

**Preliminary Paper No. 7**

**ARBITRATION**

**A discussion paper**

The Law Commission welcomes your comments on this paper  
and seeks your response to the questions raised.

These should be forwarded to:  
The Director, Law Commission, P.O. Box 2590, Wellington  
by Tuesday, 3 February 1989

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# CONTENTS

	Para.	Page
PREFACE		(vii)
 I INTRODUCTION		 1
Historical developments	11	4
Reforming influences	19	6
Philosophical approach	23	7
Domestic and international arbitration	30	8
Central issues	36	10
 II THE ARBITRATION PROCESS: A COMPARATIVE REVIEW		 12
Act a code	41	13
Definitions		
The "arbitration agreement"	44	14
Definition of "international"	48	16
Application to "commercial" arbitration	51	17
Matters excluded from arbitration	53	17
Enforcement of the arbitration agreement		
Stay of court proceedings	60	20
Revocation of the agreement	67	22
Commencement of the arbitration		
Commencement and limitation periods	70	23
Appointment of Arbitrators	75	24
Challenge to appointments	82	27
Removal of an arbitrator	84	27
Replacement of arbitrator	90	29
Umpires	94	30
Jurisdiction of arbitral tribunal	98	31
The arbitration proceedings		
Initiation of the arbitration process	102	33
Tribunal's powers on default of a party	104	33
Conduct of the arbitration	109	35
Tribunal's procedural powers	114	36
Choice of procedural law	123	39
The arbitral award		
Applicable law	127	41
Dispensing with law	130	42
Determination of preliminary points of law by the court	135	43
Tribunal's powers with regard to the award	138	44

The arbitral award (cont'd)		
Requirements with regard to the award	145	46
Review of the award	151	48
Tribunal reviewing the award	163	52
Enforcement of the award		
Procedures available for enforcement	166	53
Other Matters		
Court-annexed and statutory arbitration	171	55
III      TENTATIVE PREFERENCES		59
APPENDICES		65
Select bibliography		65
Comparative table of provisions		69
Provisions for statutory arbitration		73
Legislation		75
New Zealand		
Arbitration Act 1908		77
Arbitration (International Investment Disputes) Act 1979		92
Arbitration (Foreign Agreements and Awards) Act 1982		104
England		
Arbitration Act 1950		111
Arbitration Act 1975		122
Arbitration Act 1979		124
Australia		
Commercial Arbitration Act 1984 (New South Wales)		129
UNCITRAL		
Model Law on International Commercial Arbitration		153
Excerpts from Arbitration Rules		162

## PREFACE

This discussion paper represents an important stage in the Law Commission's review of the law relating to arbitration. Substantial research and preliminary consultation has preceded its publication, and we hope that responses to it will provide additional information about the advantages and disadvantages of the present system in practice as well as advice on the options available for law reform.

Arbitration is an ancient and valuable method for resolving disputes. Its central features are that it is based on an agreement between the parties to the dispute, involves referral of a dispute to an independent arbitral tribunal (made up of one or more arbitrators), and produces a binding decision which may be enforced through the courts. For many New Zealanders the word "arbitration" may suggest some connection with industrial relations, a linguistic legacy of the Industrial Conciliation and Arbitration Acts in force for much of this century. This paper is not about industrial arbitration as such but about arbitration as a means of deciding a wide range of disputes. Many of these disputes arise in a commercial context, but to describe our topic as "commercial arbitration" would fail to capture its full range – from a dispute between a house owner and painter over the quality of work done, to the dispute between the Greenpeace organisation and France arising from the sinking of the vessel "Rainbow Warrior" in 1985.

The Law Commission included a review of arbitration law in its programme for several reasons. We were aware of substantial changes to the English legislation on which the main New Zealand legislation is modelled, and to equivalent legislation in Australia, Canada and elsewhere, as well as the international model produced by the United Nations Commission on International Trade Law (UNCITRAL). We were also conscious of the importance of ensuring that dispute resolution processes can operate effectively in contemporary social conditions, a matter close to the heart of the work being done on the structure of the courts – a topic referred to the Commission by the Minister of Justice.

A recurring theme in this paper is the tension between party autonomy and judicial intervention in the arbitral process. A conscious restriction on the role of courts has been a feature of recent legislative reforms overseas. The adoption or rejection of that approach is a critical issue in this review.

The paper is in three parts. Part I is an introductory section. Part II comprises an extended review of the law relating to the different stages of an arbitration – comparing the present New Zealand, English and Australian Acts and the UNCITRAL Model Law on International Commercial Arbitration. Part III gives an indication of the Law Commission's present (albeit tentative) opinion on the general direction for reform of our law. For those

under pressure of time, Parts I and III may be read to gain a sensible appreciation of the topic and our tentative preferences. Those with a particular interest in the topic will find the reading of Part II both important and interesting.

Information (of considerable importance because of the privacy in which arbitrations are conducted) and submissions (which may, but need not, be based on the questions set out in Part II) in response to this paper would be greatly appreciated. These should be sent to

The Director  
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by 3 February 1989, and should indicate whether the respondent wishes to meet members of the Commission to discuss the submission.

## I INTRODUCTION

1. According to *The Oxford English Dictionary* the meaning of "arbitration" for present purposes is –

"the settlement of a dispute or question at issue by one to whom the conflicting parties agree to refer their claims in order to obtain an equitable decision."

2. The definition indicates the wider context in which arbitration law must be viewed: as one of a number of methods by which disputes may be resolved. History suggests that disputes are inherent in human societies, and ours is surely no exception. Many disputes are resolved informally whether by explicit or tacit agreement, or by simply letting the point lapse. Sometimes there is scope for the assistance of a third party without the power to impose a settlement or decision on the parties in dispute – a mediator or conciliator. And there are processes where a binding decision is given by a third party – arbitration before an arbitrator, or litigation before a judge.

3. There are similarities between arbitration and litigation. In both the decision-maker must be impartial, treat the parties equally, and hear their respective cases – and its decision is binding on the parties. The difference is that arbitration is essentially a private matter based on agreement between the parties. This agreement extends not only to the use of arbitration, but also to the identity of the arbitrator/s and the law and procedure to be followed. But arbitration and litigation are not entirely separate as the public powers of the courts are used to enforce arbitration agreements and awards.

4. At its best arbitration can offer advantages over litigation – the opportunity to choose an expert as decision-maker, the degree of informality and flexibility in terms of procedure, the reduction in time and expense (consequent on flexibility and expertise), as well as privacy. Not all of these features will always be present. For instance some arbitrations are very formal and drawn out with pleadings, discovery, oral evidence and full arguments, and involve as well as the arbitrator/s, lawyers, expert witnesses and so on, all of whom have to be paid. Others are one-off affairs where a simple on-site inspection suffices for an immediate decision. Ultimately the difference comes down to the factor of choice and the flexibility this allows for.

5. Arbitration (in the non-industrial context) is probably not well known nor understood in New Zealand. In part that may reflect favourably on our system of courts which, by international standards, operate speedily and efficiently. But it may also relate to the fact that lawyers – to whom many disputes are referred –

have been educated and trained to think in terms of litigation when a dispute arises rather than some other form of resolving the dispute. Thus, although there are exceptions, arbitration of disputes in New Zealand has been and still is predominantly associated with the construction industry, sharemilking and valuation disputes. It may be that the law reform process of which this paper is a part will achieve, among other things, a greater awareness of the availability of arbitration as an alternative to litigation.

6. Legal constraints on arbitration have undoubtedly reduced its popularity in some spheres of activity. In particular s.8 of the Insurance Law Reform Act 1977 makes unenforceable against the insured an arbitration agreement in an insurance contract unless entered into after a dispute has arisen, and s.13 of the Small Claims Tribunals Act 1976 (soon to be superseded by s.16 of the Disputes Tribunals Act 1988 in much the same terms) prevents parties contracting out of the tribunals' jurisdiction through an arbitration clause. This paper will consider whether such legal constraints on arbitration are justified.

7. The present modest use of arbitration may also be at least partly the result of the somewhat antiquated system of arbitration law we have inherited from England (and which has now been the subject of revision there). The statutory part of New Zealand's arbitration law consists principally of –

- (a) the Arbitration Act 1908 as substantially amended by the Arbitration Amendment Act 1938, comprising the main body of law regulating the arbitration of disputes in New Zealand (or subject to New Zealand law);
- (b) the Arbitration Clauses (Protocol) and the Arbitration (Foreign Awards) Act 1933 and the Arbitration (Foreign Agreements and Awards) Act 1982 – implementing international conventions designed to facilitate the recognition and enforcement of foreign agreements and awards (see para.33 below). The latter Act now virtually supersedes the former;
- (c) the Arbitration (International Investment Disputes) Act 1979 – implementing the "Washington Convention" which establishes a mechanism for the resolution of investment disputes between states and foreign nationals.

In addition the common law – distilled from judicial decisions – plays an important part both in interpreting the statutes and in filling the gaps left by them (and imposes a general standard of decision according to law). This is particularly the case in respect of the 1908 and 1938 Acts which are only partially a codification of the general law on arbitration. These Acts and the common law that goes with them will be the primary focus of this paper.

8. Most of that body of law relates to disputes submitted to arbitration by virtue of an agreement between the parties. A standard arbitration agreement is clause 12.3 of the New Zealand Conditions of Contract for Building and Civil Engineering Construction NZS 3910 1987, which provides that (if a dispute arises in respect of which the Engineer is asked to give a decision under cl.12.2.2):

"If either:

- (a) the Principal or the Contractor is dissatisfied with the Engineer's decision under 12.2.2, or
- (b) no decision is given by the Engineer within the time prescribed by 12.2.2

then either the Principal or the Contractor may by notice require that the matter in dispute be referred to arbitration."

(And there are detailed provisions regarding notice, conciliation and appointment of arbitrators.) But an arbitration clause can be much simpler – as in one recent case over an agreement for the sale of shares:

"In the event of a disagreement on the terms of this Agreement or the interpretation thereof such disagreement shall be referred to arbitration under the provisions of the Arbitration Act and its amendments."

The simplest of all arbitration agreements is the one-off – perhaps unwritten – agreement to submit a particular dispute which has arisen to a chosen arbitrator.

9. All of these forms have in common that (subject to arguments which might be made about standard form contracts, and so on) they are consensual. This almost goes without saying since an essential aspect of arbitration, as the *Oxford English Dictionary* definition indicates, is that it is the result of an agreement between the parties. Thus the main part of this paper will proceed on the basis that the arbitration is consensual.

10. However the 1908 Act also contains provisions for court-annexed arbitration. That is, the High Court is empowered to refer certain matters which arise in litigation to an arbitrator for a ruling which the court may or may not accept (and similar provisions are found in the District Courts Act 1947, although there the consent of the parties is necessary). There are also a number of statutes which provide that disputes arising in relation to the subject matter regulated by the statute are to be resolved in accordance with the Arbitration Act. The appropriateness of such forms of "compulsory" arbitration is also something to be considered in the context of this paper, and will be taken up separately at the end.

## HISTORICAL DEVELOPMENTS

11. The word "arbitration" is derived from Old French as is "arbitrator" which in turn is interchangeable with "arbiter" – derived from Latin and incorporating the notion of "one who goes to see". This illustrates the antiquity of arbitration as a method of dispute resolution. A leading English Judge once observed that "the submission of disputes to independent adjudication is a form of ordering human society as old as society itself": Lord Parker of Waddington, *The History and Development of Commercial Arbitration* (1959). And according to *The Oxford Companion to Law* (1980):

"The practice was well known among the [ancient] Greeks and there is evidence for the existence of public arbitrators in many states. In Athens private arbitrators were frequently appointed to settle claims on an equitable basis and so relieved the pressure on the courts."

12. New Zealand's present arbitration law can be traced back to the "law merchant" – the customs and law which developed in the Middle Ages in Western Europe to regulate the relationships between merchants. Over time, the major common law English court, the Court of King's Bench, assimilated the rules of the law merchant with the common law of England. But this involved some extension of judicial control over other forms of commercial dispute resolution. Thus, for instance, the courts developed the rules that an agreement to oust the jurisdiction of the King's Court was void, and awards could be set aside for error of law on their face.

13. The first English Arbitration Act was passed in 1698. The aim was to make the written submission of an existing dispute to named arbitrator/s enforceable in the courts. (At common law, the courts would not lend their powers to enforce an arbitration agreement prior to the award unless the reference was made pursuant to their own inherent jurisdiction.) However at the same time a "price" was exacted for this recognition, because the Act also marks the beginning of judicial scrutiny of arbitration, providing that:

"... any arbitration or umpirage procured by corruption or undue means, shall be judged and esteemed void and of none effect, and accordingly be set aside by any court of law or equity ..."

New Zealand inherited this Act in 1840.

14. The English Common Law Procedure Act of 1854 attempted to make the arbitral process more effective (e.g. providing for the appointment of arbitrators by default, and for the stay of court proceedings to enforce an arbitration agreement). But at the same time it expanded the court's powers of supervision and control, introducing a procedure whereby the court could direct the arbitral



tribunal to state a preliminary point of law in the form of a "consultative case" for the opinion of the court. The courts held that this was not subject to any contrary agreement of the parties. The provisions of this Act were adopted by the New Zealand Parliament in the Supreme Court Practice and Procedure Amendment Act 1866.

15. The English arbitration legislation was consolidated in a single Act in 1889. The Act also made some important changes to the law – extending the term "submission" to mean all written agreements for arbitration (whether made before or after a dispute arose), implying a code of powers for the arbitral tribunal, and making the award itself summarily enforceable. It was at least partially a codification of the existing practice as well. In particular it recognised the court's power, previously based on its inherent jurisdiction, to set aside an award on the grounds of an arbitrator's misconduct. But the codification was not complete, leaving untouched the court's inherent power to set aside an award on the ground of error of law on its face – and the courts continued to exercise this in addition to their statutory powers. The English Act formed the basis for the New Zealand Arbitration Act 1890, and the 1908 Act which superseded it (the major difference between the two Acts being the extension of the New Zealand legislation to cover valuation agreements in 1906).

16. Further amendments were contained in the English Arbitration Act 1934. In particular the court was empowered to compel the tribunal to state its award in the form of a "special case". This, together with the power to compel a reference of a preliminary point of law, effectively enabled the courts to adjudicate on any point of law arising in the reference. The New Zealand 1938 Arbitration Amendment Act essentially reproduces the 1934 English Act.

17. When the law was again consolidated in the English Act of 1950 there were few substantive amendments. It was not until the 1979 Act that any substantial changes were made to reduce the court's powers. Among other things this Act replaced the consultative and special case procedures and the common law power to set aside an award for error of law, with somewhat more limited provisions for judicial determination of preliminary points of law and appeal on points of law, and, further, allowed most international parties to contract out of these provisions altogether.

18. Thus, before the 1979 Act, English arbitration was very much subject to law and to the supervision of the courts. The autonomy of arbitration as a form of dispute resolution was recognised but only within clearly defined limits. This has changed to some degree in England but is still the case in New Zealand, since our arbitration legislation is based on the pre-1979 English legislation.

## REFORMING INFLUENCES

19. The English 1979 reforms were largely the result of the Report of the Commercial Court Committee, chaired by Mr Justice (now Lord) Donaldson in June 1978, responding to the demands of international arbitration, in particular, and the difficulties and delays which had been experienced with the special case procedure. These have been used as a model for reform of arbitration legislation in Hong Kong, Singapore and Bermuda, and to a lesser extent in British Columbia (for domestic arbitration). In New Zealand the former Contracts and Commercial Law Reform Committee considered the possibility of similar reforms here but that project was deferred because of what were felt to be more pressing priorities.

20. The English reforms have also provided the starting point for a comprehensive review of the Australian state legislation on arbitration (which previously tended to be along the same lines as the current New Zealand legislation, based also on the English model). The review was carried out by the Standing Committee of Attorneys-General ("SCAG") drawing on work which had already been done in the various state law reform agencies. It resulted in a uniform Arbitration Bill in 1984 which has since been enacted in all Australian states except Queensland. Whether New Zealand should follow the uniform legislation, in the light of its commitment to harmonisation of commercial laws under the "Closer Economic Relations" Agreement ("CER"), is a question of major importance.

21. A third important thrust of reform is the UNCITRAL Model Law on International Commercial Arbitration, adopted by UNCITRAL in June 1985, and by the United Nations General Assembly in December 1985. The aim was to unify national laws dealing with international commercial arbitration and to provide a "fair and equitable framework for the settlement of international commercial disputes". The Model has already found favour in the common law world (and, although regarded there as somewhat conservative, also in the civil law world): it has been enacted in most Canadian provinces and territories and on the federal level, and is expected to be enacted in Australia later this year (following the recommendation of a Working Group of the Standing Committee of Attorneys-General). Thus there are CER – as well as international uniformity arguments for considering UNCITRAL on the international level at least.

22. Moreover, the fact that the Model was intended primarily for international arbitration has not prevented it being adopted also for domestic arbitration (e.g. the Canadian Commercial Arbitration Act and new arbitration provisions in the Quebec Civil Code, both enacted in 1986). The Hong Kong Law Reform Commission recommended this as well in its recent Report on the Model Law, with the proviso that the parties should agree to it after the dispute arises. The SCAG Working Group which recommended the

adoption of the Model Law in Australia has also recommended that some modifications be made to the Commercial Arbitration Acts for domestic arbitration, partly in response to the Model Law.

## PHILOSOPHICAL APPROACH

23. In all these reforms, as in the law which preceded them, a primary tension exists between two broad concepts –

- (a) party autonomy – that is, that arbitration (properly so called) is founded on the agreement of the parties, and that agreement should be respected even though a court may have reservations about its terms or the result achieved; and
- (b) judicial scrutiny – that is, that courts have a public right and responsibility as organs of the state to ensure that the process of arbitration operates in all cases according to a uniform – if minimum – standard imposed by law.

24. This is a tension which must be appreciated, even if it cannot be resolved, when contemplating law reform. Essentially it comes back to the conceptual basis for arbitration. There are various theories which have been put forward to explain arbitration – each with consequences for where the balance between party autonomy and judicial scrutiny should lie.

25. The "jurisdictional theory" holds that the real authority of arbitration derives, not from the contract between the parties, but from the recognition accorded by the state. It argues that the court, representing the state and applying its law, is entitled to insist on certain conditions. These need not be limited to the parties' immediate concerns – for instance there are the interests of the state in maintaining a fair and uniform system of law and order. The uniformity policy was, in particular, the rationale for court intervention in England for a long time. The high point was the statement made in relation to arbitration by Scrutton LJ in *Czarnikow v. Roth Schmidt and Co.* [1922] 2 KB 478 that:

"There must be no Alsatia in England where the King's writ does not run."

(The term "Alsatia" once referred to a part of London which had become known as a sanctuary for criminals.)

26. Subsequently intervention has been justified in order to protect weaker contractual parties from the consequences of their contracts (see for instance the Donaldson Committee's report). Most recently the arguments have been framed in terms of "procedural fairness", as in the (English) Departmental Advisory Committee and Scottish Advisory Committee ("ED&S") Consultative Document on the UNCITRAL Model Law. But these

still presuppose that it is for the state to determine whether, and to what extent, parties should be able to order their private relations.

27. The "contractual theory" by contrast holds that arbitration, having its origins in and depending for its continuity solely on the agreement of the parties, is essentially contractual. The argument here is that the parties voluntarily agree to submit their disputes to arbitration, to appoint the arbitrator/s and, most importantly, to accept the arbitral tribunal's award as having binding force. Once authorised by the parties to make the award the tribunal acts as agent of the parties, and the award is binding on them as an agreement made on their behalf by their agent. Thus, according to this theory, the authority of the parties is paramount in all respects, and the only essential function of the court is to enforce agreements and awards which are not honoured as unexecuted contracts.

28. We are inclined to the view that the interests of individual freedom and public order are both relevant: at very least the parties must initiate the process by agreeing to go to arbitration in the first place, but on the other hand the law through the court system must decide what legitimacy to accord to the agreement and what effect to give to the award (since the tribunal cannot itself enforce it). Thus the court may be entitled to demand that some standards of conduct are met since the tribunal is after all carrying out an adjudicative function, and in any event it is impractical to expect otherwise. But ultimately, if contract principles are to mean anything in this context, the freedom of the parties to select arbitration rather than court processes as the means for resolving their disputes must be respected.

29. This is a practical as well as conceptual necessity. If the courts exercise too great a control over the arbitral proceedings and its outcome, the inherent advantages of arbitration over litigation stand to be undermined: speed and economy are negated by the delays and costs of subsequent litigation; if the final decision is left not to the chosen arbitrator/s the choice and expertise of the adjudicator becomes of relatively less benefit; and the advantages of privacy are lost since the court proceedings are heard in public. And the flexibility of the arbitration process is of little value if the rigid procedures of the court are superimposed. The balance is thus a delicate one and in modern times has tended to move in favour of effective arbitration, yet at the same time attempting to ensure minimum standards of legality, fairness and due process.

## DOMESTIC AND INTERNATIONAL ARBITRATION

30. The balance may be drawn differently for international arbitration (which, broadly speaking, takes place in the context of more than one national system of law). It has been

argued that international arbitration should be entirely "delocalised" from national systems of law on the basis that they are irrelevant to the parties' concerns – and especially that the place of the arbitration, often chosen simply for geographical convenience, should not involve any particular legal consequences. The argument is the strongest for arbitrations involving states; indeed, the Washington Convention effectively establishes a supra-national method of dispute resolution.

31. A variation on this holds that the national law of the place of the arbitration is still a reference point for international arbitrations – but it need not regulate these to a great degree. Its limited relevance suggests that this law should not apply strict controls, and also suggests that it would not have a great interest in doing so. There are significant practical advantages in having liberal treatment for international arbitration – since international parties tend to want flexibility in their dealings and are, moreover, able to shop around, selecting the national forum whose law is most congenial to this (a fact noted in the Donaldson Committee's report). Moreover, since international parties can usually look after themselves (and are often backed up by international arbitration institutions such as the International Chamber of Commerce), they do not need a great deal of support from national laws and courts.

32. This approach is consistent with the approach of many national systems of "conflict of laws". These are the rules designed to deal with cases with a foreign element where an issue is raised as to its consequences. One such issue is whether the foreign element should lead to the displacement of national law as governing the substantive dispute. In common law countries such as England, New Zealand and Australia (where the conflicts rules are part of state law) conflicts rules allow the parties a choice of foreign law to govern the substance of a contractual dispute subject to minimal constraints such as public policy. By analogy it can be argued that they should also allow a choice of law to govern an arbitration agreement as the "proper law" of the arbitration contract, and to govern the arbitral procedure as the "proper law" of the arbitral proceedings (and see the English case of *Bank Mellat v. Helliniki Techniki SA* [1984] QB 291 at 301). Thus if the local conflicts rules are applied in a liberal fashion, the parties can effectively select the laws which they think are the most suitable for their arbitration without having to seek out a foreign forum.

