSA (SAMDI)
35.	Ntshalintshali, Mr B	Cosatu
36.	Pandya, Adv N (SC)	Advocate
37.	Prisgrove, Mr R B	Architect, arbitrator & mediator
38.	Pule, Mr L B	Greater Nigel Justice Centre
39.	Shai, Adv B	Greater Pretoria Metropolitan Council
40.	Shete, Mr S T	D T I
41.	Sibeko, Ms K	Black Sash Trust (Gauteng Advice Office)
42.	Snyman, Dr J L	Independent Complaints Directorate
43.	Van Huyssteen, Ms L	ABSA Bank Ltd
44.	Van Kerken, Ms E T	Vista
45.	Vilakazi, Ms S	SA Domestic Service Allied Workers Union
46.	Watson, Mr M J	Watson Kells & Associates
47.	Xhakaza, Ms L	Regional Land Claims Commission

DURBAN: 21 SEPTEMBER 1999

1.	Abrahams, Mr G L	Magistrates' Office, Durban
2.	Anthoo, Ms J	NADEL
3.	Galvin, Mr P J	Metro Council Legal Services
4.	Govender, Mr K	State Attorney, KZN
5.	Knight, Prof K	Association of Arbitrators
6.	Lister-James, Mr G	Lister-James Consulting Engineers
7.	Lopes, Adv G	Durban Bar
8.	Madonsela, Mr T G	State Attorney
9.	Mahadevey, Mr R	Durban Metro Council
10.	Moodely, Ms S	Saloshna Saloshne Moodely & Co/ NADEL
11.	More, Mr M	SANGOCO

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| 12. | Mosuhli, Ms M M | State Attorney, KZN |
| 13. | Mowatt, Prof J G | University of Durban-Westville |
| 14. | Mwelase, Miss K Z | Community Resource Center |
| 15. | Myeza, Mr S P | Portnet, Richards Bay |
| 16. | Nzimande, Prof G S | University of Zululand |
| 17. | Osman, Ms M | Land Claims Commission |
| 18. | Setiloane, Mr S | CCMA |
| 19. | Thejpal, Mr P | NADEL |
| 20. | Van Staden, Mr G | IOF (Pty) Ltd |
| 21. | Vedan, Mr J D | Inner West City Council |
| 22. | Yako, Mr R O | USA |
| 23. | Whyte, Mr G G | Protekon/ Association of Arbitrators |
| 24. | Wilms, A E | Durban Metro Council |

CAPE TOWN: 22 SEPTEMBER 1999

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|-----|-------------------------|---|
| 1. | Bosman, Adv D | Academy for Mediation |
| 2. | Chaskalson, Mr J | The Arbitration Forum |
| 3. | De Kock, Mr G H | Shareholders Association of South Africa |
| 4. | Elsworthy, Mr G | City of Cape Town |
| 5. | Firth, Mr H | City of Cape Town |
| 6. | Freitag, Ms I | Magistrates' Office, Cape Town |
| 7. | George, Mr S R | Magistrates' Office, Cape Town |
| 8. | Giles, Mr G S | Stellenbosch University |
| 9. | Horn, Adv R R (SC) | Association of Arbitrators |
| 10. | Khumalo, Mr Justice JAM | High Court, Mafikeng |
| 11. | Kotze, Mr H | The Arbitration Forum |
| 12. | Myrdal, Ms S | Office of Pension Funds Adjudicator |
| 13. | Ndlovu, Ms D N | Attorneys Association of South Eastern Cape |
| 14. | Osman, Ms P | The Arbitration Forum |
| 15. | Potgieter, Adv T D | Cape Bar Council |
| 16. | Qose, Mr M | Provincial Administration, Western-Cape |
| 17. | Russell, Mr B M | Caltrop Contract Services (Pty) Ltd |
| 18. | Saldanha, Mr V C | Legal Resources Centre, Cape Town |

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|-----|---------------------|---|
| 19. | Sessions, Mr N | Farrow Laing Dispute Management (Pty) Ltd |
| 20. | Smith, Ms J J | Provincial Administration, Western-Cape |
| 21. | Swart, Mr A | Boland PKS |
| 22. | Tilley, Ms A | Black Sash |
| 23. | Tunbridge, Ms N | National Council of Women of South Africa |
| 24. | Van Huyssteen, Prof | University of the Western Cape |
| 25. | Wandrag, Ms M S | University of the Western Cape |
| 26. | Wilson, Ms V | The Arbitration Forum |
| 27. | Wright, Ms T | The Arbitration Forum |

EAST LONDON: 23 SEPTEMBER 1999

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|-----|----------------------------|---|
| 1. | Barker, Mr G W | Rhodes University |
| 2. | Barnaschone, Mr N | The Law Society of South Africa |
| 3. | Breytenbach, Mr W C | State Attorney, Port Elizabeth |
| 4. | Chirwa, Dr V | Legal Resources Centre |
| 5. | Coetzee, Mr J H | State Attorney, Port Elizabeth |
| 6. | Fanana, Ms Z | State Law Adviser, Bisho |
| 7. | Mukheibir, Mr P | Association of Arbitrators |
| 8. | Pickard, Mr Justice B de V | High Court, Bisho |
| 9. | Pretorius, Mr P M A | Regional Magistrate, East London |
| 10. | Proserpio, Dr G C | Architect |
| 11. | Rivarola, Mr M | Adams & Frost |
| 12. | Theron, Mr D | Magistrates' Office, East London |
| 13. | Van der Merwe, Mr R | Arbitration Tribunal Initiative, Port Elizabeth |
| 14. | Van Tonder, Adv K A | Port Elizabeth Bar |

ANNEXURE E**LIST OF RESPONDENTS TO DISCUSSION PAPER 83**

1. AFSA
2. Amakaya Construction CC
3. Arbitration Forum, The
4. Association of Arbitrators (Southern Africa)
5. Bryan Pringrove CC
6. Chapman, M (FICA)
7. Cohen, CH
8. GCB of SA (Laws & Administration Committee)
9. King, The Hon Mr Justice E
10. Lane, Adv PMM (SC)
11. Law Society of South Africa
12. Loots, PC
13. Miller du Toit Inc
14. Natal Law Society
15. Office of the Family Advocate
16. Provincial Administration, Western Cape
17. SA Maritime Arbitrators Association (SAMAA)
18. Singh, Adv N
19. Van Huyssteen, Prof L F
20. Wetsgenootskap van die Kaap die Goeie Hoop, Die