33. Conflicts rules could also provide for the recognition and enforcement of foreign arbitration agreements and awards, although very often this is dealt with by statute rather than judge-made rules. Many common law countries as well as a number of civil law countries are party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, aimed at providing for easier recognition and enforcement of foreign arbitral agreements and awards, generally on a reciprocal basis. The Convention represents an advance over the

earlier Geneva Protocol on Arbitration Clauses (1923) and Convention on the Execution of Foreign Arbitral Awards (1927) in this respect, and was intended eventually to replace the earlier treaties.

34. The law of the place of the arbitration could go even further in liberalising the arbitration rules for international disputes. In cases where the law of the place of arbitration does still regulate the arbitration, its effect can be minimised by reducing the number of mandatory provisions, thus allowing the parties a broad freedom to decide on the terms of their arbitration. At the same time the parties might be allowed greater freedom to determine the substantive rules governing their disputes than conflicts rules would normally allow, or even to largely dispense with substantive rules – relying instead on general principles of justice and fairness. This is essentially the approach adopted in the UNCITRAL Model Law on International Commercial Arbitration.

35. However at the time the Model Law was adopted by UNCITRAL it was recognised that its principles could, with adaptation, be extended also to domestic arbitration. This is a view we are inclined to share. There may be both theoretical and practical reasons for drawing the balance between private autonomy and public interest differently in the international case, but this need not result in completely separate laws for international and domestic arbitration. Essentially there is no fundamental distinction between the two: both are based on contract, and both represent an attempt to find an alternative form of dispute resolution which requires a certain degree of autonomy to be truly effective. In the domestic case as well, national law may be of little relevance to the parties' commercial interests. And domestic parties too may have some experience of arbitration. For the sake of conceptual coherence and consistency there are advantages in having the same arbitration law wherever possible. There are also significant practical reasons for not taking a dualistic approach, including the difficulty in defining precisely where the dividing line comes between "international" and "domestic" arbitrations. Thus, the approach that is adopted in Part II of this paper is to consider a new Arbitration Act as being potentially applicable to both domestic and international arbitration but possibly subject to variation for those aspects where separate treatment can be justified.

## CENTRAL ISSUES

36. Two of the matters discussed in this Introduction will be seen to recur throughout this paper –

- (a) the tension and proper balance between party autonomy and judicial control; and
- (b) the desirability or not of distinctive rules for international as opposed to domestic arbitrations.

37. As mentioned in the Preface, Part II of this paper features an extended review of the law relating to the various stages in the arbitration process. The review is based on a comparison of the present New Zealand, Australian and English legislation (as supplemented by the common law) and the UNCITRAL Model Law. Readers pressed for time could choose to pass directly to Part III which contains an indication of the Law Commission's present (albeit tentative) opinion on the general direction for law reform. But those with a particular interest in arbitration, and intending to make submissions in response to this paper, will find that Part II provides important and interesting reading.

## II THE ARBITRATION PROCESS: A COMPARATIVE REVIEW

38. This review examines the existing system of arbitration law in New Zealand, notes its inadequacies, and suggests some tentative options for reform. The primary focus is the Arbitration Act 1908 as amended ("the New Zealand Act"). Acknowledging that a great deal of work has already been done elsewhere in the area of arbitration law reform, the main emphasis is on existing and proven models. The ones which have been selected are –

- (a) the English Arbitration Acts of 1950–1979 (together "the English Act") – the latter reforms still among the leading reforms in the world today, yet the closest to the New Zealand arbitration law and practice;
- (b) the Australian Commercial Arbitration Acts 1984–1986 ("the Australian Acts") – having particular relevance for New Zealand because of CER; and
- (c) the UNCITRAL Model Law of 1985 ("the Model Law") – already receiving wide acceptance internationally as a modern standard. It is approached on the basis that, perhaps with adaptations, it can apply to domestic arbitration as well as international arbitration.

For more detailed reference, copies of the relevant legislation are appended to this paper (together with copies of the main New Zealand legislation) – and a table compares the specific provisions. Reference will also be made to other arbitration laws – the Hong Kong, Bermuda, British Columbia and United States legislation in particular – where these are considered to be of interest. The main reference for the common law is Mustill & Boyd, *The Law and Practice of Commercial Arbitration in England* (1982), and for the conflict of laws aspects reference is also made to Collins (ed), *Dicey and Morris on the Conflict of Laws* (1987).

39. The general approach is on an issue by issue basis following the order in which the issues commonly might arise in an arbitration, beginning with the definition of arbitration agreement and finishing with the recognition and enforcement of the arbitration award. At the same time an attempt is made to structure the discussion by grouping the issues under general headings (definitions, enforcement of the arbitration agreement, commencement of the arbitration, the arbitration proceedings, the arbitral award, enforcement of the award). The answers to some of the questions may, however, require some preliminary consideration of later issues first – for instance as to what might be the consequences of adopting a particular definition.



40. The provisions of the New Zealand Act are not necessarily dealt with in the order they arise. Indeed those provisions, representing the result of a series of older statutes and patchy consolidations, and with the 1938 amendments not fully integrated into the principal Act, have no clear order. Nor do they represent the whole of New Zealand arbitration law which includes also the provisions for statutory arbitration, the statutes implementing the various international conventions to which New Zealand is a party (in particular the 1982 Act which implements the New York Convention), and the important body of common law which has built up around and outside the statutory provisions. These additional aspects of New Zealand's arbitration law have to be considered as well when carrying out the review.

#### Act a code

41. The preceding comments raise an important preliminary question – whether there should be an attempt to codify the arbitration law. There may be advantages in gathering together in an ordered way the whole body of arbitration law in one statute or set of statutes. This serves the purposes of accessibility and certainty (but can still allow scope for flexibility in the arbitration agreement itself). It can also provide a way of regulating those aspects which are presently outside the legislation. For these purposes not every detail has to be spelt out in the legislation – but at least the main aspects should be covered and some detail can be provided in authoritative commentaries. Thus, while complete codification may be impossible, a certain degree of comprehensiveness can be achieved.

42. This idea has already received some attention in the recent arbitration reforms. The **Australian Acts** provide an ordered scheme for the statutory provisions, and adopt a more modern style of drafting. They also attempt to set out in statutory form matters which were previously left to the common law. Even the **English 1950 Act** provides some order (among other things incorporating the 1934 amendments in the main format) and the **1979 Act** replaces the common law appeal on points of law with a modified statutory appeal, thus bringing it within the statutory scheme.

43. The **Model Law** is perhaps the most logical in its structure, and exhibits a very clear and simple drafting style. For those matters which are not spelt out in sufficient detail in the Model Law, reference may be made to the very full set of "preparatory materials" – the UN Secretary General's *Analytical Commentary on the Draft Text* and the UNCITRAL *Report on the Work of its 18th Session*. Indeed the Model Law represents a clear attempt to create an area of "lex specialis" (special law), operating to the exclusion of other laws, with the express exception of treaty law, within its scope of operation. It aims to be relatively comprehensive – spelling out in statutory form the extent of the parties' contractual capacities regarding arbitration. It also states the limits on this – expressed in terms of "mandatory" provisions which cannot

be derogated from. Moreover art.5 specifically provides that "in matters governed by this Law, no court shall intervene except where so provided in this Law". There may be some disagreement as to what are "matters governed by this Law", although the preparatory materials provide some assistance. But the aim is clearly to codify at least the central aspects of arbitration law – and at the same time restrict the court's ability to intervene in the arbitration process.

### **Question 1**

**Should a new Arbitration Act be in the form of a code – or at least have a greater degree of codification as its aim?**

## **DEFINITIONS**

### **The "arbitration agreement"**

44. Arbitration (in the sense generally intended in this review) is necessarily pursuant to an agreement. But not all arbitration agreements are presently covered by arbitration legislation. Thus the first question to be addressed is what amounts to an "agreement" from the point of view of the legislation. The New Zealand Act terms this a "submission" and defines it principally as "a written agreement to submit present or future differences to arbitration...". The definition then goes on to include valuation agreements – where there is not necessarily a dispute (where there is, the normal definition would suffice). There is no clear explanation for how this came about but it was apparently thought desirable in 1906, when the relevant amendment was made, to treat valuation as equivalent to arbitration rather than specifically regulating valuation. However, as it has developed, many of the Act's provisions are often not suited to valuation. The New Zealand Act is alone in extending its arbitration legislation to valuation agreements involving no dispute and, since arbitration is essentially a method of dispute resolution, it is questionable whether it is an appropriate or justified extension.

45. The main part of the New Zealand Act's definition of "submission" reproduces what is found in the **English and Australian Acts**, although there the more modern terminology of "arbitration agreement" is used. This may be perfectly adequate and is certainly simple, the details being left to the cases to develop. However there may be advantages in providing some detail in the definition itself, if only for the purposes of clarification and accessibility. For instance there is the question of whether the term "written" covers a document which is not signed by the parties, the circumstances in which it does being left to the common law.

46. The **Model Law**, which also has an "in writing" requirement, states explicitly that it is sufficient if the document is signed by the parties or there is an exchange of specified documents.

In this respect it follows largely the New York Convention definition. (The aim was principally to ensure that the agreement and resultant award would be enforceable under the Convention.) Whether this might be too limited is another question. The ED&S Consultative Document, for instance, suggests that it is probably stricter than the common law. It would not as such cover forms of contract which customarily become binding on a party by oral acceptance. The exchange of statements of claim and defence would bring it within the Model Law's definition but a recalcitrant party could simply refuse to take these steps. This may justify the extension of the definition to include documents which although signed by only one of the parties give sufficient evidence of a contract (and the awards could still be enforceable under the New York Convention – the definition there of "in writing" being merely inclusive).

47. On the other hand it may be questioned whether there should be an "in writing" requirement at all. The current New Zealand definition does not exclude unwritten agreements altogether but merely leaves them outside the statutory scheme. The English and Australian Acts are similar. Thus oral agreements and agreements implied by conduct are, by and large, left to be dealt with under the common law. There are difficulties with this approach, not the least being the uncertainty as to the status and effect of agreements to arbitrate future disputes at common law, the revocability of the arbitrator's authority, and the enforceability of submissions to arbitration in the face of court proceedings (discussed in *Money v. Ven-Lu-Ree Ltd* unreported judgment of Chilwell J, High Court–Auckland, CL 83/87, 23 February 1988). The Model Law does not recognise unwritten agreements. The preparatory materials suggest that other forms of agreement would thus be invalidated. This may be one way of dealing with the difficulties of common law arbitrations. But it restricts the parties' ability to resolve their disputes by arbitration – and departs from the common law tradition which accepts that, with very limited exceptions, oral contracts are equally as valid as written contracts (although writing may make proof an easier matter). A writing requirement may simply be too formal for some arbitrations. Thus, it may be preferable to dispense with the requirement – even for international arbitrations.

### Question 2

- (1) What definition of "arbitration agreement" should be adopted in a new Act? Should it extend to valuation agreements where there is no dispute?
- (2) Should there be a "writing" requirement (and if so on what terms)? Should a distinction be made between domestic and international arbitration in this respect?

### Definition of "international"

48. The above discussion indicates that for some purposes (although not necessarily the one discussed above) there might have to be a distinction between international and domestic arbitration. Thus the distinction needs to be examined at an early stage. At present the New Zealand statutes on arbitration contain no general definition of "international". The 1982 Act focuses on the more limited notion of foreign agreements (as providing for arbitration in another state). This is in contrast to the approach of the comparable English Act of 1975, also taken up in the 1979 Act. These Acts essentially focus on international arbitration agreements, defined as those which are not "domestic" – either because the place of arbitration is in another state, or because a party is linked to another state through nationality, habitual residence, incorporation, or exercise of central management and control. The provisions of the Australian Acts which follow the 1979 English Act adopt a like approach to "international" arbitration.

49. The definition in art.1(3) of the Model Law provides a contrast. It contains both an objective and a subjective element. The objective part focuses on strictly territorial connections, without reference to the forum itself. Thus an arbitration is regarded as "international" if different states are involved through the connecting factors of the parties' places of business, the place of the arbitration, and the place of the transaction. It may be that the Model Law's territorial connections yield a more realistic approach to international transactions than the English Act's focus on residence, nationality, and incorporation. It is also the approach adopted in other international trade law instruments – such as the Vienna Convention on the International Sale of Goods.

50. The Model Law's definition is in some respects narrower than the English and Australian definitions (for instance not extending automatically to the case of a foreign company's local subsidiary, or even a foreign company with a local place of business). But the subjective part introduces an element of flexibility which would allow the parties themselves to bring such cases within its scope by designating the transaction as "relating to more than one country". The preparatory materials indicate that the intention was not, however, to enable parties to submit purely domestic agreements to the international regime.

### Question 3

**What definition of "international" should be adopted in a new Act for the purposes of any distinctions which may need to be made between domestic and international arbitration?**

### Application to "commercial" arbitration

51. The New Zealand Act is not limited in its scope to commercial arbitration. Nor is a distinction made in the **English Act** – even for international arbitration. However restrictions to commercial arbitration are fairly common in civil law countries and are increasingly becoming common in common law countries as well (for instance some Canadian jurisdictions). The United States Arbitration Act 1925 has always been limited to matters maritime and commercial. The **Australian Acts**, though, are termed "Commercial Arbitration Acts" but contain no express restriction to "commercial" arbitration.

52. The **Model Law** is restricted to "commercial" arbitration but "commercial" is very widely defined, in a non-exhaustive fashion, in a footnote. The intention was apparently to expand on what civil law countries regarded as "commercial", but at the same time ensure that arbitrations involving state interests could be excluded. The preparatory materials state that the use of a footnote was meant to show that the definition is merely indicative. However the definition may have more weight if it is incorporated in the text of the legislation (as would be the normal drafting practice in New Zealand). This raises two questions: first, should "commercial" be defined so broadly if the restriction is to have any real significance (or should, for instance, a narrower definition be adopted – such as that used in s.24B of the Judicature Act 1908 to determine which matters should go in the Commercial List). But, more importantly, should there be a "commercial" restriction at all when our arbitration and general contract law traditionally makes no such distinction (and when the intention is to promote rather than limit arbitration). The restriction is not an essential element of the Model Law – and there seems no reason to retain it for domestic arbitration. It could also be omitted for international arbitration (although most would be "commercial" in the UNCITRAL sense). As the Model Law is restricted to consensual arbitration, and does not purport to affect the principle of sovereign immunity, the real value of the restriction is questionable.

#### Question 4

Should a new Act's scope of application be limited to "commercial arbitration" and if so how should "commercial" be defined? Should a distinction be made between domestic and international arbitration?

### Matters excluded from arbitration

53. With the exception of fraud, the New Zealand Act does not deal with the issue of "arbitrability" (i.e. what can and cannot be determined by arbitration). Indeed this is a common approach in the arbitration models, although made explicit only in the **Model Law**. However it is a topic of great significance in the arbitration context, not least in providing the courts with a basis for refusing to stay court proceedings or for setting aside an award.

Historically the question of what is not arbitrable seems to have been treated as one which fairly comes within the domain of the courts as an aspect of its public policy. Essentially it is a restriction which has been developed in the case law to exclude from arbitration matters which are viewed as coming within the public domain – such as crime, fraud and dishonesty: see Walton & Vitoria, *Russell on Arbitration* (1982). In New Zealand the court's powers to exclude questions of fraud from arbitration are also provided for in s.16 of the 1938 Amendment Act.

54. The question arises, what (if anything) should be done about arbitrability? The restrictions on criminal matters, and in particular the right to impose criminal sanctions, may be accepted as being an aspect of the public function of the state and its courts. But that justification does not extend to any private remedies the injured party may have. Nor, arguably, does it extend to matters of civil fraud and dishonesty since these may be regarded as essentially private matters between the parties. The question then is whether arbitrability should continue to be left to the courts (removing even the final statutory constraint of s.16(3)). They may be prepared to take a more liberal approach than in the past – especially if the arbitration legislation itself indicates a policy favouring arbitration. This is the approach taken in the United States: see *Shearson-American Express v. McMahon* 107 S. Ct 2332 where the the Supreme Court held that:

"The Arbitration Act thus establishes a 'federal policy favouring arbitration' ... As we observed in *Mitsubishi Motors Corp. v. Soler-Chrysler Plymouth, Inc.* [473 US 614], 'we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals' should inhibit enforcement of the Act ..."

55. On the other hand it may be preferable to deal with arbitrability in the legislation itself, to ensure that the exclusions are minimal (and also to clarify what they are). For instance, the Quebec Arbitration Statute of 1986 provides simply that "disputes over the status or capacity of persons, family matters or questions of public order cannot be submitted to arbitration".

56. Arbitration of certain matters is also excluded by specific New Zealand statutes. These fall into various categories. First there are the statutes which give exclusive jurisdiction over aspects of their subject matter to a specialised court or tribunal – for instance the Labour Relations Act 1987 and the Family Proceedings Act 1980. The policy reasons for this are relatively clear and it should be noted that such courts and tribunals offer to varying degrees a number of the advantages of arbitration, such as expertise, privacy, and informality.

57. Secondly there is the provision in the Small Claims Tribunals Act 1976 (and Disputes Tribunals Act 1988) which allows the tribunals to maintain jurisdiction in respect of a claim notwithstanding an arbitration clause. The intention here is

no doubt to promote the use of these tribunals – and if one thinks of them as experts in small claims disputes then the policy seems acceptable, particularly since they should be cheaper than arbitration. On the other hand, if the advantages are so obvious, it might be asked why the choice should not be left to the parties themselves.

58. Thirdly there is the provision in the Insurance Law Reform Act 1977 which makes an arbitration clause in an insurance contract unenforceable against the insured. The justification given in the Contracts and Commercial Law Reform Committee report (1975) which led to the provision is the public interest in having such disputes dealt with openly. But this raises the questions of why insurance companies in particular should be singled out in such a manner and, on the other hand, why, if there is a public interest in having such matters dealt with openly, the restriction is limited to agreements to arbitrate disputes which may arise in future (i.e. not present disputes). There is the consumer protection aspect to be considered – but the question is whether there is a special need for consumer protection in this context – or whether, if at all, it should be dealt with under the more general contract law. Overall the absolute prohibition does seem to be somewhat anomalous and it may be doubted whether the provision is justified in the context of a modern policy of encouraging arbitration.

59. A further question arises concerning the provisions of the Commerce Act 1986 and the Fair Trading Act 1986. These provide private statutory rights for consumers (both in tort and contract) in respect of the anti-competitive and misleading and deceptive conduct they proscribe. They might be interpreted to give the courts exclusive jurisdiction over these matters since they deal with this aspect specifically but make no reference to arbitrators. The justification for such a narrow approach is questionable: In general there is no policy reason why an arbitral tribunal's jurisdiction should not extend to statutory private rights – and ordinarily it would. And the fact that the statutes are primarily concerned with matters of public law does not alter the fact that they provide for private remedies. Thus it would clarify matters to indicate in the Commerce Act and Fair Trading Act or elsewhere that they are not intended to exclude arbitration.

#### Question 5

- (1) Should arbitrability be dealt with in a new Act? Should the courts be encouraged to take a more liberal approach?
- (2) Should amendments be made to any other statutes to remove obstacles to arbitration?

## ENFORCEMENT OF THE ARBITRATION AGREEMENT

### Stay of court proceedings

60. An arbitration agreement notwithstanding, once a dispute arises (and perhaps even after the arbitration has commenced) a party may decide it prefers to take the matter to court. The question which arises at this stage is whether the other party (or parties) can insist on arbitration. Section 5 of the New Zealand Act provides that the court has a discretion to stay the court proceedings, if it is satisfied that:

- (a) there is "no sufficient reason why the matter should not be referred" to arbitration;
- (b) the applicant (being the defendant in the court proceedings) was at the commencement of the court proceedings and remains ready and willing to do all things necessary to the proper conduct of the arbitration;
- (c) the applicant has not taken any steps in the court proceedings.

(The English and Australian provisions are much the same.)

61. There are a number of problems with this provision (apart from the complex style of drafting). To begin with there is no clarification of what a "sufficient reason" might amount to, and this has been left to the courts which consider a whole range of factors – not only whether there is a valid and binding agreement, but also whether the matters in dispute are factually or legally complex, whether the intended arbitrator is qualified to settle the factual and legal matters in dispute, the comparative expense and delay as between the court proceedings and arbitration under the agreement, and so on. Moreover, even if the court is satisfied that there is no good reason, technically at least, it can still determine that the stay should not be granted. Thus, overall, the court has very wide powers to refuse enforcement of an arbitration agreement.

62. There are already some exceptions to the general discretion to refuse a stay. The courts themselves have made an exception for agreements which expressly provide that the arbitration is a condition precedent to court proceedings – termed a "*Scott v. Avery* clause" (after the case where such conditions were accepted as not derogating from the principle that an arbitration agreement cannot oust the jurisdiction of the court). These are generally considered as automatic grounds for a stay. The logic of such a distinction may be doubted, since after all such a provision only makes explicit what is implicit in any arbitration agreement (even if not treated that way by the courts). The Australian Acts have reacted by stating that a *Scott v. Avery* clause shall no longer of itself be a ground for staying court proceedings. Another approach



would be to limit the court's powers generally to override an arbitration agreement – which is effectively the approach of the Model Law.

63. The New Zealand 1982 Act also provides a statutory exception for foreign arbitration agreements (providing for arbitration in another state). Under this Act the court's powers to refuse a stay are limited. A stay must be granted unless the arbitration agreement is defective in some respect (as being "null and void, inoperative or incapable of being performed") or there is no dispute covered by the agreement. The comparable English and Australian provisions are similar (see the English Act of 1975 and the Australian Acts, Part VII as well as the Commonwealth Arbitration (Foreign Awards and Agreements) Act 1974) – although their scope of application is somewhat different (extending either to international agreements or, in the case of the Australian Acts, to a somewhat broader notion of "foreign" agreements). In each case the aim was to implement the New York Convention's provisions for the enforcement of (foreign) arbitration agreements.

64. The Model Law takes much the same approach as the 1958 Convention within its general "international" scope of application. If this was extended to domestic arbitration agreements – as well as "foreign domestic" agreements (although already covered by the Convention) it would mean a generally very limited power for courts to continue with proceedings once a valid and enforceable arbitration agreement is proved. This may be the better approach in that it acknowledges the contractual nature of such agreements – as well as setting clear limits on the court's powers. Moreover it is not without precedent: the United States Arbitration Act (which applies to international and interstate matters) provides for a mandatory stay if the issue is referable to arbitration under the agreement and the applicant is not in default in proceeding with the arbitration.

65. Some might seek the retaining of more control over the enforceability of domestic agreements because of the closer connection they generally would have with the national system (as discussed in paras.30–35). If so, the court's discretion to refuse to stay court proceedings might be retained for domestic arbitration, albeit in a more limited form. But it would have to be made clear that the discretion is in fact intended to be a narrow residual discretion to be exercised only in exceptional cases where the public interest requires it – for instance because of the particular public interest in the legal issues involved or a special need for consumer protection which is not already covered by the general contract law grounds for relief (which would render the agreement void, inoperative or incapable of being performed).

66. A further question which might arise is as to the effect of court proceedings on the arbitration agreement and the authority of an arbitrator (or arbitrators) appointed under it. This has particular practical significance because of the potential for abuse if the

arbitration is forced to stop. The New Zealand Act makes no reference to the issue nor do the English and Australian Acts. However the ED&S Consultative Document suggests that if an arbitral tribunal has been appointed and has entered on the dispute, it might be able to continue with the reference, and even make an award, while the application to the court is pending. The Model Law makes the arbitrator's powers to do so explicit.

#### Question 6

- (1) Under a new Act what should be the conditions for staying court proceedings to enforce an arbitration agreement? Should this question be answered differently for international and domestic arbitration?
- (2) Should there be provision for the arbitration to continue while the application for stay is pending?

#### Revocation of the agreement

67. Another basis upon which the court may be called on to intervene at the very early stages of an arbitration is if a party wishes to revoke its agreement to arbitrate. Section 3 of the New Zealand Act provides that a submission (unless it expresses a contrary intention) is irrevocable, except by leave of the court. The reason for this has already been noted in the historical section of this paper – the original intention being to prevent the revocation of submissions prior to the award. This function is not so necessary nowadays since other statutory provisions (e.g. the stay of proceedings provisions noted above) can effectively be used to enforce the agreement.

68. Indeed, in more recent years the provision has come to be regarded as a basis for allowing rather than preventing unilateral revocation. There is old English case authority to the effect that the power of revocation is really limited to the arbitrator's authority rather than the agreement itself. However, it is difficult to reconcile this with the terms of the provision itself and the question remains whether the statute should provide the court with a power to revoke the agreement (in the context of a modern policy of encouraging arbitration).

69. The comparable English provision now explicitly limits revocation to the authority of an arbitrator appointed pursuant to the agreement, rather than to the agreement itself – but the court is again empowered to end the agreement once the appointment of an arbitrator is revoked. The Australian Acts are however somewhat more supportive of arbitration, stating that, unless the parties provide otherwise, the authority of an arbitrator is irrevocable, and omitting the court's power to terminate the agreement on revocation of an arbitrator's appointment (although there is provision for termination on removal of an arbitrator). The Model Law goes one step further since it makes no provision at all for revocation – but a party can in limited circumstances challenge

its own appointed arbitrator under the challenge provisions (see below para.83).

#### Question 7

**Should a new Act retain provision for court-authorised revocation of an arbitration agreement (or an arbitrator's authority)?**

### COMMENCEMENT OF THE ARBITRATION

#### Commencement and limitation periods

70. Once a dispute arises, provided there is no problem regarding enforcement of the agreement, the arbitration can commence. At this stage it may be worth clarifying the actual point of commencement of the arbitration. This has the practical function of determining when the procedures for initiating the arbitration may be instituted. But it is also relevant from the point of view of limitation periods, both for the arbitration itself and for any further arbitration proceedings or court proceedings which may follow an abortive arbitration.

71. The question of commencement of the arbitration is not dealt with in the New Zealand Arbitration Act, but is dealt with in s.29 of the Limitation Act 1950. This provides that –

- (a) the arbitration is deemed to be commenced by the service of notice (in a prescribed manner) requiring the appointment of an arbitrator or submission of a dispute to an already designated arbitrator;
- (b) the normal statutory limitation periods for the commencement of court proceedings apply equally to arbitration proceedings;
- (c) where the court sets aside an award or directs that the arbitration ceases to have effect the period taken up by the arbitration process (i.e. from the point of commencement) may be ordered to be excluded in determining the limitation period for the purpose of court proceedings.

72. The limitation provisions for court proceedings have recently been reviewed in the Law Commission's report on Limitation Defences (NZLC R6). Essentially what is recommended is that arbitration proceedings continue to be treated as court proceedings for limitation purposes, and that the time taken up by arbitration proceedings which somehow fail should not be taken into account in the calculation of the limitation period for subsequent proceedings (removing the court's discretion on this).

73. The arguments in favour of treating arbitration proceedings as court proceedings for limitation purposes are that the same policies which lie behind limitation periods for court proceedings (i.e. security for the defendant, practical problems of proof,

and insurance implications) also apply to arbitration proceedings. Nor need this be completely contrary to contractual autonomy. At present the common law accepts that parties may derogate from the statutory limitation periods prescribed by the Limitation Act by prescribing their own limitation period – but in the arbitration context this is subject to s.18 of the Arbitration Amendment Act 1938 which provides that the court may extend a statutory limitation period if "undue hardship" would otherwise result (and see similarly the English and Australian Acts). In the Limitation Defences report, which endorses the principle of contractual limitation periods, the need for the particular constraint in the arbitration context is questioned. There is, for instance, no such constraint in the Model Law.

74. As to the question of commencement the recommendation is that for limitation purposes time stops running when notice is given to appoint an arbitrator (not altogether different from what already applies under the current Limitation Act). The basis for this is that only then is the defendant in a position to know that proceedings have been started. This is also subject to contrary agreement between the parties. The question arises whether there should be similar provision for commencement in the arbitration legislation itself given that its purpose is broader than the determination of limitation periods. For instance, the Model Law (the only arbitration model surveyed which provides for commencement) states that, unless otherwise agreed by the parties, the arbitration proceedings commence when a request for the dispute to be referred to arbitration is received by the respondent.

#### Question 8

- (1) What, if any, provision should be made for commencement of the arbitration proceedings in a new Act?
- (2) Should there continue to be a provision authorising the court to extend a contractual limitation period?

#### Appointment of arbitrators

75. As the initial discussion on arbitration agreements has indicated, it is not generally a formal requirement for the validity of the agreement that the parties decide then and there everything to do with setting up the arbitration – for example that the arbitrator or arbitrators be named in the agreement (or even that a procedure be decided on for selecting them). This is explicitly stated in the New Zealand Act's definition of "submission" as a written agreement to submit disputes to arbitration, "whether or not an arbitrator is named therein". If the parties cannot (or will not) decide on the arbitrator/s once the dispute arises, the Act provides a statutory mechanism for appointment in the following terms –

- (a) If the parties fail to agree on the number of arbitrators, there shall be one arbitrator.

- (b) If the parties fail to agree on the appointment of a single or third arbitrator (or, in the case of a third arbitrator, the parties authorise the other arbitrators to make the appointment and they fail to agree) and there is still no appointment after seven days' notice, the court may be asked to make the appointment.
- (c) If a party fails to make an appointment of an arbitrator in the case of two arbitrators, each to be appointed by a party, the other party may after seven days' notice declare its arbitrator the sole arbitrator, subject to this being set aside by the court.

76. As can be seen, the New Zealand provisions are rather limited. They do not, for instance, envisage the possibility of more than three arbitrators and two parties, or anyone other than the parties or arbitrators making the appointment. This reduces their applicability. Moreover the entirely different procedures for a default appointment in the case of two arbitrators (para.75(c)) seems somewhat anomalous and its restrictions are somewhat questionable. It has been held that they do not even extend to the parallel case of the first two out of three arbitrators: see *Canam Construction Ltd v. Yukich*, unreported judgment of Vautier J. High Court, Auckland, 316/85, 17 October 1985.

77. The English provisions are largely similar to those in the New Zealand Act. The main difference is that the court's power of appointment by default has been extended by the 1979 Act to cover cases where a third party is authorised by the parties to appoint an arbitrator and fails to do so. The extension is not limited to the appointment of a single or third arbitrator. The Hong Kong Arbitration Amendment Ordinance of 1984 takes this further by making a corresponding adjustment to the original provision, thus authorising the court to appoint any arbitrator in default of the parties or other arbitrators authorised to make the appointment.

78. The Australian Acts contain more uniform and detailed provisions regarding the appointment of arbitrators. They state explicitly that unless the parties provide otherwise, any arbitrator shall be appointed jointly by the parties. In the case of default by any person authorised to appoint an arbitrator (whether or not a party), the following procedures apply –

- (a) the person in default may be called on to appoint a "default nominee" or to accept the appointment of the arbitrator/s already appointed as sole arbitrator/s;
- (b) if there is no response within a "reasonable time" (or a time fixed by the default notice, being not less than seven days) the appointment is automatic;
- (c) the court can be called on to set aside the automatic default appointment and appoint a substitute.

79. This procedure has some advantages over a simple approach to the court on default. If the party in default does accept the automatic default appointment the need to take the matter to the court can be avoided. But if the party does not accept it and later objects, the court can still be called in to set aside the appointment (and no apparent time limit for objection is set). Moreover the procedure can be bypassed altogether in certain circumstances (i.e. if the court decides that it is inadequate or unreasonable or if the parties agree to bypass it), and in that case the court can be called on immediately to make the appointment.

80. The **Model Law** states that (unless the parties agree otherwise) a single arbitrator shall be appointed jointly by the parties, but in the case of three arbitrators the parties shall each agree on one, and the two thus appointed shall appoint the third. This does create a distinction which the Australian provision seeks to avoid, but may be more realistic as to what the parties would want. Secondly, in the case of default (unless the parties agree otherwise), the Model Law provides that, after 30 days' notice to appoint, the court can be called on to make the appointment. This provision has the advantage of simplicity and immediacy. Sometimes, however (as discussed above), it could save time ultimately to provide for automatic default appointments – provided there are strict time limits. Thus, in the domestic case at least, where the parties may be less experienced (and without the back-up support of institutionalised arbitration), there may be a case for amending the Model Law provision to provide for this.

81. Another respect in which the Model Law may not be entirely satisfactory for domestic arbitration at least is its provision that (unless otherwise agreed by the parties) the number of arbitrators shall be three rather than one. Arguably this is perfectly suitable for many international arbitrations, where expertise may be important (and cost less important). Also the parties may see an advantage in each having an arbitrator who is friendly towards that party's interests, although it should be noted that the Model Law does not accept the concept of an "arbitrator-advocate". Indeed, as the preparatory materials point out, three arbitrators is the most common choice for international arbitrations. But there are likely to be many arbitrations where the parties would prefer to have only one arbitrator, if only for the sake of economy, speed and simplicity. Overall a presumption in favour of a single arbitrator may be preferable.

#### Question 9

- (1) If the parties fail to agree on the number of arbitrators, how many should a new Act provide for? Should the answer be different for international arbitration?
- (2) What provision should be made in a new Act for the method of appointment of an arbitrator in the event the parties do not provide for this? Should a distinction be made in this respect between international and domestic arbitration?

### Challenge to appointments

82. The next issue is whether there should be any controls on who can be appointed as an arbitrator. Is it to be left entirely to the person making the appointment, or is the other party entitled to object? Can a party object to its own arbitrator? There seems little doubt that at common law, as a contractual matter, a party may object to the appointment of an arbitrator who simply does not possess the qualifications agreed on by the parties. The New Zealand Act also allows for removal of an arbitrator named in the agreement on the basis that the arbitrator is not or may not be impartial. The English Act has an equivalent provision, and the Australian Acts extend this to any appointment, not just the arbitrator named in an agreement. But at common law, according to *Mustill & Boyd*, actual or possible lack of impartiality is always a ground for challenge – provided the application is made in due time so that waiver cannot be implied. This presupposes that an arbitrator cannot act as an advocate of the party making the appointment. Indeed the need for an independent quasi-judicial approach is rarely if ever questioned.

83. The Model Law also takes the approach that arbitrators should meet any contractual requirements and should be impartial. Article 12 states that an arbitrator is subject to challenge if there are "justifiable doubts as to his impartiality or independence, or if he does not possess the qualifications agreed on by the parties", and this is ultimately enforceable by the court. However a party involved in the appointment cannot challenge it except for reasons of which that party became aware only subsequently, and in this respect the Model Law is narrower than the other models. The Model Law also introduces a (rather short) 15 day time limit for the challenge and expressly authorises the arbitrator to continue with the proceedings while the challenge is pending. The attempt here is to strike the best balance between the need to deal with justified complaints about the arbitrator's qualifications and abilities as soon as possible, so as to avoid unnecessary expense and time wasted on futile arbitrations, and the desire to minimise the delays and obstructiveness of unwarranted complaints.

#### Question 10

What provision should a new Act make for challenge of an arbitrator's appointment? Should there be a time limit on making challenges?

### Removal of an arbitrator

84. Once the appointment is made (and any initial challenges dealt with), what grounds should there be for removing an arbitrator during the course of the reference? At the very least it would seem that failure to act should ultimately be a ground for removal. The New Zealand Act provides that the court can remove an arbitrator who fails to use "reasonable dispatch" in entering on and proceeding with the reference and making an award. And the authority of an

arbitrator is automatically ended (without the intervention of the court) in the event of failure or incapacity to act, or death. In addition, at common law, the parties can, in exercise of their contractual rights, agree to remove an arbitrator. And the statute seems to allow a party, by leave of the court, to revoke the authority of its own appointed arbitrator (recall para.68 above).

85. Finally, s.12 of the New Zealand Act empowers the court to remove an arbitrator, if a party so requests, on the basis of "misconduct". "Misconduct" is not defined in the Act, but its meaning has been developed in the cases to cover serious procedural errors, such as excess of authority, acting contrary to public policy, unfairness and bias. Thus the parties and the court have a very significant power to remove an arbitrator during the course of a reference. (It should be noted that it is a power which has rarely, if ever, been used in New Zealand.)

86. The position under the English Act is much the same (although there the power to revoke an arbitrator's appointment is made explicit). In particular, notwithstanding the 1979 Act, which reduced the court's powers of intervention on substantive points of law, the court's power to remove an arbitrator for "misconduct" remains in the same general form. Indeed the common law seems to treat the court's powers to regulate the arbitrator's activities as somewhat akin to its procedural powers of supervision over inferior tribunals and thus very much subject to the courts's definition and control.

87. The Australian Acts retain "misconduct" as a ground for removing the arbitrator. This is explicitly defined in terms which come close to a power of judicial review, including making specific reference to "the rules of natural justice". (The British Columbia Act makes the further reform of renaming "misconduct" as "arbitral error" to remove unwarranted implications of personal condemnation.) In addition the Australian Acts allow for removal of an arbitrator on the basis of incompetence or unsuitability. The only specific ground for automatic termination of an arbitrator's authority is death.

88. The Model Law provides that in the event of failure or impossibility to act, the parties can by agreement remove an arbitrator or the arbitrator can resign, and if there is any controversy the court can be called on to remove the arbitrator. However in extreme cases (for instance death) the appointment would simply end, and there is no need to have this confirmed by the court. (At least it would seem that this might be implied from the introductory words of art.15.) The parties can also, by agreement, remove the arbitrator or the arbitrator can resign in other circumstances without the assistance of the court. The intention here is pragmatic, since, as pointed out in the preparatory materials, the arbitration cannot succeed if the arbitrator or the parties are unwilling.

89. Under the Model Law the court's powers to remove an arbitrator for anything amounting to "misconduct" are not entirely clear (depending largely on how broadly the reference to



"circumstances" in art.12(2) is interpreted). It may be possible to interpret the court's powers in this respect in a limited manner – avoiding the opportunity for obstructive and dilatory tactics during the course of the reference. (And it should be noted that such grounds might still provide a basis for objection to the award itself.) But on the other hand it seems somewhat unreasonable to allow no recourse against an arbitrator for actual lack of impartiality or independence, even though the likelihood of this could have formed a basis for challenge at the outset. This suggests that a broader interpretation should be applied to art.12(2) (as the *Analytical Commentary* would seem to advocate).

### Question 11

- (1) Under a new Act what should be the grounds for removal of an arbitrator?
- (2) Should the court be authorised to remove an arbitrator on the basis of "misconduct", or anything along those lines?

### Replacement of arbitrator

90. In the event that an arbitrator resigns or is removed, the further question arises as to how a replacement is to be appointed. Under the New Zealand Act this depends initially on whether the arbitrator was removed by the court. If the arbitrator's mandate ends through failure or incapacity to act or death, or agreement of the parties, the power to appoint a replacement (unless provided otherwise by the parties) is treated as a simple case of appointment by default. Thus, if the appointment is not made after seven days' notice, the court can be called upon either to make the appointment, or to set aside an appointment of an already appointed arbitrator as sole arbitrator (depending on whether there were originally one, three or two arbitrators). Alternatively, if the arbitrator was removed by the court, the court can simply appoint an arbitrator in substitution, and if all the arbitrators are removed, the court can appoint a sole arbitrator to replace them or else terminate the agreement. In practice the courts will usually appoint an arbitrator nominated by the party making the application.

91. This does create some problems apart from those already raised regarding the default provisions: in particular as to why the authority to appoint the replacement is taken away from the party originally authorised in some cases but not others. The justification sometimes offered for the court making the appointment of the replacement in the case where an arbitrator is removed is that otherwise a recalcitrant party could continue to appoint unsuitable arbitrators simply to delay the proceedings. However there can be many reasons for removal which do not indicate bad behaviour on the part of the party who made the appointment, and it may be unreasonable to take away the contractual right to appoint a replacement – even apart from the delays involved in going to court when this can be avoided. Another anomaly is the option the court has to appoint a sole arbitrator, even if the parties had chosen to have more than one, or to simply terminate the agreement without making an appointment at all.

92. The English Act is similar to the New Zealand Act on replacement of arbitrators. The Australian Acts contain somewhat simplified provisions: if the arbitrator dies or otherwise "ceases to hold office", then (unless the parties otherwise provide) the person who made the original appointment can appoint a replacement and in the case of default the normal default provisions apply. Secondly, if the arbitrator is removed by the court, the court can appoint a replacement or terminate the agreement. However the court does not have the option of appointing a sole arbitrator in place of all the arbitrators removed.

93. The Model Law goes one step further in adhering to the contract principle by providing that, in the case of any resignation or removal of any arbitrator, the power to appoint a substitute simply falls back on the party or parties authorised to make the original appointment. Thus it is only if the party actually defaults in making the replacement appointment that the court's powers itself to make the appointment can be invoked (as in the case of any default in appointment). This does not however deal with the problem of repeated appointments of unsuitable arbitrators (noted above), and if this is a real risk it may be useful to provide for this as well by providing for the court to be called in the second time a party's arbitrator is removed.

#### Question 12

What provision should be made in a new Act for replacement of an arbitrator? Should there be a distinction based on whether the arbitrator resigned or was removed by the court?

#### Umpires

94. A quite separate question is whether there is need to make provision for umpires to decide disagreements between a number of arbitrators. The New Zealand Act contains provisions for umpires. In particular it provides that, unless otherwise agreed by the parties –

- (a) if the reference is to two arbitrators they shall appoint an umpire immediately;
- (b) If there are three arbitrators, one to be appointed by each party and the third to be appointed by the other two, the third is deemed to be an umpire.

(The Act also spells out when an umpire can enter on the reference, and extends the provisions for appointment, removal, and so on of arbitrators to cover umpires as well.)

95. There are some problems with this approach (adverted to in the Donaldson Committee's report) – not the least being that the

parties may not want to go to the trouble and expense of appointing an umpire until there is an actual dispute between the arbitrators and that very often the parties actually intended the third arbitrator to be an arbitrator, not an umpire. Indeed it is questionable whether there should be any presumption in favour of an umpire when the parties themselves make no provision for it.

96. The English 1979 Act has already made a number of amendments to the 1950 Act in this respect. Now (subject to contrary provision in the arbitration agreement) two arbitrators may appoint an umpire at any time, and are only required to appoint "forthwith" if they cannot agree. And in the case of three arbitrators there is no presumption that the third is to be an umpire, but rather the general rule is that a majority decision prevails. (The Hong Kong Amendment Ordinance of 1984 and Bermuda Act of 1986 also take account of the rare case where there may be no majority by providing for the arbitrators' chairman to decide in such event.) The Australian Acts are substantially the same as the English Act but expand the provisions so that an umpire may be appointed in any case of an even number of arbitrators, and the majority rule prevails in any case of three or more arbitrators and failing a majority the arbitrators' chairman decides. This takes into account the fact that the parties may wish to appoint any number of arbitrators.

97. The Model Law departs from the umpire rule altogether so that (unless otherwise agreed by the parties) majority decision-making prevails whenever there is more than one arbitrator. The only exception is for procedural questions which can be left to the presiding arbitrator. This should not create problems in the case of an uneven number of arbitrators and, in the event the parties opt for an even number of arbitrators, the Model Law would allow them to make their own provision for an umpire. But, consistent with its contractual approach, it does not presume an umpire when the parties have only specified arbitrators. Nevertheless there may be a case, for domestic arbitration at least (because of the parties' possible lesser experience and lack of institutional support), for providing for an umpire when the parties have specified an even number of arbitrators without providing their own method for resolving deadlocks.

### Question 13

- (1) In the case of more than one arbitrator, should a new Act provide (in the absence of agreement by the parties) for appointment of an umpire to decide if the arbitrators do not agree? Should there be a distinction in this respect between domestic and international arbitration?
- (2) In the event there is no arbitrator should the general rule be majority decision-making?

### Jurisdiction of arbitral tribunal

98. Once the appointment of the arbitrator or arbitrators is complete, but before they can begin, there may be

a number of preliminary jurisdictional questions. It may be claimed that the dispute does not fall within the terms of the arbitration agreement, or that a condition precedent (e.g. notice of the dispute) has not been fulfilled, or even that the agreement itself is defective in some respect. The question here is whether the arbitral tribunal can deal with such issues. The position under New Zealand law is at the least unclear. The Act has nothing to say about it, and the matter is thus entirely left to the common law. The same is true under both the **English and Australian Acts**.

99. The common law position, as explained by *Mustill & Boyd*, is that an arbitral tribunal has only limited power to determine its own jurisdiction. In particular it cannot determine issues which go to the very existence of the contract comprising or containing the arbitration agreement, and nor can it determine whether a condition precedent to its jurisdiction has been satisfied. The rationale for this is that, if in fact there is no contract, the tribunal has no authority to make any decision. A distinction is made for issues of the continuing existence of the contract (e.g. cancellation) where the arbitration agreement is in the form of a clause severable from a main contract: and the tribunal, if appropriately empowered by the parties, can decide such issues, unless the continuing existence of the arbitration agreement is itself in direct question. It may be also that the parties can empower the tribunal to determine questions of the simple scope of an arbitration agreement.

100. The problem with this approach is that in practice the tribunal may have to determine points of jurisdiction, if only to avoid the costs and delays of taking the issue to court (and in any event may not have much choice since a party must make the application). But, because of its somewhat limited powers at common law, this does not prevent the matter being raised again at a later stage before the court, thus running the risk that the whole arbitration will be rendered futile.

101. The **Model Law** deals with the practical problem by specifically empowering the arbitral tribunal to rule on its jurisdiction, including the existence and validity of the arbitration agreement from which its authority stems. At the same time the severability doctrine is expanded to provide that an arbitration clause in an underlying contract is always a separate and independent contract. Thus questions which only concern the existence and validity of the underlying contract are not treated as involving jurisdictional issues for the tribunal. In cases where the existence of the arbitration agreement is in direct question the problem of the tribunal deciding on the basis of a non-existent contractual authority is covered by a statutory right of appeal to the court, effectively giving the court the ultimate authority to determine the issue. But to avoid delays there is a 30 day time limit for such appeals. The jurisdictional question must itself be raised with the tribunal at an early stage of the proceedings. In the unlikely event that the tribunal postpones its decision until the award, the issue can still be taken up by the court as a basis for setting aside the award or refusing recognition or enforcement.

**Question 14**

- (1) Should a new Act provide the arbitral tribunal with powers to determine questions of jurisdiction?
- (2) What should be the role of the court in this?

**THE ARBITRATION PROCEEDINGS****Initiation of the arbitration process**

102. Once jurisdiction is established, the arbitration process can begin. The question might arise here as to how to go about beginning it. The New Zealand Act does not itself specify any requirements – or provide any guidelines – in this regard. Thus, unless the parties themselves take the necessary steps, it is left to the arbitrator/s once appointed to get the process underway – for instance by asking the parties to set out their respective claims and defences in writing. The position under the **English Act** is much the same, but the **Australian Acts** expressly empower the arbitral tribunal (in the absence of provision by the parties) to determine such procedural issues.

103. The **Model Law** is quite detailed on the procedures for initiation of the arbitration, and does not leave this to the parties or tribunal. Article 23 provides that the parties must submit statements of claim and defence to the arbitral tribunal within a time agreed by the parties or set by the tribunal. This has the advantage of making it clear to the parties and the arbitrator/s what is required, and ensuring that it happens with reasonable speed. The preparatory materials point out that the provision does not set any particular standards of formality, and thus quite simple statements would suffice. Nevertheless it may be questioned whether it needs to be mandatory – at least in its present form. It may well be that a requirement for written statements of claim and defence is too formal for some arbitrations, for instance the simple look/sniff type. An expansion of the provision to encompass oral statements, at least in the case of domestic arbitration, may be sufficient to deal with this problem.

**Question 15**

- (1) Should a new Act set out the procedures to be followed by parties for initiation of the arbitration process? How detailed should these be?

**Tribunal's powers on default of a party**

104. A problem may arise if a party simply refuses to participate in the arbitration process. The question is whether the arbitral tribunal can proceed without the party – or in extreme cases can move to have the claim struck out. The New Zealand Act does not deal with this problem. Although it might be argued that the power to revoke the arbitration agreement could conceivably be invoked to terminate a claim which is not prosecuted, that has not been its function thus far – and is probably unlikely to become so at this late stage of the jurisprudence.

105. At common law, according to *Mustill & Boyd*, in the case of clear default the tribunal can continue even without express authorisation in the arbitration agreement provided it gives notice. It is not clear what the tribunal's powers are when there is no clear default (for instance the party is merely slow in responding to the tribunal's orders). In any event the tribunal cannot act unless requested by a party who has itself taken steps to urge the recalcitrant party to proceed. The tribunal's power to strike out a claim for non prosecution is not recognised at all – and it is doubtful whether even the court has this power (after the case of *Bremer Vulkan v. South India Shipping Corp.* [1981] AC 909). In some circumstances it may be arguable that the arbitration can be regarded as ultimately ended through normal contractual processes. But such an argument is difficult to maintain when the only basis is a failure to act on a claim.

106. The English 1979 Act makes provision for the tribunal to continue in the absence of a defaulting party, with the authorisation of the court. Here "default" is defined to mean a failure to respond to an order of the tribunal within an express term of notice or a "reasonable time" (what is "reasonable" being left to the court). It is not entirely clear what effect this provision was supposed to have on the common law position, or indeed what its effect is (for instance whether the tribunal can continue under its common law powers without going to court for authorisation). Moreover the statutory power does not deal with the question of whether the tribunal – or court – should be able to strike out a claim for want of prosecution. In England the House of Lords has recommended that specific provision be made for this: see *Food Corp. of India v Antclizo Shipping Corp.* [1988] 2 ALL ER 513.

107. The Australian Acts also authorise the arbitral tribunal to continue notwithstanding the default of a recalcitrant party without requiring the authorisation of the court. "Default" is defined in terms of a failure to respond to an order within an express or "reasonable" time as determined by the tribunal. Thus the time and expense of going to court is avoided. In addition the Acts empower the court to terminate the proceedings in the case of "undue delay" in instituting or prosecuting a claim. This undoubtedly represents an advance over the common law. However it might be argued that the Acts go too far since the court can also prohibit the claimant from commencing further arbitration proceedings (although court proceedings would still be possible). And since "undue delay" is not defined it is left to the court to determine how extreme the remedy should be.

108. The Model Law deals with the question of default, but in this case links it to the parties' other obligations under the Model Law. First, if the defendant fails to submit a statement of defence in accordance with the Model Law or any party fails to appear at a hearing or produce documents when requested by the tribunal, the tribunal can continue notwithstanding the default. Thus the Model Law clarifies what might amount to "default" without requiring a specific order from the tribunal (or the court). Secondly, if a claimant fails to submit its statement of claim the

arbitral tribunal can terminate the proceedings – but this does not prevent the institution of new proceedings. It might be argued that the tribunal should also have the power ultimately to terminate the proceedings if a party fails to appear at a hearing or to produce documents – but this may be covered by another provision of the Model Law (art.32 allowing for termination if the claimant withdraws its claim or the parties agree on the termination of the proceedings, or if the continuation of the proceedings has for any other reason become "unnecessary or impossible").

#### Question 16

- (1) Should a new Act provide the arbitral tribunal with powers to continue *ex parte* if a party defaults?
- (2) In the event a claimant defaults, should the tribunal – or the court – have the power to strike out the claim for non prosecution?

#### Conduct of the arbitration

109. Once the arbitral tribunal begins the question arises as to how the arbitration should be conducted – for instance whether it should follow an adversarial procedure and how formal it should be. The New Zealand Act – like the English Act – contains few guidelines in this regard. Thus it is largely left to the parties to determine the arbitral procedure, or in their absence the tribunal. The common law, however, has established certain limits on the parties' (and tribunal's) freedom in this respect.

110. In particular the parties cannot decide on a procedure which would be contrary to minimal standards of "natural justice", entailing at least an obligation to act fairly, to attend to the parties' arguments and evidence, and to keep the parties informed. Nor can they derogate from the court's powers to enforce such standards. In addition, according to *Mustill & Boyd*, unless otherwise authorised by the parties, the tribunal is constrained to follow an adversarial procedure modelled on that of the court – for example holding hearings, applying strict evidential rules, and limiting its decision to the parties' arguments and evidence. This raises the questions, first, whether the tribunal's discretion should be so limited, and, secondly, whether its procedure should be modelled on the court's when, after all, it is supposed to provide a more flexible method of dispute resolution.

111. The Australian Acts move away from the idea that the arbitral procedure should be modelled on that of a court case. They specifically provide that (subject to contrary agreement by the parties) the arbitral tribunal can conduct the proceedings in such manner as it thinks fit – subject only to the Act, and is not bound by the rules of evidence. Natural justice still provides a constraint however ("misconduct" explicitly defined in those terms). But the common law's additional constraints of an adversarial procedure modelled on the courts would not seem to apply. However Sharkey & Dorter, *Commercial Arbitration* (1986), suggest that the tribunal should exercise some caution in departing from the adversarial court-style model.

112. The Australian Acts also provide that (unless otherwise agreed by the parties) the parties may not be represented in the proceedings unless the arbitrator gives leave, and the tribunal can order the parties to seek settlement of their disputes through non arbitration mechanisms such as conciliation – with the tribunal acting as conciliator. The attempt seems to be to move further away from the adversarial court model. However the appropriateness of these measures for more complex and important commercial arbitrations, at least, is somewhat doubtful. It cannot be assumed that the parties would want them, and the SCAG Working Group which reviewed the Australian Acts has recommended that these provisions be modified in the light of such criticisms.

113. The Model Law makes explicit the parties' freedom to determine the procedure to be followed by the arbitral tribunal – and failing that the tribunal's own powers to do so. The aim, expressed in the preparatory materials, was to enable the tribunal to meet the needs of the particular case and to select the procedure which is most suitable in all the circumstances. The limits are set out in the Model Law, rather than being left to the court (whose powers to intervene are restricted). Here as well natural justice is the standard to be applied, but the precise requirements entailed are clearly set out as mandatory provisions in the Model Law. In particular the Model Law requires that the parties must be treated equally and each party must be given a full opportunity of presenting its case, there must be notice of hearings, and any evidence supplied to the tribunal must be made available to all parties.

#### Question 17

- (1) How much freedom should the parties have to determine the arbitral procedure?
- (2) How much freedom should the arbitral tribunal have to determine the arbitral procedure in the event the parties make no provision?

#### Tribunal's procedural powers

114. The previous question is very much linked to the arbitral tribunal's procedural powers since in order to give effect to a determination on the arbitral procedure it must have the necessary powers to invoke its authority over the parties. The New Zealand Act provides that (unless the parties otherwise agree) there is an "implied term" in the arbitration agreement that the parties and those claiming through them will, subject to any legal objection:

- (a) submit to be examined by the tribunal on oath in relation to the matters in dispute;
- (b) produce whatever books, deeds, papers, accounts, writings, or documents within their possession or power as may be required or called for; and



- (c) do "all such other things as during the proceedings on the reference the arbitrators ... may require".

The English Act is similar in this respect.

115. These powers may be very useful for an arbitral tribunal – in particular when it models its procedure on an adversarial style court procedure. The first two are equivalent to a court's power in the context of its proceedings to receive evidence on oath. The third power is expressed in broad terms which could in fact encompass the first two powers – as well as, for instance, enabling the tribunal to order discovery, to make interim protection orders in respect of goods which are the subject of the reference, and to require the parties to attend a hearing. However it is not all-embracing. In particular it does not empower the tribunal to use the personal remedies available to a judge for non-compliance with its orders (such as committal for contempt of court), or to issue subpoenas or other orders whose effectiveness depends on such powers. In addition it does not extend to matters ancillary to the reference or beyond the parties themselves.

116. The parties can enlarge on the tribunal's powers within the limits imposed by natural justice and their own contractual authority. For instance they can empower the tribunal to order security for costs even though this is ancillary to the reference. However, according to *Mustill & Boyd*, enforcement powers generally are regarded as being exclusively within the jurisdiction of the courts. Thus, in the event of non-compliance, it is left to the tribunal to continue, if possible, under its general default powers. The question arises whether the arbitration process could not be made more effective by expanding the tribunal's powers in this respect. A further question is whether the tribunal's implied powers should have to be modelled on those a court would have.

117. Under the New Zealand Act the court can also make certain procedural orders in respect of the arbitration, and these may be used to supplement the tribunal's own powers although in some respects they merely duplicate them. For instance, the 1938 Amendment Act provides that the court can make orders regarding security for costs, the preservation of goods in the hands of third parties, and the taking of evidence overseas. Similarly the court can subpoena witnesses to testify or produce documents. There are equivalent provisions in the English Act. These provide a very useful supplement to the tribunal's own powers. But the question remains why they should be exercised by the court rather than the tribunal itself – at least as regards the parties themselves. To extend the tribunal's powers to third parties is of course somewhat more problematic (given the contractual nature of its authority) – and there may be a case for providing some form of judicial support if those powers are to remain. There is a separate question of whether such wide powers are appropriate in the context of arbitration proceedings.

118. The Australian Acts provide in somewhat broader terms that the parties shall do all things which the tribunal requires to enable a just award to be made. This seems to give

the tribunal much the same powers to take evidence, order discovery, make protection orders, attend hearings and so on as under the New Zealand and English Acts. But here it is not an implied term of the parties' contract, but a mandatory provision from which they cannot derogate. In addition (though subject to contrary agreement) the tribunal can itself call on the court to enforce certain orders – which may extend to persons other than the parties themselves. A party can also go to the court for a subpoena, and the court has a general power to make "interlocutory orders" (e.g. for security of costs) in the same way as in court proceedings.

119. The Australian Acts also contain a provision for consolidation of related claims by order of the court, provided all the parties consent in the application. This can be a very useful power, although to make it subject to consent of the parties may not improve much on the common law (where consolidation by consent is already possible, the main problem being when one party does not agree). The need for the court to be involved from the beginning may also be questioned although the problems with empowering the tribunal to bind third parties have already been noted. The SCAG Working Group on the Acts has recommended that the Australian Acts be amended so that only one party need make the application and the decision can, in the first instance, be made by the tribunal or tribunals concerned – but leaving the matter for the court if they cannot agree.

120. The **Model Law** does not confer a broad procedural power on the arbitral tribunal. There are certain specific powers however – which indeed might do more to inform the parties of what their rights are (and in any event can be supplemented by agreement of the parties). These include the powers to order the parties to attend at a hearing or produce documents, and to make interim protection orders – though limited to the parties and the subject matter of the dispute. There is no attempt here to model the tribunal's powers on what a court would have in its proceedings. For instance the preparatory materials state that the power to make interim protection orders would extend not only to the preservation, custody and sale of goods forming the subject matter of the dispute, but also to measures designed provisionally to determine and "stabilize" the relationship of the parties in a long-term project.

121. The tribunal (or a party with its consent) can also call on the court to provide assistance in the obtaining of evidence – and this would presumably extend to third parties as well. Similarly, the court's somewhat broader powers to order "interim measures of protection" are not excluded under the **Model Law**. The **Model Law** does not empower the tribunal to enforce its own orders, but the preparatory materials suggest that the tribunal could be given some powers of compulsion. At very least its orders could be made directly enforceable through the judicial system in the same way as awards. A simple redefinition of the term "award" to include interlocutory orders may suffice (discussed further below para.144).

122. There are other additions which might be made to the tribunal's procedural powers under the Model Law (rather than leaving it to the parties in each case). For instance the tribunal's power to order the production of documents probably does not extend to full discovery, that being a distinctively common law concept. The tribunal could apply to the court for discovery under the general provision regarding the granting of evidential assistance but that would be rather cumbersome. Thus, in the domestic case at least (where discovery is likely to be familiar to the parties), it might be useful to give the tribunal full discovery powers unless the parties agree otherwise. Similarly there is no reason why the tribunal should not be empowered to make other generally useful orders in respect of the parties – such as security for costs. The power to order consolidation of related claims (although this goes beyond the parties themselves) could also be worthwhile – at least in the domestic case, where the parties may be more willing to submit to the tribunal, and ultimately the court on the issue.

#### Question 18

- (1) What procedural powers should the arbitral tribunal have under a new Act? Should these extend beyond the parties themselves – for instance the ordering of consolidation? Should a distinction be made between domestic and international arbitration?
- (2) Should the court have powers of reinforcement – and if so on what terms?

#### Choice of procedural law

123. The preceding discussion on the arbitration proceedings has been based on the assumption that the law which provides the reference point is the law of the place of the arbitration. In most cases there is no question that the procedural law of the arbitration is other than the law of the forum. However the question could conceivably arise whether the parties, or in default of them the tribunal, could subject the arbitration to a foreign law. This is less likely to happen in the case of domestic arbitrations, since they at least have some contact with the place of arbitration. But the mere fact that a foreign law favours arbitration – having fewer mandatory provisions, and allowing greater procedural support – may be sufficient reason for it to be preferred. The New Zealand Act does not provide for a choice of foreign procedural law. Nor does the English Act (although the Bermuda Act does). The Australian Acts make only an indirect reference to choice of procedural law (in their definition of "foreign" arbitration agreement).

124. The common law does however provide some assistance. It has already been suggested in the introduction to this paper that common law rules on conflicts of law would encompass a choice of procedural law governing the arbitration as the "proper law" of the arbitration proceedings. However there are probably some limits. In particular *Mustill & Boyd* suggest that –

- (a) only the parties can choose the procedural law – and if there is no such choice there is a presumption that the territorial law of the place of arbitration applies;
- (b) the parties could not exclude the mandatory elements of the local law (e.g. adherence to natural justice standards), and nor could they exclude the powers of the local courts to enforce such standards;
- (c) it is doubtful whether the parties could contract out of the supervisory role of the local courts in relation to the arbitration;
- (d) it is unlikely that a foreign court would be prepared to intervene even if asked – and in any event it could not enforce its orders without assistance from the local courts

125. Such limits are more restrictive than the conflicts principles applicable to substantive contracts issues. For instance these would usually apply the law with the closest connection to the dispute in the absence of a choice of proper law and would only exclude a choice of proper law if it was made in bad faith, or if its enforcement was contrary to the minimal standards of "public policy". The need for the greater restrictions in the arbitration context might be questioned. But on the other hand, given the problems of effective court supervision in particular, it is questionable whether the parties would really benefit from a choice of foreign procedural law.

126. The **Model Law** does not allow the parties a choice of the procedural law to govern their arbitration. It explicitly states that the Model Law applies on a strictly territorial basis (with limited exceptions regarding the recognition and enforcement of arbitration agreements and awards and interim measures of protection). The explanation given in the preparatory materials is that this conforms with the practice in the great majority of national laws and, even where national laws allow the parties to choose another state's procedural law, experience shows that the facility is rarely used. But more importantly the Model Law already offers the parties, and in their absence the arbitral tribunal, a very wide freedom to shape the rules of arbitral procedure (including the freedom to incorporate foreign procedural rules) – which suggests that it is not necessary to have an additional provision for choice of a foreign procedural law.

#### **Question 19**

**Under a new Act, should the parties to an arbitration held in New Zealand (or in default of them the tribunal) be free to determine that the arbitration shall be governed by a procedural law other than that of New Zealand?**

## THE ARBITRAL AWARD

### Applicable law

127. A related question is whether the parties, or in default of them the tribunal, can decide which system of law will govern the substance of their dispute. This is a question which again more commonly arises in international arbitrations because of their links with a number of countries, but might also arise in purely domestic arbitrations (e.g. because the parties consider a foreign law to be more appropriate for their dispute). There is no choice of law provision in the New Zealand Act. Nor are there in the **English and Australian Acts** (though the Bermuda Act does make some provision). It might seem that such questions are outside the scope of arbitration legislation – concerned as they are with the substance of the dispute. But as a practical matter there can be advantages, not least for the tribunal, in spelling out how it should go about determining what is the "proper law" to govern the dispute. Moreover the contractual nature of arbitration might suggest that there should be a broader choice of law than conflicts principles – developed by the courts for their own purposes – would normally allow.

128. As already mentioned, common law conflicts rules would normally allow a free choice of the proper law governing the substance of a dispute. However there are some restrictions on this (apart from the bona fide choice and public policy limits already noted in para.125) which are of significance in this context. These concern both the range of issues governed by the proper law (issues such as capacity, formal validity, and performance of the contract not exclusively governed by the proper law), and the ability to "split" the contract selecting different laws for different aspects (there being some reluctance to accept this at common law without a demonstrable "good reason"). The restrictions also concern the actual law which can be chosen – conflicts rules normally limiting this to a particular national system of law. Finally, in the absence of a choice of law by the parties, the tribunal is limited to applying the conflicts rules of the place of the arbitration. The question is whether such restrictions are reasonable in respect of disputes which are to be resolved by arbitration.

129. The **Model Law**, for instance, takes a more liberal approach, providing that the tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute and otherwise may apply whatever conflict of laws rules it considers applicable. The preparatory materials state that the intention was to provide the parties with a wider range of options than conflicts rules would normally accept, both as to the issues covered and as to the ability to split the contract, and even to enable them to adopt rules which have been "elaborated on the international level". (One example would be the rules set out in the Vienna Convention on the International Sale of Goods; another might be the principles identified in "General Principles of Law in International Commercial Arbitration" (1988))

101 *Harv L.R.* 1816.) The choice provided for the tribunal, in default of the parties, is deliberately more limited, but allows it to decide on the applicable conflicts rules. The aim in this case was to ensure some predictability for the parties, while retaining some flexibility for the tribunal.

### Question 20

**What, if any, provision should a new Act make for choice of law other than New Zealand law to apply to the substantive matters in dispute in the arbitration?**

### Dispensing with law

130. The parties may wish to go further than determining the substantive "law" to govern their dispute. They may, for instance, want the tribunal to be able to dispense with the law, deciding for itself what is fair and reasonable in the circumstances. Many civil law systems recognise the power of an arbitrator to determine matters as "*amiable compositeur*" or "*ex aequo et bono*" (i.e. according to equity and good conscience rather than strict law). The concept can be traced back in English law as well – to the law merchant before the common law courts. It is increasingly coming to the fore again in the common law world, and is already an established practice in the United States. However as yet this is not the case in New Zealand where it is relatively unknown.

131. The New Zealand Act does not provide for the arbitral tribunal's power to dispense with the law (although some New Zealand specialist courts and tribunals are empowered by their constituent statute to take account of "equity and good conscience": and see also s.59 of the District Courts Act 1947 for disputes under \$500). In this respect the New Zealand Act follows the English Act. The common law position is somewhat ambiguous. *Mustill & Boyd* suggest that on a strict view the arbitral tribunal must apply the law, but that a more liberal view allows for the ouster of "technicalities and strict constructions". Either way a high standard of legality is demanded. There may be arguments in favour of this (e.g. that otherwise the parties could effectively exclude the court's jurisdiction regarding matters of law). But on the other hand its consistency with the notion of arbitration as alternative dispute resolution, tailored to the specific wants and needs of the parties, is questionable.

132. The Australian Acts provides that the parties can empower the tribunal to determine issues "*as amiable compositeur*" or "*ex aequo et bono*" – the Victorian Act translating this as "considerations of general justice and fairness". However the precise scope of the power is somewhat ambiguous, and no definition is provided. But, given that the Acts retain the appeal on points of law, it is doubtful whether the tribunal could do more than interpret the law in a non-technical fashion (corresponding to the more liberal common law approach). The fact that the provision itself is located in a general section on "conduct of the proceedings"

suggests an even narrower interpretation, limited to dispensing with strict legal procedures rather than substantive law.

133. The **Model Law** also provides that the parties may empower the arbitral tribunal to decide "ex aequo et bono" or as "amiable compositeur" – but here the specific context is "rules applicable to the substance of the dispute" (and there is not the constraint of the court's jurisdiction over matters of law since the Model Law does not provide for this). Again a definition is not provided, the reason given in the preliminary materials being that the concept varies depending on the system from which it derives. Even the expressions "amiable compositeur" and "ex aequo et bono" do not add much, being themselves interchangeable. But the *Analytical Commentary* suggests that the concept could encompass the power to find a fair and equitable solution within the limits of public policy. There are also limits provided in the Model Law – since it states that the decision shall be made in accordance with the terms of the contract taking into account trade usages. The aim is to ensure at least some predictability.

134. As the *Analytical Commentary* points out, the parties themselves could provide further limits by providing their own definition. There may be advantages in making this explicit in the legislation – and perhaps even, in the case of domestic arbitration (for the benefit of those unfamiliar with this form of arbitration), providing a standard meaning. One that appears to be commonly accepted is the definition given in *Black's Law Dictionary* as empowering the tribunal to "abate something of the strictness of the law in favour of natural equity". This indicates a somewhat narrower approach than the full extent allowed for by the Model Law since it implies the tribunal should at least begin with the law. But it may be more realistic as to what the parties would actually want.

#### Question 21

**Should a new Act empower the parties to authorise the arbitrator to decide according to non-legal principles, and if so in what terms? Should a distinction be made between international and domestic arbitration?**

#### Determination of preliminary points of law by the court

135. A related question concerns the court's powers to be involved in the determination of legal issues during the course of the arbitration. At present the New Zealand Act is unique among the legislation surveyed in that it retains the court's power to require an arbitrator to refer a preliminary point of law for determination by way of case stated, giving the courts a very wide power to supervise the tribunal's handling of the substantive issues.

136. The **English 1979 Act** changed the equivalent provision in the 1950 Act and now provides that the court may only determine a preliminary point of law (on application of a party) if:

- (a) the parties or the arbitrator consents;

- (b) the determination might produce substantial savings in costs to the parties; and
- (c) the question of law is one in respect of which leave to appeal would be likely to be given.

The court's power can be precluded altogether by agreement between the parties. However in the case of domestic arbitration and some categories of international arbitration (the "special category" disputes), the agreement must be entered into after the dispute arises. The **Australian Acts** have taken up the English reforms virtually intact.

137. The **Model Law** goes one step further in removing the legal supervision of the courts, by omitting altogether the power to refer a preliminary point of law to the court. Further, art.5 might (depending on its interpretation) preclude the parties incorporating such a power by agreement. It is arguable that this goes too far in preventing the parties, and indeed the tribunal, obtaining legal assistance when it is genuinely needed. On the other hand, the power to get assistance from experts (art.26) would presumably extend to legal experts, and this may be quite adequate.

#### Question 22

**Should a new Act contain a power to refer a preliminary point of law to the court, and if so should the court be empowered to compel a reference?**

#### Tribunal's powers with regard to the award

138. Once the tribunal is in a position to make its decision the question may arise as to its powers regarding the award. The New Zealand Act provides for a number of powers. In particular the tribunal can, subject to contrary agreement between the parties –

- (a) make awards which are final and binding on the parties and persons claiming through them;
- (b) (in addition to damages) order specific performance of contracts, and make orders under the Contractual Mistakes Act 1977, the Contracts Privity Act 1982 and the Contractual Remedies Act 1979;
- (c) make interim awards (i.e. awards which only deal with aspects of the questions referred, pending the final award).

The **English** and **Australian Acts** contain similar provisions.

139. In addition under the New Zealand Act the tribunal can make ancillary orders regarding –

- (a) interest on the award (or otherwise the award carries interest as a judgment debt); and



- (b) costs of the reference and the award (which *Mustill & Boyd* suggest would include the tribunal's own fees)

(and see similarly the **English Act**). In this case the parties cannot agree otherwise except, in the case of costs, after the dispute arises. The original reason for the restrictions (at least in the case of costs) was consumer protection. But the need for a special provision in this context may be questioned. The **Australian Acts** allow the parties to agree otherwise as to the tribunal's powers to award costs and interest.

140. All in all the tribunal's powers come close to those of a court. In respect of interests and costs they may be even broader, allowing the tribunal a greater discretion to determine who should pay and the amounts payable. However there are limits on this. The **Australian Acts** provide for a maximum rate of interest to apply unless the parties agree otherwise – and the New Zealand and English provisions apply a standard limit of the rate of interest on a judgment debt. As to costs, *Mustill & Boyd* state that the discretion must be exercised "judicially" – meaning that the tribunal should apply the principle that the costs normally follow the event. But the reasonableness of such a restriction in the arbitration context is questionable since, unlike court proceedings, the parties have agreed to go there (and it would perhaps be a more appropriate practice for each party to pay its own costs).

141. The parties can also confer additional powers on the tribunal with regard to the award – such as granting injunctions, making declaratory orders, and ordering interest up to the date of the award. Many such powers can be implied from a normal arbitration agreement without express provision. A clear example is the power to award interest (applied in *Kenneth Williams & Co. Ltd v. Martelli* [1980] 2 NZLR 596, and very recently in *Angus Group Ltd v. Lincoln-Industries Ltd* unreported judgment of Henry J, High Court–Auckland, CL 46/88, 13/6/1988). This power is made explicit in the **Australian Acts**, although a maximum amount is specified. As in the case of the tribunal's procedural powers there are limits on how far the tribunal's powers can extend (not only because of the contractual nature of its authority). In particular the tribunal cannot be empowered to enforce its orders, regarded as a matter only for the court. This effectively means that the powers to order specific performance and injunctions, dependant as they are on immediate powers of enforcement, may be of little practical value.

142. It should be noted that the New Zealand Act recognises the tribunal has something amounting to a power to enforce its orders as to its own fee since it can withhold the award until this is paid. However, a party may apply to have the award delivered into court and the fee to be taxed by the "taxing officer" – a "reasonable" fee to be paid to the tribunal and the balance to be delivered to the applicant (and there are similar provisions in the **English** and **Australian Acts**). One problem with this is that it gives no remedy to a party who does not take up and pay for the award. It also means that the tribunal's fee is effectively determined by the

court, and it is not at all clear what it will regard as "reasonable" (although the Australian Acts at least give the tribunal the opportunity to be heard on the issue). Thus the procedure may not be very attractive for the tribunal, and it may prefer simply to inform the parties that the award is available on payment of a specified sum. Indeed this seems to be the normal practice in New Zealand. But it raises the question however of just what controls there should be on the tribunal's discretion to determine its own fee.

143. In contrast to the other models surveyed the **Model Law** actually makes very little reference to the tribunal's powers regarding the award, leaving these to the parties themselves to determine. It might be argued that the tribunal should have at least some statutory implied powers. But it may not be necessary to provide for everything: even without a statutory provision, there could be little doubt that the parties intended that a final and binding order would be made. And a simple arbitration agreement, liberally interpreted, could be read to empower the tribunal to make such orders as the tribunal considers appropriate within the limits of the remedies provided for by common law and statute. Indeed to dispense with specific references to certain common law and statutory remedies avoids a possible presumption that others might be excluded. The problem of enforcement is remedied to some extent by the more streamlined process for enforcement of awards through the courts (discussed further below).

144. However some additional powers could well be provided for in the legislation, at least for domestic parties. Such powers might include, for instance, the power to make interim and interlocutory awards and the power to make orders ancillary to the reference such as costs and interest on the award. The UNCITRAL Rules (which preceded the Model Law and are in some respects more detailed) may provide some assistance in this regard. The relevant provisions (arts.32 and 38-41) are appended to this paper. The Rules do not deal with the question of interest, but the Australian report on the Model Law may be of some assistance. It recommends that there be similar provisions to those in the Australian Acts, but giving the tribunal the discretion to determine the rate of interest having regard to matters such as the currency of the award and interest rates applicable to that currency.

### Question 23

**What should a new Act say about the tribunal's powers with regard to the award? Should there be a distinction in this respect between international and domestic arbitration?**

### Requirements with regard to the award

145. A question arises as to whether the tribunal is subject to any requirements in the making of its award. The New Zealand Act in fact imposes no formal requirements on the award – following the **English Act** in this respect. Thus, for instance (unless the parties provide otherwise) the award need not be in writing, or

signed by the arbitrators, or specifically refer to the parties, or even be brought to their attention for it to be valid. However there are obvious advantages in having some formalities, both for information for the parties and for enforcement by the court if need be. In most cases it would not be too onerous to require that the award be written and signed by a sufficient proportion of the arbitrators to indicate its authority. This is, for instance the approach of the **Australian Acts** which provide for such requirements (subject to contrary agreement of the parties).

146. The **Model Law** goes further and requires that the award must not only be in writing and signed by a majority of the arbitrators but should also specify the date and place of the arbitration. In addition the **Model Law** requires that a copy of the award be sent to each party. These requirements are mandatory. Arguably they may be overly technical and detailed for some arbitrations – for instance the simple look/sniff type. But the preparatory materials point out that such requirements are imposed by a number of countries, and would have to be met if the award is to be enforced there. Even the New York Convention requires that a written award be supplied before enforcement can issue. Thus it may save time and trouble later to set them out in the **Model Law**. On the other hand, for cases where the need for enforcement overseas is less likely, the requirement could be made subject to contrary agreement.

147. In addition to formal requirements for the award there may be substantive requirements which have to be met. The New Zealand Act does not refer to this (nor do the **English and Australian Acts**) but the common law does impose some standards on the award as a condition for enforcement. *Mustill & Boyd* summarise these as "cogency", "completeness", "certainty", "finality", and "enforceability". At a minimal level these are largely self-evident: for instance it could hardly be called an "award" if there was not a decision on the issues submitted – and to that extent it may be questioned whether there is a need to make specific reference to them. (The **Model Law** does not.) But the common law requirements appear to go beyond a minimal level and it is questionable whether such standards are necessary.

148. Finally there is the question whether the award should set out the tribunal's reasons. The New Zealand Act does not impose a requirement in this respect and nor does the common law. Thus, unless specifically requested by the parties, the arbitrator/s can omit to state their reasons and will often do so (especially since the technical distinction between reasons in the award and reasons given in a separate document was queried in *Manukau City Council v. Fletcher Mainline Ltd* [1982] 2 NZLR 142). While this may be convenient for the tribunal, it can create problems, both for the parties who may wish to know why they won or lost, and whether they have just cause for complaint, and for the court called upon to review the award. Indeed it may be argued that "natural justice" should require the giving of reasons, if only to demonstrate that the tribunal has not acted "arbitrarily". Also there may be problems of enforcement overseas when there is not a reasoned award (although the New York Convention does not actually require it).

149. In response to these problems the **English 1979 Act** has instituted a limited requirement for reasoned awards, linking this with the court's power to review an award. It provides that (on application of the parties or one of them with leave of the court) the court can order that the award should set out the reasons in sufficient detail to enable a court on appeal to consider any questions of law. However the parties can exclude this power in the same way as they can exclude appeals on points of law. These are valuable reforms, although it may be questioned whether they go far enough – in particular why the court should have to be asked about the need to have reasons.

150. The **Australian Acts** require reasons to be given as a matter of course. In this respect they are similar to the **Model Law**. In both cases the requirement is not mandatory. Thus in the few instances where the parties themselves prefer not to have written reasons (e.g. because of the delays and costs involved) they still have the option of providing otherwise. This provides a flexible solution and avoids the need to go to court on the issue.

#### **Question 24**

**What – if any – formal requirements should a new Act impose on the award? Should there be any requirement for reasons to be stated in the award?**

#### **Review of the award**

151. Once the award is made there is an important question whether there should be some opportunity for a dissatisfied party to be able to have it reviewed by the court. There may be arguments of certainty and finality of the award against this. But on the other hand, as noted in the introduction to this paper, the parties themselves expect a fair and reasonable result (and may feel justified in complaining if it is not) – and apart from this there is the public interest in ensuring that some standards are met. Indeed the right to at least minimal review is accepted in most if not all legal systems. (One exception, however, is for investment disputes under the Washington Convention where any review is by a second arbitration body.)

152. In the New Zealand case there are broad powers of review – provided for in both the legislation and the common law. First, the Act provides that "misconduct" by the arbitral tribunal is a basis for setting aside the award. And, as in the case of "misconduct" as a ground for removing an arbitrator, this is interpreted by the courts to encompass matters such as excess of jurisdiction, unfairness, and breach of natural justice. To some extent the review comes close to the court's powers of judicial review over inferior courts and administrative tribunals – although it does not seem to involve a "statutory power of decision" for the purposes of the Judicature Amendment Act 1972: see *New Zealand Stock Exchange v. Listed Companies Assn Inc.* [1984] NZLR 699; and also *R v. Panel on Takeovers* [1987] QB 815, at 847. This is also the case under the

**English and Australian Acts** although, as already mentioned, the Australian Acts do give some statutory guidance as to what "misconduct" means.

153. Secondly, the Act allows the court to require an award be stated on a point of law in the form of a special case for the decision of the court. This supplements its common law power to set aside an award for error of law apparent on the face of the award. But in this case the court is not limited to questions apparent on the face of the award since the case stated procedure requires a separate statement of the legal issues involved (and the relevant facts). Nor is the court's jurisdiction excluded if the legal issue was specifically referred to the tribunal. (Whereas it is under the common law power as the courts have interpreted this: see *Attorney-General v. Offshore Mining Co. Ltd* [1983] NZLR 418.) In addition the practice of stating the award in the alternative depending on the court's decision, allows the court to determine the legal point without having to set aside the award altogether (the latter being the extent of its powers under the common law review). Thus, effectively, the case stated procedure gives the court a rather broad power to determine appeals on points of law.

154. However the case stated procedure has its own problems. In particular the submitting of questions in the form of a case stated requires at least some cooperation from the tribunal (which it may not be very ready to give). In addition the procedure of stating a case is somewhat technical. The question is whether this degree of formality is really necessary or warranted in the context of arbitration. But the more fundamental question is whether there should be the appeal at all, or at least whether it should be stated in such broad terms. The courts have generally shown restraint in the exercise of their power. But the power is still there and at very least the question is whether it should remain in such an unfettered form. In any event it may be questioned whether it should exist alongside a separate common law power to set aside the award for error of law apparent on its face.

155. The major reform of the **English 1979 Act** was to consolidate the court's powers to review the award on points of law. The case stated procedure and the common law power to set aside for error of law are both abolished. In place of these the Act provides a limited appeal on questions of law, exerciseable by consent of the parties or leave of the court – not to be granted unless the determination of the legal question "could substantially affect the rights of one or more of the parties". Further appeal to the Court of Appeal is by leave only – to be granted only if the matter is "of great public importance". As in the case of preliminary points of law and reasoned awards, provision is made for the parties to exclude the appeal altogether – provided that, in the case of domestic arbitration agreements and "special category" disputes, the exclusion agreement is entered into after the dispute arises.

156. The courts have interpreted their powers to hear appeals on points of law narrowly. In *Pioneer Shipping Ltd v. BTP Tioxide Ltd, The Nema* [1982] AC 724 the following guidelines were established:

first, in the case of one-off contracts leave should be granted only if the error of law is evident on the face of the reasoned award; second, in the case of standard form contracts raising a standard issue of law there should be a strong *prima facie* case of error, but if the issue was not a standard one the stricter criterion of error on the face of the award should apply. This would appear to place substantial limits on the court's power to review the award on matters of law. However *The Nema* guidelines have led to problems of interpretation and application in subsequent cases, and it is still very much up to the individual judge to determine whether or not leave should be granted in the particular circumstances of the case.

157. The English statutory reforms were taken up virtually intact in the **Australian Acts**. The Australian courts however have not always followed *The Nema* guidelines on the granting of leave to appeal – but the SCAG Working Group on the Australian Acts has recommended that *The Nema* guidelines be given statutory form to ensure that the statutory policy of minimal judicial review be preserved. The English provisions were also adopted in the Hong Kong and Bermuda statutes, but with some modifications (in particular their omission of the distinction for "special category disputes").

158. The **Model Law** goes even further and excludes the possibility of appeal on points of law altogether – thus leaving the actual decision entirely in the tribunal's hands consistent with the notions of certainty and finality of the arbitration. It does however accept that the arbitration must conform to minimal procedural standards, but instead of leaving these to the courts sets them out specifically in the legislation in terms which largely correspond to what is already required in earlier provisions. (The grounds themselves parallel the New York Convention's defences to enforcement, also taken up in the Model Law –see below para.169). The grounds for setting aside the award are set out in art.34 as follows:

- (a) a party lacked capacity to conclude the arbitration agreement or the agreement was invalid;
- (b) a party was not notified of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present its case;
- (c) the award went beyond the questions referred to the tribunal;
- (d) the tribunal's composition or the arbitral procedure was not in accordance with the agreement of the parties unless the agreement was in conflict with a mandatory provision of the Model Law;
- (e) the subject matter of the dispute was not arbitrable as determined by the court;
- (f) the award is in conflict with public policy, as determined by the court.

In addition the Model Law specifies a three month time limit for the application for setting aside to be made, in order to ensure that any objections are dealt with speedily.

159. In substance these grounds come close to the common law concept of misconduct. In particular the first, third and the fourth (first part) equate in broad terms to the notion of an excess of authority, and the second and fourth (second part) are essentially requirements of "natural justice" and "fairness". It is true that they represent only part of what such requirements would entail – and, if the matter was left there, there would not be a full right of procedural review equating to the notion of "misconduct" under the other models. The preparatory materials suggest that it would help to adopt a broad view of the "public policy" requirement, not limited to the normal common law focus on substantive rather than procedural standards. The concept would indeed come closest to the civil law concept of "ordre publique" (as public policy is there termed).

160. The *Analytical Commentary* provides the following description of "public policy" for the purposes of setting aside the award:

"It was understood that the term 'public policy', which as used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects. Thus, instances such as corruption, bribery or fraud and similar serious cases would constitute a ground for setting aside. It was noted, in that connection, that the wording 'the award is in conflict with the public policy of this State' was not to be interpreted as excluding instances or events relating to the manner in which an award was arrived at."

The Australian report on the Model Law considered this point sufficiently important to recommend that "public policy" be defined in those terms in the actual text of the implementing statute.

161. It may be argued that the Model Law is defective in not providing for some power of review for error of law (apart from the substantive aspects of public policy). Even if this does not amount to a full appeal it could, for instance, encompass errors of law going to the root of the decision in much the same way as a court's power of judicial review over inferior tribunals seems to be extending to fundamental errors of law (see *Bulk Gas Users Group v. Attorney-General* [1983] NZLR 129). On the other hand it must be recalled that an arbitral tribunal, whose authority is based on contract, is not the same as an inferior tribunal, whose authority stems from statute, and is probably not subject to judicial review as such (see para.152). The court's power to review arbitral awards may be similar in effect to its power to review decisions of inferior tribunals but is in fact quite different in character, being based on a public interest requiring intervention in a private relationship rather than an inherent supervisory jurisdiction in respect of the exercise of a delegated public authority. Thus there is no

absolute necessity that the power be expressed in such broad terms and indeed there may be strong arguments against extending it to questions of law. In particular (as mentioned in the introduction to this paper) there are the interests of speed, economy, flexibility, etc. of the arbitration – and the overriding consideration that the parties after all chose to have their disputes resolved by arbitration rather than through the court system.

162. Nevertheless it may be argued that in the case of domestic arbitration, where the connection with national law is likely to be closer, there may be some interest in retaining some review of matters of law. At the very least this might justify some review for a simple non-application of the law (if the law is applicable). In addition the parties might want to have some provision for review for errors in the application of the law, and there may be public policy reasons for providing such supervision. Thus it may be reasonable to expand the Model Law's list of grounds for review for domestic arbitration to take account of the first, and possibly the second. If not there may be a danger that the courts will take it on themselves to read the power into the existing statutory grounds for review. There is already a precedent for such an approach: the United States Arbitration Act does not itself allow for an award to be set aside for an error of law. But the courts have created the doctrine of "manifest disregard of law" interpreting the broad excess of jurisdiction ground in the Act to mean that if the arbitrator was in fundamental disaccord with the applicable principles of law the award is invalid. To avoid the need for such judicial creativity it may be preferable to make explicit statutory provision for review for error of law – possibly subject to the agreement of the parties themselves.

#### Question 25

- (1) What provision should a new Act make for review of an award by the court?
- (2) Should the court's powers be limited to procedural matters or should they extend to matters of substantive law (and if so, to what extent)? Should there be any distinction between domestic and international arbitration in this respect?

#### Tribunal reviewing the award

163. At this stage a further question arises. If the award is set aside, it is largely left to the parties to recommence the arbitration (including appointing a new tribunal). However there may be cases where the error is rather minor, and it is easier and more convenient to simply pass the matter back to the original tribunal to rectify. Alternatively, if the tribunal itself can deal with it without waiting for remission, the need to go to court may be avoided altogether. The question, then, is whether the legislation should provide for such powers, and if so in what terms. The New Zealand Act contains a rather broad provision for the court to remit matters to the arbitral tribunal for its reconsideration. In addition the Act contains a rather limited provision for the tribunal itself



to correct in its award "any clerical mistake or error arising from any accidental slip or omission". The English and Australian Acts have similar provisions.

164. The Acts provide no guidelines as to when the court's power to remit might be exercised, but the courts have used it to deal with lesser matters of "misconduct" (as an alternative to setting aside) as well as to allow an arbitrator to correct a mistake in the award or deal with new evidence. A further category of cases where remission is possible is for "patent defects" in the award – non-compliance with the substantive award requirements of cogency, completeness, clarity and so on. However the tribunal's own powers to review the award are very narrowly construed – consistent with the common law principle that the tribunal having made the award is "functus officio" (having discharged its function) – and thus has no authority to alter its award without the consent of the parties unless there is a clear statutory authority to the contrary.

165. The Model Law, by contrast, provides for a somewhat more limited power of remission and a somewhat broader power for the tribunal to review its own award, although otherwise the principle of "functus officio" is preserved. Specifically, the tribunal can correct clerical errors and the like and can interpret its award and make additional awards. The court on the other hand can only remit a matter to the tribunal in the context of a setting aside application if this could eliminate the grounds for setting aside. For instance a "patent defect" in the award would not be sufficient (although if this was sufficiently serious there would be no "award", leaving the solution in the tribunal's hands). On remission the tribunal itself must decide whether an amendment is actually necessary to eliminate the grounds for setting aside. Thus the tribunal's authority as the decision-maker is retained to a maximum extent.

#### Question 26

Should a new Act provide for the power of a court to remit an award to the arbitrator, and if so on what terms?

### ENFORCEMENT OF THE AWARD

#### Procedures available for enforcement

166. Once the award is in a position to be enforced, the question of how to enforce it may arise. It does not always arise since if a party simply complies there is no need for enforcement. Nor is it necessary for recognition of the binding effect of the award in other proceedings (although the same conditions as for enforcement apply for recognition). However if there is a problem of enforcement, the need to be able to call on the courts to lend assistance arises, since (without the necessary powers of contempt and so on) the tribunal cannot enforce its own award.

167. At common law the only method of enforcement is by an action on the award, effectively enforcing it as a contract. But the New Zealand Act provides for a simplified procedure of summary enforcement as if the award was a judgment of the court (and, further, the court can enter judgment in terms of the award, making it possible to enforce the award overseas under the foreign judgments schemes). The English and Australian Acts have enforcement provisions in much the same terms. Enforcement under the statutory provision, as at common law, is however discretionary. In particular the court will not enforce an award which is in excess of the tribunal's jurisdiction, or which fails to meet the requirements of cogency, completeness, certainty, finality and enforceability.

168. The rules for enforcement of foreign awards – or at least those governed by the New York Convention – are somewhat different. The New Zealand 1982 Act guarantees equal treatment for "convention awards" (made in a convention country), but in fact enforcement is easier than for domestic awards. If a convention award is registered enforcement must issue unless certain defences are established. These are that –

- (a) a party lacked capacity to conclude the arbitration agreement or the agreement was invalid;
- (b) a party was not notified of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present its case;
- (c) the award went beyond what was referred;
- (d) the tribunal's composition or the arbitral procedure was not in accordance with the agreement of the parties or the law of the country where the arbitration took place;
- (e) the award has not yet become binding on the parties or has been set aside (by a competent authority in the country in which, or under the law of which, the award was made);
- (f) the subject matter of the dispute was not arbitral as determined by the court; or
- (g) the award is in conflict with public policy, again as determined by the court.

169. The Model Law applies the same grounds for refusing recognition and enforcement to all awards coming within its scope. If this is extended to domestic and foreign domestic awards, as well as international awards, it provides a uniform system of enforcement based on minimal constraints. It is also consistent with the grounds for setting aside the award under the Model Law (with some variation to account for the possibility that the award may be foreign). Thus new grounds are not introduced at the enforcement stage, and a party is not prejudiced by not having actively sought to have the award set aside. There is still one important difference however: since non-enforcement can only

prevent enforcement in the state where enforcement is sought, setting aside (which "kills" the award at the root) is given priority by providing for enforcement proceedings to be suspended if an application has been made to set aside the award.

170. It is possible that the Model Law's grounds for refusing enforcement would have to be expanded in one respect (at least) for domestic arbitration to accommodate a similar expansion in the grounds for setting aside the award. That is, if error of law was made a ground for setting aside the award, consistency would require that it should be made a ground for refusing enforcement. Thus again a distinction might possibly be made between international and domestic arbitration.

#### Question 27

- (1) What procedures should a new Act provide for judicial enforcement of an award?
- (2) What conditions should there be for enforcement to issue? Should a distinction be made between domestic and international arbitration?

### OTHER MATTERS

#### Court-annexed and statutory arbitration

171. The topic of compulsory arbitration – imposed on the parties by statute or by the court in the course of proceedings – has not yet been addressed in this review. It is questionable whether it should be considered at all since it is not really "arbitration" when the element of voluntary submission to the process is missing. Nor, arguably, can it be aligned to arbitration as a matter of principle when such a significant element is not present. At best it can be regarded as a statutory or judicial recognition of the advantages of arbitration as a form of alternative dispute resolution – with similar procedures and the opportunity to select an expert adjudicator. However since it is a recognised form of adjudication in New Zealand it will be dealt with now – as part of the somewhat larger topic of court-annexed and statutory arbitration.

172. The New Zealand Act is indeed now unique among the arbitration models surveyed in itself providing for court-annexed arbitration. The provisions stem from the English 1854 Act, in England removed into the Supreme Court of Judicature Consolidation Act in 1925. Specifically:

- (a) The court can refer questions arising in the course of proceedings (other than criminal proceedings by the Crown) to a "referee" whose report it may adopt in whole or in part (and see also s.62 of the District Courts Act 1947).
- (b) Alternatively, the court can order that technical questions, or with the consent of the parties, any other questions of fact, be tried before an arbitrator agreed on by the parties

or before an officer of the court (and see also District Courts Act ss.61 and 62A, although there the consent of the parties is always required).

The provisions essentially enable the expertise of arbitrators to be drawn on to assist in court proceedings – in much the same way as referees, arbitrators and assessors under the English and various Australian courts statutes. As such, the provisions can be very useful for all those concerned.

173. Nevertheless there is little in common between the forms of court-annexed arbitration noted above and the voluntary arbitration it is supposedly modelled on. The first form can hardly be called "arbitration" even in the broadest sense since the referee does not have the power of decision: *Papps v Canterbury Furnishers Ltd* [1959] NZLR 1037. The second form is closer to voluntary arbitration and indeed is voluntary if the parties agree to it and appoint the arbitrator themselves, but is subject to a separate statutory regime bringing it further within the court system, and leaving very little authority to the parties themselves. Thus s.16 provides that the arbitrator is an officer of the court, the proceedings to be conducted according to court rules or as the court directs, and the decision is equivalent to a jury verdict.

174. It may be questioned whether these forms of "arbitration" can be regarded as sufficiently close to the normal concept of arbitration to remain in an arbitration statute, especially if the statute itself moves closer to the contractual model. On the other hand, since the processes are valuable there may be a case for retaining them in some form. There could, for instance, be something equivalent to the English or Australian provisions for referees, arbitrators (although it might be better to avoid this terminology) and assessors in the Judicature Act and High Court Rules. Indeed it may be sufficient simply to expand the existing High Court Rules provisions regarding the taking of accounts and inquiries (rr.384ff).

175. The New Zealand Act also provides for statutory arbitration, albeit indirectly, stating that the Act applies to arbitration under other Acts as if the arbitration were pursuant to a submission except insofar as this is inconsistent with the Act regulating the procedure (and see similarly the English and Australian Acts). There are a number of statutes which refer disputes or particular types of disputes to arbitration. A reasonably comprehensive list is appended to this paper. In most cases these are subject to the Arbitration Act – although the Labour Relations Act provisions for arbitration of disputes of interest provide an important exception, the rationale for which will not be re-examined here.

176. Many of the statutory arbitration provisions are concerned with the relationship between individuals and government or local government (or in some cases between different government or local government bodies). If any overall aim can be discerned here, it seems to be to provide a dispute resolution mechanism which is

simpler and less adversarial than going to court and provides greater practical expertise. However the question arises whether these aims could not more appropriately be served by referring such matters to administrative tribunals – since their function is much the same – as discussed in the Legislation Advisory Committee's recent Discussion Paper on Administrative Tribunals (Department of Justice, 1988). Indeed this is a question which might well be left to that Committee to recommend on.

177. In other cases however the statutes in question establish statutory corporations or authorise the incorporation of private corporations outside the general scheme of the Companies legislation (though it is questionable whether they ought to continue to be excluded – a point raised in the Law Commissions's Preliminary Paper on Company Law (NZLC PP5, 1987). Here the arbitration provisions tend to be used to establish a method of dispute resolution between the corporation and its individual members, subscribers or security holders in much the same way as an arbitration clause might be found in a company's articles of association. There is some resemblance to voluntary arbitration here in terms of both form and function – in particular the enhancement of privacy and expertise. This suggests that there might be some advantages in retaining such forms of statutory arbitration as essentially analogous to voluntary arbitration. Indeed the arbitration is "voluntary" in the sense that the individual party can choose whether or not to become a member, subscriber or security holder of the body in question.

178. There are still some differences however, which need to be addressed. In particular the New Zealand Arbitration Act makes it clear that it applies only to the extent it is not inconsistent with the statute providing for the arbitration. Thus, for instance, a court could not refuse a stay of proceedings, since there has already been a statutory determination in favour of arbitration. In addition some provisions of the 1938 Amendment Act are specifically excluded. *Russell on Arbitration* suggests that the exclusions supposedly relate to provisions which are either inherently inapplicable to statutory arbitrations, or would allow the court to override express provisions of the statute. However these would already be covered by the general reference to inconsistency – and moreover the list is not complete, referring only to certain provisions. To avoid unnecessary duplication the additional reference to specific exclusions could be dropped altogether (as for instance in the Australian Acts). Alternatively, and preferably if the aim is to make clear which of the normal provisions would be excluded, the general reference could be dropped in favour of a comprehensive list of specific exclusions, the selection itself based on an "inconsistency" criterion.

179. Some care will have to be taken too in the drafting of any statutory provision in the arbitration legislation to indicate that the intention is to treat the statutory arbitration as equivalent to voluntary arbitration. The present provision in the New Zealand Act, for instance, applies the Act to statutory arbitrations "as if

the arbitration were pursuant to a submission". But it does not actually exclude the court's ability to treat them as creatures of statute – and for instance exercise its powers of judicial review under the Judicature Amendment Act 1972. This means that a fundamental divergence could develop between voluntary and statutory arbitrations. Thus it may be preferable to state simply that the statutory provision for arbitration is "deemed to be an arbitration agreement" – as some of the specific statutory provisions for arbitration already do.

**Question 28**

**Should there be provision – in a new Act or elsewhere – for court annexed arbitration? – for statutory arbitration? If so in what terms?**

### III TENTATIVE PREFERENCES

180. Although this is a preliminary paper for discussion and *not* a report representing the settled views of the Law Commission, we believe it is helpful for those responding to the paper to have an indication of our present (albeit tentative) opinion on the general direction of reform of New Zealand's arbitration laws. Such an indication is to be found in the paragraphs following, but we stress that it is in all respects subject to the weight and cogency of responses received to the paper, and to our further consideration of the issues.

181. We have considered, directly or indirectly, a range of broad options. These might be summarised as –

- (a) repeal the present statutes: why have any statutes in this area at all?
- (b) retain the present statutes: is there any identifiable need or demand for change?
- (c) follow the improved English model: why not adopt the changes introduced there by the 1979 Act which have been grafted on to statutes which share a common origin (and terminology) with our own?
- (d) adopt the Australian model: why not give full recognition to the logic of trans-Tasman ties, not least the Closer Economic Relation Agreement, by adopting the modern uniform Australian legislation here?
- (e) adopt the UNCITRAL Model Law: why not take advantage of an international model which has already gained acceptance in relation to international arbitration in several comparable countries, and is applicable – perhaps with minor modification – to domestic arbitration?
- (f) create a new New Zealand statute: why not draw the very best elements from all the models on offer, and shape them into legislation specific to our own country but in line with the general approach taken in comparable countries?

182. The main options discussed in Part II were (c), (d) and (e). We doubt that there is a real case for option (a) – repeal – but it serves to focus attention on the basic objective of legislation in this field. We believe that objective to be the support and strengthening of a method of dispute resolution separate from the ordinary courts which has been proved to be popular and effective. Although arbitration is founded on an agreement, the common law relating to arbitration agreements does not permit as effective a system as is possible when supported by legislative rules designed to enable the

system to work in the absence of cooperation. Clarification of the law is another important objective. In any event New Zealand could not simply repeal its special foreign awards and international investment disputes statutes since they implement international obligations.

183. We are also presently inclined to reject option (b) leaving the law as it is – except, perhaps, in the case of the Arbitration (International Investment Disputes) Act 1979. There may be an argument that the present law has worked well enough for those who have to apply it and that the factors which have led to change elsewhere are not applicable here. But at very least, the central arbitration statutes – the Arbitration Act 1908 and its 1938 Amendment – are confusing in their structure, patchy in their content, and unclear in their language. More significantly, they represent a perhaps dated view of arbitration as very much subject to the control of the court. This is unsatisfactory if arbitration is to be promoted as a dispute resolution process based on the will of the parties. We doubt that there are good reasons for derogating so much from the principle of freedom of contract in this context. Similar considerations also lay behind the reforms that have taken place elsewhere. The focus there may have been on international arbitration (sometimes to the exclusion of domestic arbitration), but there seems to be no clear policy reason for treating domestic arbitration as essentially different. The models are by and large equally relevant to both forms of arbitration.

184. The last option – to devise a completely new arbitration regime for New Zealand – cannot be rejected outright but the discussion of the selected models indicates that they already offer a wide range of ways of dealing with particular issues, and it is questionable how much further we should go. The advantages of having a model are obvious: the research and discussion already undertaken; the texts and commentaries available to provide greater understanding; the body of case law which builds up around it; and the promotion of greater regional and international harmonisation. The further the model is departed from the less these advantages become. But changes are not altogether excluded. The model is after all only a model, and it should be possible to make the changes necessary to adapt it to particular needs and circumstances – provided they do not depart from its overall philosophy.

185. If those options are discounted, the question is what model to adopt. The English model does have a certain appeal as being the closest to the New Zealand tradition of arbitration – and yet providing for some liberalisation so that arbitration (in particular international arbitration) can be more effective. But the question is really whether it goes far enough in dealing with the problems of the existing regime. We doubt that it does, in particular considering the extent to which it leaves matters to the common law.



186. The Australian model must also be considered carefully. Not only because of CER – although this is very important – but because it does provide a somewhat more coherent and comprehensive approach to arbitration than the English model. However the overall philosophy is not all that different, historically stemming from a basic distrust of arbitration and other private forms of dispute resolution. Further, as regards CER, Australia is about to adopt the UNCITRAL Model Law for international arbitration on an "opt out" basis. The Australian Acts will remain for domestic arbitration and for those international cases where the parties choose the domestic regime. Our tentative view for New Zealand is that the arguments in favour of avoiding a domestic/international dichotomy in our arbitration laws weigh against the adoption of a completely separate law for domestic arbitration.

187. It may be clear by this stage that our present preference is to adopt the UNCITRAL Model Law, certainly for international arbitration. There are the obvious arguments of international harmonisation and CER in favour of it. More importantly it seems to strike the right balance between the interests of arbitral autonomy and judicial supervision (see in particular the discussion in Part II related to questions 6, 7, 11, 22, 25 and 27). Essentially the Model Law represents the clearest idea of arbitration as a form of dispute resolution which is based on private contract rather than public authority, and which is an alternative (rather than an adjunct) to the courts, though still subject to limited judicial supervision. This seems to us to be conceptually the soundest approach, as well as being the most conducive to arbitration as an effective technique for dispute resolution. Although the Model Law is itself restricted to written agreements (as is the present New Zealand Act), commercial arbitration and international arbitration, we think its approach is equally appropriate for other forms of consensual arbitration (see questions 2, 3 and 4). Therefore we would propose expanding the Model Law's scope of application to encompass these as well.

188. There might have to be some changes to the Model Law for domestic arbitration at least. We have tried to indicate the possibilities in the course of formulating the issues. Mostly these come down to cases where –

- (a) because of the generally closer connection of domestic parties with national laws, a closer connection with national courts might be appropriate (questions 6, 25 and 27);
- (b) because domestic parties may have less experience of arbitration and lack support from arbitration institutions, supplementary terms might be included (questions 9, 13, 18, 21, and 23).

The second category calls only for a filling out of the Model Law's non-mandatory provisions. But the first category does require more far-reaching changes for domestic arbitration. In particular it may

be argued that the court should be given an overriding discretion to refuse a stay of proceedings in the face of a valid and enforceable arbitration agreement, and that it should be allowed to review an arbitral award for error of law. Such changes (like the other changes suggested to supplement the Model Law) would bring it closer to the Australian Acts. Thus there could be a greater degree of harmonisation on the domestic level.

189. On the other hand it may be argued that to give those additional powers of intervention to the court would take it too far from the Model Law's starting point of minimal court involvement. This is our tentative view. We are inclined to think that the closer connection with national laws is insufficient justification for making such a change – particularly if the consumer protection element is left to be dealt with at the more general level of contract law. At the same time we would question the need to restrict the supplementary provisions referred to above to domestic arbitration – since they may be of benefit to international parties as well. In any event, since the provisions would not be mandatory, international parties could contract out of them if they so wished – as indeed could domestic parties who did not require them. This suggests that the distinction between international and domestic arbitration could be dispensed with, leaving it to the parties in each case to adapt the Model Law to their own needs.

190. If distinctions are made between international and domestic arbitration a great deal will hinge on the precise definition of "international". We have indicated that the Model Law's definition may not be ideal, and indeed it is questionable whether any definition could be. However somewhat greater flexibility can be achieved by allowing international parties the same choice as they will have in Australia (assuming the SCAG proposal for the Model Law is adopted) to opt out of the international regime and choose the domestic regime for their arbitration. The same flexibility can be allowed for in the domestic context if the parties there are allowed to opt into the international regime (as proposed by the Hong Kong Law Reform Commission). Thus the parties need not be prejudiced because they fall on one or other side of the necessarily somewhat arbitrary dividing line between "international" and "domestic" arbitration. Nor do we think the time for such choices would have to be restricted to after the dispute arises (as the Hong Kong Commission recommends for domestic parties contracting into the international regime). Particular problems of unconscionability and the like can be left to be dealt with under the general contract law, which is still developing in this respect.

191. Among other matters that will have to be attended to is the fate of the provisions for court-annexed arbitration currently in the New Zealand Act, and the various provisions for statutory arbitration (see question 28). As indicated, our present view is that the former cannot really be regarded as arbitration but may be useful (and therefore should be retained in another form), and that

in the latter case a distinction should be made between arbitrators effectively carrying out the function of administrative tribunals (in which case maybe they should be treated as such) and forms of statutory arbitration which are analogous to consensual arbitration, where there may still be a case for retaining them.

192. There is also the important question of a statutory provision regarding arbitrability (question 5). This is something we are inclined to favour, since it can be used to reduce the restrictions on arbitration to a minimum. A related question is the reduction of other legislative obstacles to arbitration. We would advocate the repeal of s.8 of the Insurance Law Reform Act 1977, but are not so concerned about the restrictions on arbitration in the (now) Disputes Tribunals Act 1988 and statutes establishing specialised courts and tribunals – since here at least some of the advantages of arbitration are found in those courts and tribunals.

193. Finally, regarding the statutes which implement the international conventions to which New Zealand is a party, (apart from the 1979 Act referred to already) the main concern is what should become of the Arbitration Clauses (Protocol) and the Arbitration (Foreign Awards) Act 1933 in the light of the Arbitration (Foreign Agreements and Awards) Act 1982. This has not been discussed at length in this paper, but we have indicated that the original intention was that the New York Convention should supersede the Protocol on Arbitration Clauses and the Convention on Foreign Awards. In the New Zealand case the earlier Act could be repealed (although the Protocol and Convention would remain part of our international obligations) and the few remaining outstanding territories still covered by it dealt with as if under the later regime. As far as the 1982 Act is concerned, we think its approach should be extended to non-Convention countries through the Model Law's equivalent provisions for recognition and enforcement of arbitral agreements and awards. The remaining significance of the New York Convention would be its application to "foreign domestic" agreements and awards. But it may even be that the Model Law provisions could be extended to cover these as well (replacing altogether the 1982 Act) thus removing any residual dichotomy in New Zealand's arbitration laws.

194. In summary, the Law Commission's present opinion – based on the belief that party autonomy should receive greater emphasis, that the law can be made clearer and more accessible, and that a sound internationally developed model is available – is that New Zealand's arbitration laws might be broadly reformed as follows –

- (a) the 1908 Arbitration Act (as amended) to be replaced with legislation modelled on the UNCITRAL Model Law – perhaps with some additional modifications for domestic arbitration agreements (but preferably not);
- (b) arbitration at common law (presently applicable to unwritten agreements) to be brought under the statutory regime;

- (c) the limits on arbitrability to be defined by statute in a minimal sense;
- (d) only such statutory arbitration as can be fully assimilated to consensual arbitration to remain under the arbitration regime;
- (e) the 1982 Arbitration (Foreign Agreements and Awards) Act to completely supersede the 1933 Act – and possibly both to be subsumed under the general regime;
- (f) the 1979 Arbitration (International Investment Disputes) Act to remain unchanged.

195. Finally, we return to the importance of responses to this paper – on matters of fact as well as opinion – to assist us in deciding whether to confirm or depart from the present opinion. The next stage in this law reform process is heavily dependent on those interested in this area making their views known – in writing to the Commission in the first instance, although that may later be supplemented by oral discussion.

## APPENDIX 1

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[Those who wish to consult any of the materials listed above should feel free to contact the Law Commission for assistance.]



# COMPARATIVE TABLE OF PROVISIONS

	<u>New Zealand</u> <u>Act</u>	<u>English</u> <u>Act</u>	<u>Australian</u> <u>Acts</u>	<u>Model</u> <u>Law</u>
Act a code	-	-	-	art.5
The "arbitration agreement"	s.2	s.32	s.4	art.7
Definition of "international"	-	s.3 1979	s.40	art.1
Application to "commercial" arbitration	-	-	-	art.1
Matters excluded from arbitration	s.16 1938	s.24	-	-
Stay of court proceedings	s.5	s.4	s.53	art.8
Revocation of the agreement	s.3	s.1	s.50	-
Commencement and limitation periods	s.18 1938	s.27	s.48	art.21
Appointment of arbitrators	s.4 s.6 s.7	s.6 s.7 s.10	s.7 s.8 s.10	art.11
Challenge to appointments	s.16 1938	s.24	s.45	art.12 art.13
Removal of an arbitrator	s.3 s.6 s.7 s.12 s.8 1938	s.1 s.7 s.10 s.13 s.23	s.9 s.44	art.14 art.15
Replacement of arbitrator	s.6 s.7 s.5 1938	s.7 s.10 s.25	ss.9-11	art.15

	<u>New Zealand</u> <u>Act</u>	<u>English</u> <u>Act</u>	<u>Australian</u> <u>Acts</u>	<u>Model</u> <u>Law</u>
Umpires	s.4 s.6 1938	s.8 s.9	s.12 s.15 s.16	art.29
Jurisdiction of arbitral tribunal	-	-	-	art.16
Initiation of arbitration process	-	-	s.14	art.23
Tribunal's powers on default		s.5 1979	s.18 s.46	art.25 art.32
Conduct of the arbitration	-	-	s.14 s.19 s.20 s.27	art.19 art.24 art.26
Tribunal's procedural powers	s.4 s.8 s.9 s.10 1938	s.12	s.17 s.18 s.25 s.26	art.9 art.17 art.24 art.27
Choice of procedural law	-	-	s.57	art.1
Applicable law	-	-	-	art.28
Dispensing with law	-	-	s.22	art.28
Determination of preliminary points of law	s.11 1938	ss.2-4 1979	ss.39-41	-

	<u>New Zealand Act</u>	<u>English Act</u>	<u>Australian Acts</u>	<u>Model Law</u>
Tribunal's powers regarding the award	s.4 ss.13-15 1938	ss.14-20	s.23 s.24 s.38 s.31 s.32 ss.34-36	art.32
Requirements with regard to the award	-	s.1 1979 s.3 1979 s.4 1979	s.29	art.31
Review of the award	s.12 s.11 1938	s.23 s.1 1979 s.3 1979 s.4 1979	s.38 ss.40-42	art.34
Tribunal reviewing the award	s.8 s.11	s.17 s.22	s.30 s.43	art.33 art.34
Procedures available for enforcement	s.13 s.12 1938	s.26	s.33	art.35 art.36
Court-annexed and statutory arbitration	ss.14-18 s.25 s.20 1938	s.31	s.3	-



## APPENDIX 3

**PROVISIONS FOR STATUTORY ARBITRATION**Government and Local Government

Patents Act 1953 s.53;  
 Auckland Metropolitan Drainage Act 1960 s.95;  
 Animals Act 1967 s.42;  
 Hutt Valley Drainage Act 1967 s.83;  
 Poultry Act 1968 s.10;  
 Tokoroa Agricultural and Pastoral Association Empowering Act 1968 s.6(2);  
 Building Research Levy Act 1969 ss.5(2), 6;  
 Apiaries Act 1969 s.15(2);  
 2nd Schedule Public Bodies Leases Act 1969;  
 Marine Farming Act 1971 ss.24, 39;  
 Mining Act 1971 s.86(2), (3);  
 Tauranga City Council and Mount Maunganui Borough Council (Tauranga Harbour Bridge) Empowering Act 1972 s.24;  
 Wanganui Harbour Board Empowering Act 1972 s.3(2);  
 Napier Harbour Board Empowering Act 1974 s.3(2);  
 Broadcasting Act 1976 s.34A(8);  
 Town and Country Planning Act 1977 s.165;  
 Poultry Board Act 1980 s.25;  
 Gas Act 1982 s.29(3);  
 Fisheries Act 1983 s.28C;  
 Trees (Electric Lines) Regulations 1986 rr.4–13;

Statutory Corporations carrying out Commercial Activities

Trustee Bank Act 1983 s.30;

Private Corporations Created by Statute

Co-operative Companies Act 1956 s.9(b);  
 Co-operative Freezing Companies Act 1960 s.9(2);  
 Building Societies Act 1965 s.109;  
 Unit Titles Amendment Act 1979 s.9(6)(b);  
 Friendly Societies and Credit Unions Act 1982 ss.78, 80;

Other

Labour Relations Act 1987 ss.147–149



## APPENDIX 4

## LEGISLATION

New Zealand	
Arbitration Act 1908	77
Arbitration (International Investment Disputes) Act 1979	92
Arbitration (Foreign Agreements and Awards) Act 1982	104
England	
Arbitration Act 1950	111
Arbitration Act 1975	122
Arbitration Act 1979	124
Australia	
Commercial Arbitration Act 1984 (New South Wales)	129
UNCITRAL	
Model Law on International Commercial Arbitration	153
Excerpts from Arbitration Rules	162





REPRINTED ACT  
[WITH AMENDMENTS INCORPORATED]

# ARBITRATION

REPRINTED AS ON 1 JANUARY 1979

INDEX	Page
Arbitration Act 1908 ... ..	2
Arbitration Amendment Act 1915 ... ..	12
Arbitration Clauses (Protocol) and the Arbitration (Foreign Awards) Act 1933 ... ..	12
Arbitration Amendment Act 1938 ... ..	21
Limitation Act 1950: s. 35 (2) ... ..	27 (n)
Arbitration Amendment Act 1952 ... ..	30
Arbitration Clauses (Protocol) and the Arbitration (Foreign Awards) Amendment Act 1957 ... ..	30
Niue Act 1966: s. 681 ... ..	3 (n)
Tokelau (New Zealand Laws) Regulations 1975 (S.R. 1975/263): reg. 2 (1) ... ..	3 (n)
Contractual Mistakes Act 1977: s. 11 ... ..	11 (n)

In this index "(n)" after a page number indicates that the enactment is referred to in a note on that page.

## ANALYSIS

### THE ARBITRATION ACT 1908

Title	References Under Order of Court
1. Short Title, etc.	14. Reference for report
2. Interpretation	15. Power to refer in certain cases
	16. Powers and remuneration of arbitrators
	17. Court to have powers as in references by consent
	18. Court of Appeal to have powers of Court
<i>References by Consent Out of Court</i>	<i>General</i>
3. Submission to be irrevocable	19. Power to compel attendance of witness in any part of New Zealand, and to order prisoner to attend
4. Provisions implied in submissions	20. <i>Repealed</i>
5. Power of Court to stay proceedings where there is a submission	21. Costs
6. Appointment of arbitrator or umpire	22. Arbitrator or umpire entitled to remuneration
7. Power for parties to supply vacancy	23. Power to make rules
8. Powers of arbitrator	24. Crown to be bound
9. Witnesses may be subpoenaed	25. Application of Act to references under statutory powers
10. Power to enlarge time for making award	Schedules
11. Power to remit award	
12. Power to remove arbitrator or set aside award	
13. Enforcing award	

## THE ARBITRATION CLAUSES (PROTOCOL) AND THE ARBITRATION (FOREIGN AWARDS) ACT 1933

Title	PART II
Preamble	ENFORCEMENT OF FOREIGN ARBITRAL
1. Short Title	AWARDS
	4. Application of Part II
	5. Effect of foreign awards
	6. Conditions for enforcement of foreign awards
	7. Evidence
	8. Meaning of "final award"
	9. Saving
	Schedules
PART I	
PROTOCOL ON ARBITRATION CLAUSES	
2. Interpretation	
3. Stay of Court proceedings in respect of matters to be referred to arbitration under commercial agreements	

## THE ARBITRATION AMENDMENT ACT 1938

Title	11. Statement of case by arbitrator or umpire
1. Short Title and commencement	12. Entry of judgement in terms of award
2. Interpretation	13. Interest on awards
3. Submission not to be discharged by death of party thereto	14. Provision as to costs
4. Provisions in case of bankruptcy	15. Taxation of arbitrator's or umpire's fees
5. Power of Court where arbitrator is removed or appointment of arbitrator is revoked	16. Power of Court to give relief where arbitrator is not impartial or dispute referred involves question of fraud
6. Provisions on the appointment of three arbitrators	18. Limitation of time for commencing arbitration proceedings
7. Provisions relating to umpires	19. Saving for pending arbitrations
8. Arbitrators and umpires to use due dispatch	20. Application to statutory arbitrations
10. Additional powers of Court	21. Amendments of principal Act
	Schedules

## THE ARBITRATION ACT 1908

1908, No. 8

An Act to consolidate certain enactments of the General Assembly relating to arbitration [4 August 1908]

1. Short Title, etc.—(1) The Short Title of this Act is the Arbitration Act 1908.

(2) This Act is a consolidation of the enactments mentioned in the First Schedule hereto, and with respect to those enactments the following provisions shall apply:

(a) All submissions, awards, orders, rules, reports, appointments, instruments, and generally all acts of authority which originated under any of the said enactments, and are subsisting or in force on the coming into operation of this Act, shall enure for the purposes of this Act as fully and effectually as if they

had originated under the corresponding provisions of this Act, and accordingly shall, where necessary, be deemed to have so originated.

(b) All matters and proceedings commenced under any such enactment, and pending or in progress on the coming into operation of this Act, may be continued, completed, and enforced under this Act.

This Act was extended to Niue by s. 681 of the Niue Act 1966.

This Act was extended to Tokelau by reg. 2 (1) of the Tokelau (New Zealand Laws) Regulations 1975 (S.R. 1975/263).

For further provisions dealing with arbitration under this Act, see:

Animals Act 1967, s. 42  
Apiaries Act 1969, s. 15 (2)  
Auckland Metropolitan Drainage Act 1960, s. 95 (2)  
Building Research Levy Act 1969, s. 6 (5)  
Co-operative Freezing Companies Act 1960, s. 9 (b)  
Hutt Valley Drainage Act 1967, s. 83 (2)  
Mangawai Lands Empowering Act 1966, s. 6 (5)  
Marine Farming Act 1971, s. 39 (5)  
Milk Act 1967, s. 46 (5) and s. 47 (2)  
Mining Act 1971, s. 86 (2)  
North Shore Drainage Act 1963, s. 79 (2)  
Poultry Act, 1968, s. 10  
Tauranga City Council and Mount Maunganui Borough Council (Tauranga Harbour Bridge) Empowering Act 1972, s. 24  
Tokoroa Agricultural and Pastoral Association Empowering Act 1968, s. 6 (2)

2. Interpretation—In this Act, if not inconsistent with the context,—

"Arbitrator" includes referee and valuer:

"Court" means the Supreme Court, and includes a Judge thereof:

"Rules of Court" means rules of the Court of Appeal, or of the Supreme Court, made by the proper authority under this Act:

"Submission" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not, or under which any question or matter is to be decided by one or more persons to be appointed by the contracting parties or by some person named in the agreement.

Cf. 1890, No. 10, s. 3; 1906, No. 33, s. 2; Arbitration Act 1950, s. 32 (U.K.)

"Submission": see—

Animals Act 1967, s. 42  
Apiaries Act 1969, s. 15 (2)  
Co-operative Freezing Companies Act 1960, s. 9 (b)  
Hutt Valley Drainage Act 1967, s. 83 (2)  
Mangawai Lands Empowering Act 1966, s. 6 (5)  
Milk Act 1967, s. 47 (2)  
Mining Act 1971, s. 86 (3)  
North Shore Drainage Act 1963, s. 79 (2)  
Poultry Act 1968, s. 10  
Tokoroa Agricultural and Pastoral Association Empowering Act 1968, s. 6 (2)

*References by Consent Out of Court*

**3. Submission to be irrevocable**—A submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the Court, and shall have the same effect in all respects as if made an order of Court.

Cf. 1890, No. 10, s. 4; Arbitration Act 1950, s. 1 (U.K.)

As to the grounds for setting aside an award, see s. 12 (2) of this Act.  
As to the effects of death or bankruptcy, see ss. 3 and 4 of the Arbitration Amendment Act 1938.

As to the power of the Court to give relief where an arbitrator is not impartial or where the dispute referred involves questions of fraud, see s. 16 of the Arbitration Amendment Act 1938.

**4. Provisions implied in submissions**—A submission, unless a contrary intention is expressed therein, shall be deemed to include the provisions specified in the Second Schedule hereto, so far as they are applicable to the reference under the submission.

Cf. 1890, No. 10, s. 5; Arbitration Act 1950, ss. 6, (8) (1), (2), 12 (1), (2), 14, 15, 16, 18 (1) (U.K.)

**[5. Power of Court to stay proceedings where there is a submission]**—(1) If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any Court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to those legal proceedings may, at any time before filing a statement of defence or a notice of intention to defend or taking any other step in the proceedings, apply to the Court in which the proceedings were commenced to stay the proceedings; and that Court may, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, make an order staying the proceedings.

(2) The refusal by any Magistrate's Court of an application for a stay of proceedings under this section in any action under the Magistrates' Courts Act 1947 shall not affect the right of the defendant in the action to have the action transferred to the Supreme Court under subsection (1) of section 43 of that Act or, as the case may require, to apply under subsection (2) of that section for an order that the action be so transferred, and in any such case the time prescribed under that Act for giving notice under the said

section 43 shall not begin to run until the stay of proceedings is refused.]

Cf. Arbitration Act 1950, s. 4 (1) (U.K.)

This section was substituted for the original s. 5 by s. 2 of the Arbitration Amendment Act 1952.

As to the stay of Court proceedings in respect of matters referred to arbitration under commercial agreements, see s. 3 of the Arbitration Clauses (Protocol) and the Arbitration (Foreign Awards) Act 1933.

**6. Appointment of arbitrator or umpire**—(1) In any of the following cases:

- (a) Where a submission provides that the reference shall be to a single arbitrator, and all the parties do not concur in the appointment of an arbitrator; or
- (b) Where an appointed arbitrator fails to act, or is or becomes incapable of acting, or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties do not supply the vacancy; or
- (c) Where the parties or 2 arbitrators are at liberty to appoint an umpire [or a third arbitrator] [or where 2 arbitrators are required to appoint an umpire] and do not appoint one; or
- (d) Where an appointed umpire or third arbitrator fails to act, or is or becomes incapable of acting, or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties or arbitrators do not supply the vacancy,—

any party may serve the other party or the arbitrators, as the case may be, with a written notice to appoint an arbitrator or umpire [or a third arbitrator].

(2) If the appointment is not made within 7 days after the service of the notice, the Court may, on application by the party who gave the notice, appoint an arbitrator or umpire [or a third arbitrator], who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties.

Cf. 1890, No. 10, s. 7; Arbitration Act 1950, s. 10 (U.K.)

The words "or a third arbitrator" were inserted in 3 places by s. 2 of the Arbitration Amendment Act 1915. These words were previously in the Arbitration Amendment Act 1890.

In subs. (1) (c) the words "or where 2 arbitrators are required to appoint an umpire" were inserted by s. 7 (2) of the Arbitration Amendment Act 1938.

For provisions as to the appointment of 3 arbitrators, see s. 6 of the Arbitration Amendment Act 1938.

As to umpires, see s. 7 of the Arbitration Amendment Act 1938.

As to a trustee company being appointed arbitrator or umpire, see ss. 7 and 11 of the Trustee Companies Act 1907.

**7. Power for parties to supply vacancy**—(1) Where a submission provides that the reference shall be to 2 arbitrators, one to be appointed by each party, then, unless the submission expresses a contrary intention,—

- (a) If either of the appointed arbitrators fails to act, or is or becomes incapable of acting, or dies, the party who appointed him may appoint a new arbitrator in his place; and
- (b) If one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, for 7 days after the other party, having appointed his arbitrator, has served the party making default with notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and his award shall be binding on both parties as if he had been appointed by consent.

(2) The Court may set aside any appointment made in pursuance of this section.

Cf. 1890, No. 10, s. 8; Arbitration Act 1950, s. 7 (U.K.)

As to the powers of the Court where an arbitrator is removed, see s. 5 of the Arbitration Amendment Act 1938.

**8. Powers of arbitrator**—The arbitrators or umpire acting under a submission may, unless the submission expresses a contrary intention,—

- (a) Administer oaths to the parties and witnesses appearing; and
- (b) *Repealed by s. 21 of the Arbitration Amendment Act 1938.*
- (c) Correct in an award any clerical mistake or error arising from any accidental slip or omission.

Cf. 1890, No. 10, s. 9; Arbitration Act 1950, ss. 12 (3), 17 (U.K.)

**9. Witnesses may be subpoenaed**—Any party to a submission may sue out a writ of *subpoena ad testificandum*, or a writ of *subpoena duces tecum*, but no person shall be compelled under any such writ to produce any document which he could not be compelled to produce on the trial of an action.

Cf. 1890, No. 10, s. 10; Arbitration Act 1950, s. 12 (4) (U.K.)

**10. Power to enlarge time for making award**—The time for making an award may from time to time be enlarged by

order of the Court, whether the time for making the award has expired or not.

Cf. 1890, No. 10, s. 11; Arbitration Act 1950, s. 13 (2) (U.K.)

**11. Power to remit award**—(1) In all cases of reference to arbitration the Court may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire.

(2) Where an award is remitted the arbitrators or umpire shall, unless the order otherwise directs, make their award within 3 months after the date of the order.

Cf. 1890, No. 10, s. 12; Arbitration Act 1950, s. 22 (U.K.)

See s. 8 of the Arbitration Amendment Act 1938 as to the use of due dispatch, and power to make an award at any time.

**12. Power to remove arbitrator or set aside award**—

(1) Where an arbitrator or umpire has misconducted himself [or the proceedings] the Court may remove him.

(2) Where an arbitrator or umpire has misconducted himself [or the proceedings], or any arbitration or award has been improperly procured, the Court may set the award aside.

Cf. 1890, No. 10, s. 13; Arbitration Act 1950, s. 23 (1), (2) (U.K.)

The words "or the proceedings" were inserted in subss. (1) and (2) by s. 17 of the Arbitration Amendment Act 1938.

As to the removal of an arbitrator who does not use due dispatch, see s. 8 of the Arbitration Amendment Act 1938.

As to the powers of the Court where an arbitrator is removed, see s. 5 of the Arbitration Amendment Act 1938.

As to the powers of the Court where an arbitrator is not impartial or where a question of fraud is involved, see s. 16 of the Arbitration Amendment Act 1938.

**13. Enforcing award**—An award on a submission may, by leave of the Court, be enforced in the same manner as a judgment or order to the same effect.

Cf. 1890, No. 10, s. 14; Arbitration Act 1950, s. 26 (U.K.)

As to the entry of judgment in terms of an award, see s. 12 of the Arbitration Amendment Act 1938.

As to the enforcement of an award (not being a foreign award) in other countries, see the Reciprocal Enforcement of Judgments Act 1934.

As to enforcing a foreign award, see s. 5 of the Arbitration Clauses (Protocol) and the Arbitration (Foreign Awards) Act 1933.

*References Under Order of Court*

**14. Reference for report**—(1) Subject to rules of Court and to any right to have particular cases tried by a jury, the Court or a Judge may refer any question arising in any cause or matter (other than a criminal proceeding by the Crown) for inquiry or report to any official or special referee.

(2) The report of such official or special referee may be adopted wholly or partially by the Court or a Judge, and if so adopted may be enforced as a judgment or order to the same effect.

Cf. Supreme Court of Judicature (Consolidation) Act 1925, s. 88 (U.K.)

**15. Power to refer in certain cases**—In any cause or matter (other than a criminal proceeding by the Crown),—

- (a) If all the parties interested who are not under disability consent; or
- (b) If the question in dispute consists wholly or in part of matters of account; or
- (c) If the cause or matter requires any prolonged examination of documents, or any scientific or local investigation, which cannot in the opinion of the court or a Judge conveniently be made before a jury or conducted by the Court through its other ordinary officers,—

the Court may at any time order the whole cause or matter, or any question or issue of fact arising therein, to be tried before an arbitrator agreed on by the parties, or before an officer of the Court.

Cf. 1890, No. 10, s. 15; Supreme Court of Judicature (Consolidation) Act 1925, s. 89 (U.K.)

**16. Powers and remuneration of arbitrators**—(1) In all cases of reference to an arbitrator under an order of the Court in any cause or matter the arbitrator shall be deemed to be an officer of the Court, and shall have such authority, and shall conduct the reference in such manner, as is prescribed by rules of Court, and, subject thereto, as the Court directs.

(2) The report or award of any arbitrator on any such reference shall, unless set aside by the Court, be equivalent to the verdict of a jury.

(3) The remuneration to be paid to any arbitrator to whom

any matter is referred under order of the Court shall be determined by the Court.

Cf. 1890, No. 10, s. 16; Supreme Court of Judicature (Consolidation) Act 1925, s. 90 (U.K.)

**17. Court to have powers as in references by consent**—

The Court shall, as to references under order of the Court, have all the powers conferred by this Act on the Court as to references by consent out of Court.

Cf. 1890, No. 10, s. 17; Supreme Court of Judicature (Consolidation) Act 1925, s. 91 (U.K.)

**18. Court of Appeal to have powers of Court**—The Court of Appeal shall have all the powers conferred by this Act on the Court under the provisions relating to references under order of the Court.

Cf. 1890, No. 10, s. 18; Supreme Court of Judicature (Consolidation) Act 1925, s. 92 (U.K.)

*General*

**19. Power to compel attendance of witness in any part of New Zealand, and to order prisoner to attend**—(1) The Court may order that a writ of *subpoena ad testificandum* or of *subpoena duces tecum* shall issue to compel the attendance before any arbitrator or umpire of a witness wherever he may be in New Zealand.

(2) The Court may also, by order in writing under the hand of a Judge, require a prisoner to be brought up for examination before any arbitrator or umpire, and such order shall operate and be obeyed in like manner in all things as a writ of *habeas corpus ad testificandum* issued out of the Court.

Cf. 1890, No. 10, s. 19; Arbitration Act 1950, s. 12 (4), (5) (U.K.)

**20. Repealed by s. 21 of the Arbitration Amendment Act 1938.**

**21. Costs**—Any order made under this Act may be made on such terms as to costs, or otherwise, as the authority making the order thinks just.

Cf. 1890, No. 10, s. 21; Arbitration Act 1950, s. 28 (U.K.)

See also s. 14 of the Arbitration Amendment Act 1938.

**22. Arbitrator or umpire entitled to remuneration**—An arbitrator or umpire shall be entitled to a reasonable remuneration for his services as such arbitrator or umpire, and if the parties to the submission do not agree as to the amount to be paid, or as to the mode and time of payment, a Judge may, on a summary application to him for that purpose, fix and determine all or any of such matters.

Cf. 1890, No. 10, s. 22

As to the taxation of an arbitrator's or umpire's fees, see s. 15 of the Arbitration Amendment Act 1938.

See also s. 8 (2) of the Arbitration Amendment Act 1938, as to arbitrators or umpires who are removed for failure to use all reasonable dispatch.

**23. Power to make rules**—Rules may from time to time be made in the manner prescribed by the Judicature Act 1908 for the purpose of giving effect to this Act in the Court of Appeal of the Supreme Court.

Cf. 1890, No. 10, s. 23

The manner of making rules is now prescribed by the Judicature Amendment Act 1930.

See also s. 7 (3) of the Arbitration Clauses (Protocol) and the Arbitration (Foreign Awards) Act 1933.

**24. Crown to be bound**—This Act shall apply to any arbitration to which [Her Majesty], in right of the Crown, is a party; but nothing herein shall empower the Court to order any proceedings to which [Her Majesty] is a party, or any question or issue in any such proceedings, to be tried before any arbitrator or officer without the consent of the Attorney-General. . . .

Cf. 1890, No. 10, s. 25; Supreme Court of Judicature (Consolidation) Act 1925, s. 96 (U.K.); Arbitration Act 1950, s. 30 (U.K.)

The words "or shall affect the law as to costs payable by the Crown" were omitted from this section by s. 21 of the Arbitration Amendment Act 1938.

The reference to Her Majesty has been updated from a reference to His Majesty.

**25. Application of Act to references under statutory powers**—This Act applies to every arbitration under any Act passed before or after the coming into operation of this Act as if the arbitration were pursuant to a submission, except in so far as this Act is inconsistent with the Act regulating the arbitration, or with any rules or procedure authorised or recognised by that Act.

Cf. 1890, No. 10, s. 26; Arbitration Act 1950, s. 31 (U.K.)

See also s. 20 of the Arbitration Amendment Act 1938.

## SCHEDULES

### Section 1 (2)

#### FIRST SCHEDULE ENACTMENTS CONSOLIDATED

1890, No. 10—The Arbitration Act 1890.

1906, No. 33—The Arbitration Act Amendment Act 1906.

### Section 4

#### SECOND SCHEDULE PROVISIONS TO BE IMPLIED IN SUBMISSIONS

1. If no other mode of reference is provided, the reference shall be to a single arbitrator.

[2. If the reference is to 2 arbitrators, the 2 arbitrators shall appoint an umpire immediately after they are themselves appointed.]

3. *Repealed by s. 21 of the Arbitration Amendment Act 1938.*

4. If the arbitrators . . . have delivered to any party to the submission, or to the umpire, a notice in writing stating that they cannot agree, the umpire may forthwith enter on the reference in lieu of the arbitrators.

5. *Repealed by s. 21 of the Arbitration Amendment Act 1938.*

6. The parties to the reference, and all persons claiming through them respectively, shall, subject to any legal objection, submit to be examined by the arbitrators or umpire on oath in relation to the matters in dispute, and shall, subject as aforesaid, produce before the arbitrators or umpire all books, deeds, papers, accounts, writings, or documents within their possession or power that may be required or called for, and do all such other things as during the proceedings on the reference the arbitrators or umpire may require.

7. The witnesses on the reference shall, if the arbitrators or umpire think fit, be examined on oath.

8. The award made by the arbitrators or umpire shall be final and binding on the parties and the persons claiming under them respectively.

9. The costs of the reference and award shall be in the discretion of the arbitrators or umpire, who may direct to and by whom and in what amount those costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof, and may award costs to be paid as between solicitor and client.

[10. The arbitrators or umpire shall have the same power as the Court to order specific performance of any contract other than a contract relating to land or any interest in land.]

[[10A. The arbitrators or umpire shall have the same power as the Court to exercise any of the powers conferred by section 6 or section 7 of the Contractual Mistakes Act 1977.]]

11. The arbitrators or umpire may, if they think fit, make an interim award.]

SECOND SCHEDULE Clause 10A. AMDD by s. 14(2) of 1979

No. 11 (Contractual Remedies Act 1979) and (as from 1/4/83) s. 12 of 1982 No. 132 (Contracts (Privately) Act 1982). Insert new clauses as follows:—

"10A. Subject to section 9 of the Contractual Remedies Act 1979, the arbitrators or umpire shall have the same power as the Court to exercise any of the powers conferred by sections 4, 6, 7 (6), 7 (7), and 9 of that Act.

10C. The arbitrators or umpire shall have the same power as the Court to exercise any of the powers conferred by section 7 of the Contracts (Privately) Act 1982."

**THE ARBITRATION AMENDMENT ACT 1915****1915, No. 13****An Act to amend the Arbitration Act 1908***[5 August 1915]*

**1. Short Title**—This Act may be cited as the Arbitration Amendment Act 1915, and shall form part of and be read together with the Arbitration Act 1908.

**2. (1)** *This subsection amended s. 6 of the principal Act.*

**(2)** This section shall be deemed to have been in operation as from the commencement of the Arbitration Act 1908.

**THE ARBITRATION CLAUSES (PROTOCOL)  
AND THE ARBITRATION (FOREIGN  
AWARDS) ACT 1933**

**1933, No. 4**

**An Act to give effect in New Zealand (1) to a protocol on arbitration clauses signed on behalf of His Majesty at a meeting of the Assembly of the League of Nations held on the 24th day of September 1923; and (2) to a convention on the execution of foreign arbitral awards signed on behalf of His Majesty on the 26th day of September 1927** *[28 October 1933]*

WHEREAS the protocol on arbitration clauses (the terms of which are set forth in the First Schedule hereto) was signed at Geneva on behalf of His Majesty at a meeting of the Assembly of the League of Nations held on the 24th day of September 1923, and was ratified by His Majesty in respect of the Dominion of New Zealand on the 9th day of June 1926; And whereas the convention on the execution of foreign arbitral awards (the terms of which are set forth in the Second Schedule hereto) was signed at Geneva on behalf of His Majesty on the 26th day of September 1927, and was ratified by His Majesty in respect of the Dominion of New Zealand on the 9th day of April 1929: And whereas in order that the said protocol and convention respectively should have full effect in New Zealand it is expedient that provision be made as hereinafter appearing.

**1. Short Title**—(1) This Act may be cited as the Arbitration Clauses (Protocol) and the Arbitration (Foreign Awards) Act 1933.

**(2)** This Act shall be read together with and deemed part of the Arbitration Act 1908 (hereinafter referred to as the principal Act).

**PART I****PROTOCOL ON ARBITRATION CLAUSES**

**2. Interpretation**—In this Part of this Act the expression “the said protocol” means the protocol the terms of which are set forth in the First Schedule hereto.

**3. Stay of Court proceedings in respect of matters to be referred to arbitration under commercial agreements—**

67-45

**S. 3 of the Arbitration Clauses (Protocol) and the Arbitration (Foreign Awards) Act 1933.** *(82) 1 R.S. p. 108*  
RPLD by s. 14 of 1982 No. 21.

... agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking other steps in the proceedings, apply to that Court to stay the proceedings, and that Court or a Judge thereof, unless satisfied that the agreement or arbitration has become inoperative or cannot proceed, or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.

*Cf. Arbitration Act 1950, s. 4 (2) (U.K.)*

**PART II****ENFORCEMENT OF FOREIGN ARBITRAL AWARDS**

**[4. Application of Part II]**—(1) This Part of this Act applies to any award made after the 28th day of July 1924,—

- (a) In pursuance of an agreement for arbitration to which the protocol set out in the First Schedule to this Act applies; and
- (b) Between persons of whom one is subject to the jurisdiction of one of the Powers which the Governor-General, being satisfied that reciprocal

provisions have been made, by Order in Council declares to be parties to the said Convention, and of whom the other is subject to the jurisdiction of another of those Powers; and

- (c) In one of such territories as the Governor-General, being satisfied that reciprocal provisions have been made, by Order in Council declares to be territories to which the said Convention applies,—

and an award to which this Part of this Act applies is in this Part referred to as a foreign award.

(2) Every Order in Council made in the United Kingdom under section 1 of the Arbitration (Foreign Awards) Act 1930 of the Parliament of the United Kingdom which is in force in New Zealand at the date of the commencement of this section shall be deemed to have been duly made under the provisions of this Act, but the Governor-General may, by Order in Council, declare that any such first-mentioned Order in Council shall cease to have effect as part of the law of New Zealand.]

Cf. Arbitration Act 1950, s. 35 (U.K.)

This section was substituted for the original s. 4 by s. 2 of the Arbitration Clauses (Protocol) and the Arbitration (Foreign Awards) Amendment Act 1957.

**5. Effect of foreign awards—**(1) A foreign award shall, subject to the provisions of this Part of this Act, be enforceable in New Zealand either by action or under the provisions of section 13 of the principal Act.

(2) Any foreign award which would be enforceable under this Part of this Act shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off, or otherwise in any legal proceedings in New Zealand, and any references in this Part of this Act to enforcing a foreign award shall be construed as including references to relying on an award.

Cf. Arbitration Act 1950, s. 36 (U.K.)

**6. Conditions for enforcement of foreign awards—**

(1) In order that a foreign award may be enforceable under this Part of this Act it must have—

- (a) Been made in pursuance of an agreement for arbitration which was valid under the law by which it was governed;
- (b) Been made by the tribunal provided for in the

agreement or constituted in manner agreed upon by the parties;

- (c) Been made in conformity with the law governing the arbitration procedure;
- (d) Become final in the country in which it was made;
- (e) Been in respect of a matter which may lawfully be referred to arbitration under the law of New Zealand,—

and the enforcement thereof must not be contrary to the public policy or the law of New Zealand.

(2) Subject to the provisions of this subsection, a foreign award shall not be enforceable under this Part of this Act if the court dealing with the case is satisfied that—

- (a) The award has been annulled in the country in which it was made; or
- (b) The party against whom it is sought to enforce the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case, or was under some legal incapacity and was not properly represented; or
- (c) The award does not deal with all the questions referred or contains decisions on matters beyond the scope of the agreement for arbitration:

Provided that, if the award does not deal with all the questions referred, the Court may, if it thinks fit, either postpone the enforcement of the award or order its enforcement subject to the giving of such security by the person seeking to enforce it as the Court may think fit.

(3) If a party seeking to resist the enforcement of a foreign award proves that there is any ground other than the non-existence of the conditions specified in paragraphs (a), (b), and (c) of subsection (1) of this section, or the existence of the conditions specified in paragraphs (b) and (c) of subsection (2) of this section, entitling him to contest the validity of the award, the Court may, if it thinks fit, either refuse to enforce the award or adjourn the hearing until after the expiration of such period as appears to the Court to be reasonably sufficient to enable that party to take the necessary steps to have the award annulled by the competent tribunal.

Cf. Arbitration Act 1950, s. 37 (U.K.)

**7. Evidence—**(1) The party seeking to enforce a foreign award must produce—

- (a) The original award or a copy thereof duly authenti-



- cated in manner required by the law of the country in which it was made; and
- (b) Evidence proving that the award has become final; and
  - (c) Such evidence as may be necessary to prove that the award is a foreign award and that the conditions mentioned in paragraphs (a), (b), and (c) of subsection (1) of the last foregoing section are satisfied.

(2) In any case where any document required to be produced under subsection (1) of this section is in a foreign language, it shall be the duty of the party seeking to enforce the award to produce a translation certified as correct by a diplomatic or consular agent of the country to which that party belongs, or certified as correct in such other manner as may be sufficient according to the law of New Zealand.

(3) Subject to the provisions of this section, rules of Court may be made in accordance with the Judicature Act 1908 with respect to the evidence which must be furnished by a party seeking to enforce an award under this Part of this Act.

Cf. Arbitration Act 1950, s. 38 (U.K.)

**8. Meaning of "final award"**—For the purposes of this Part of this Act an award shall not be deemed final if any proceedings for the purpose of contesting the validity of the award are pending in the country in which it was made.

Cf. Arbitration Act 1950, s. 39 (U.K.)

**9. Saving**—Nothing in this Part of this Act shall—

- (a) Prejudice any rights which any person would have had of enforcing in New Zealand any award or of availing himself in New Zealand of any award if this Part of this Act had not been enacted; or
- (b) Apply to any award made on an arbitration agreement governed by the law of New Zealand.

Cf. Arbitration Act 1950, s. 40 (U.K.)

## SCHEDULES

### FIRST SCHEDULE

#### PROTOCOL ON ARBITRATION CLAUSES

THE undersigned, being duly authorised, declare that they accept, on behalf of the countries which they represent, the following provisions:

1. Each of the Contracting States recognises the validity of an agreement whether relating to existing or future differences between parties subject respectively to the jurisdiction of different Contracting States by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject.

Each Contracting State reserves the right to limit the obligation mentioned above to contracts which are considered as commercial under its national law. Any Contracting State which avails itself of this right will notify the Secretary-General of the League of Nations, in order that the other Contracting States may be so informed.

2. The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.

The Contracting States agree to facilitate all steps in the procedure which require to be taken in their own territories, in accordance with the provisions of their law governing arbitral procedure applicable to existing differences.

3. Each Contracting State undertakes to ensure the execution by its authorities and in accordance with the provisions of its national laws of arbitral awards made in its own territory under the preceding articles.

4. The tribunals of the Contracting Parties, on being seized of a dispute regarding a contract made between persons to whom Article 1 applies and including an arbitration agreement, whether referring to present or future differences, which is valid in virtue of the said article and capable of being carried into effect, shall refer the parties on the application of either of them to the decision of the arbitrators.

Such reference shall not prejudice the competence of the judicial tribunals in case the agreement or the arbitration cannot proceed or become inoperative.

5. The present protocol, which shall remain open for signature by all States, shall be ratified. The ratifications shall be deposited as soon as possible with the Secretary-General of the League of Nations, who shall notify such deposit to all the signatory States.

6. The present protocol shall come into force as soon as 2 ratifications have been deposited. Thereafter it will take effect, in the case of each Contracting State, 1 month after the notification by the Secretary-General of the deposit of its ratification.

7. The present protocol may be denounced by any Contracting State on giving one year's notice. Denunciation shall be effected by a notification addressed to the Secretary-General of the League, who will immediately

transmit copies of such notification to all the other signatory States and inform them of the date on which it was received. The denunciation shall take effect one year after the date on which it was notified to the Secretary-General, and shall operate only in respect of the notifying State.

8. The Contracting States may declare that their acceptance of the present protocol does not include any or all of the under-mentioned territories—that is to say, their colonies, overseas possessions or territories, protectorates, or the territories over which they exercise a mandate.

The said States may subsequently adhere separately on behalf of any territory thus excluded. The Secretary-General of the League of Nations shall be informed as soon as possible of such adhesions. He shall notify such adhesions to all signatory States. They will take effect one month after the notification by the Secretary-General to all signatory States.

The Contracting States may also denounce the protocol separately on behalf of any of the territories referred to above. Article 7 applies to such denunciation.

## SECOND SCHEDULE

### CONVENTION ON THE EXECUTION OF FOREIGN ARBITRAL AWARDS

#### Article 1

In the territories of any High Contracting Party to which the present convention applies, an arbitral award made in pursuance of an agreement, whether relating to existing or future differences (hereinafter called “a submission to arbitration”) covered by the Protocol on Arbitration Clauses, opened at Geneva on September 24th, 1923, shall be recognised as binding and shall be enforced in accordance with the rules of the procedure of the territory where the award is relied upon, provided that the said award has been made in a territory of one of the High Contracting Parties to which the present convention applies and between persons who are subject to the jurisdiction of one of the High Contracting Parties.

To obtain such recognition or enforcement, it shall, further, be necessary—

- (a) That the award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto;
- (b) That the subject matter of the award is capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon;
- (c) That the award has been made by the arbitral tribunal provided for in the submission to arbitration, or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure;
- (d) That the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to *opposition*, *appel* or *pourvoi en cassation* (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending;
- (e) That the recognition or enforcement of the award is not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon.

#### Article 2

Even if the conditions laid down in Article 1 hereof are fulfilled, recognition and enforcement of the award shall be refused if the Court is satisfied—

- (a) That the award has been annulled in the country in which it was made;
- (b) That the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case; or that, being under a legal incapacity, he was not properly represented;
- (c) That the award does not deal with the differences contemplated by or falling within the terms of the submission to arbitration or that it contains decisions on matters beyond the scope of the submission to arbitration.

If the award has not covered all the questions submitted to the arbitral tribunal, the competent authority of the country where recognition or enforcement of the award is sought can, if it think fit, postpone such recognition or enforcement or grant it subject to such guarantee as that authority may decide.

#### Article 3

If the party against whom the award has been made proves that, under the law governing the arbitration procedure, there is a ground, other than the grounds referred to in Article 1 (a) and (c), and Article 2 (b) and (c), entitling him to contest the validity of the award in a Court of law, the Court may, if it thinks fit, either refuse recognition or enforcement of the award or adjourn the consideration thereof, giving such party a reasonable time within which to have the award annulled by the competent tribunal.

#### Article 4

The party relying upon an award or claiming its enforcement must supply, in particular:

- (1) The original award or a copy thereof duly authenticated, according to the requirements of the law of the country in which it was made;
- (2) Documentary or other evidence to prove that the award has become final, in the sense defined in Article 1 (d), in the country in which it was made;
- (3) When necessary, documentary or other evidence to prove that the conditions laid down in Article 1, paragraph 1 and paragraph 2 (a) and (c), have been fulfilled.

A translation of the award and of the other documents mentioned in this article into the official language of the country where the award is sought to be relied upon may be demanded. Such translation must be certified correct by a diplomatic or consular agent of the country to which the party who seeks to rely upon the award belongs or by a sworn translator of the country where the award is sought to be relied upon.

#### Article 5

The provisions of the above articles shall not deprive any interested party of the right of availing himself of an arbitral award in the manner

and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

#### Article 6

The present convention applies only to arbitral awards made after the coming into force of the Protocol on Arbitration Clauses, opened at Geneva on September 24th, 1923.

#### Article 7

The present convention, which will remain open to the signature of all the signatories of the Protocol of 1923 on Arbitration Clauses, shall be ratified.

It may be ratified only on behalf of those members of the League of Nations and non-member States on whose behalf the Protocol of 1923 shall have been ratified.

Ratifications shall be deposited as soon as possible with the Secretary-General of the League of Nations, who will notify such deposit to all the signatories.

#### Article 8

The present convention shall come into force 3 months after it shall have been ratified on behalf of 2 High Contracting Parties. Thereafter, it shall take effect, in the case of each High Contracting Party, 3 months after the deposit of the ratification on its behalf with the Secretary-General of the League of Nations.

#### Article 9

The present convention may be denounced on behalf of any member of the League or non-member State. Denunciation shall be notified in writing to the Secretary-General of the League of Nations, who will immediately send a copy thereof, certified to be in conformity with the notification, to all the other Contracting Parties, at the same time informing them of the date on which he received it.

The denunciation shall come into force only in respect of the High Contracting Party which shall have notified it, and one year after such notification shall have reached the Secretary-General of the League of Nations.

The denunciation of the Protocol on Arbitration Clauses shall entail, *ipso facto*, the denunciation of the present convention.

#### Article 10

The present convention does not apply to the colonies, protectorates, or territories under suzerainty or mandate of any High Contracting Party unless they are specially mentioned.

The application of this convention to one or more of such colonies, protectorates, or territories to which the Protocol on Arbitration Clauses, opened at Geneva on September 24th, 1923, applies, can be effected at any time by means of a declaration addressed to the Secretary-General of the League of Nations by one of the High Contracting Parties.

Such declaration shall take effect 3 months after the deposit thereof.

The High Contracting Parties can at any time denounce the convention for all or any of the colonies, protectorates, or territories referred to above. Article 9 hereof applies to such denunciation.

#### Article 11

A certified copy of the present convention shall be transmitted by the Secretary-General of the League of Nations to every member of the League of Nations and to every non-member State which signs the same.

## THE ARBITRATION AMENDMENT ACT 1938

1938, No. 6

### An Act to amend the Arbitration Act 1908

[1 September 1938]

**1. Short Title and commencement**—This Act may be cited as the Arbitration Amendment Act 1938, and shall be read together with and deemed part of the Arbitration Act 1908 (hereinafter referred to as the principal Act), and shall come into force on the 1st day of January 1939.

**2. Interpretation**—References in this Act and in the principal Act to an award shall be deemed to include references to an interim award.

Cf. Arbitration Act 1950, s. 14 (U.K.)

**3. Submission not to be discharged by death of party thereto**—(1) A submission shall not be discharged by the death of any party thereto, either as respects the deceased or any other party, but shall in such an event be enforceable by or against the personal representative of the deceased.

(2) The authority of an arbitrator shall not be revoked by the death of any party by whom he was appointed.

(3) Nothing in this section shall be taken to affect the operation of any enactment or rule of law by virtue of which any right of action is extinguished by the death of a person.

Cf. Arbitration Act 1950, s. 2 (U.K.)

Subs. (1) does not apply in statutory arbitrations; see s. 20 of this Act.

**4. Provisions in case of bankruptcy**—(1) Where it is provided by a term in a contract to which a bankrupt is a party that any differences arising thereout or in connection therewith shall be referred to arbitration, the said term shall, if the Official Assignee adopts the contract, be enforceable by or against him so far as relates to any such differences.

(2) Where a person who has been adjudged bankrupt had

before the commencement of the bankruptcy become a party to a submission and any matter to which the submission applies requires to be determined in connection with or for the purposes of the bankruptcy proceedings, then, if the case is one to which subsection (1) of this section does not apply, any other party to the submission or the Official Assignee may apply to the Court having jurisdiction in the bankruptcy proceedings for an order directing that the matter in question shall be referred to arbitration in accordance with the submission, and that Court may, if it is of opinion that, having regard to all the circumstances of the case, the matter ought to be determined by arbitration, make an order accordingly.

Cf. Arbitration Act 1950, s. 3 (U.K.)

This section does not apply in statutory arbitrations; see s. 20 of this Act.

**5. Power of Court where arbitrator is removed or appointment of arbitrator is revoked—**(1) Where an arbitrator (not being a sole arbitrator) or 2 or more arbitrators (not being all the arbitrators) or an umpire who has not entered on the reference is or are removed by the Court, the Court may, on the application of any party to the submission, appoint a person or persons to act as arbitrator or arbitrators or umpire in place of the person or persons so removed.

(2) Where the appointment of an arbitrator or arbitrators or umpire is revoked by leave of the Court, or a sole arbitrator or all the arbitrators or an umpire who has entered on the reference is or are removed by the Court, the Court may, on the application of any party to the submission, either—

- (a) Appoint a person to act as sole arbitrator in place of the person or persons removed; or
- (b) Order that the submission shall cease to have effect with respect to the dispute referred.

(3) A person appointed under this section by the Court as an arbitrator or umpire shall have the like power to act in the reference and to make an award as if he had been appointed in accordance with the terms of the submission.

(4) Where it is provided (whether by means of a provision in the submission or otherwise) that an award under a submission shall be a condition precedent to the bringing of an action with respect to any matter to which the submission applies, the Court, if it orders (whether under this section or under any other enactment) that the submission shall cease to

have effect as regards any particular dispute, may further order that the provision making an award a condition precedent to the bringing of an action shall also cease to have effect as regards that dispute.

Cf. Arbitration Act 1950, s. 25 (U.K.)

This section does not apply in statutory arbitrations; see s. 20 of this Act.

**6. Provisions on the appointment of 3 arbitrators—**

(1) Where a submission provides that the reference shall be to 3 arbitrators, one to be appointed by each party and the third to be appointed by the 2 appointed by the parties, the submission shall have effect as if it provided for the appointment of an umpire, and not for the appointment of a third arbitrator, by the 2 arbitrators appointed by the parties.

(2) Where a submission provides that the reference shall be to 3 arbitrators to be appointed otherwise than as mentioned in the last preceding subsection, the award of any 2 of the arbitrators shall be binding.

Cf. Arbitration Act 1950, s. 9 (U.K.)

**7. Provisions relating to umpires—**(1) *This subsection substituted a new clause for clause 2 of the Second Schedule to the principal Act.*

(2) *This subsection amended s. 6 (1) (c) of the principal Act.*

(3) At any time after the appointment of an umpire, however appointed, the Court may, on the application of any party to the reference and notwithstanding anything to the contrary in the submission, order that the umpire shall enter on the reference in lieu of the arbitrators and as if he were a sole arbitrator.

Cf. Arbitration Act 1950, s. 8 (3) (U.K.)

**8. Arbitrators and umpires to use due dispatch—**

(1) The Court may, on the application of any party to a reference, remove an arbitrator or umpire who fails to use all reasonable dispatch in entering on and proceeding with the reference and making an award.

(2) An arbitrator or umpire who is removed by the Court under this section shall not be entitled to receive any remuneration in respect of his services.

(3) Subject to the provisions of subsection (2) of section 11 of the principal Act and to anything to the contrary in the submission, an arbitrator or umpire shall have power to make an award at any time.

(4) For the purposes of this section the expression "proceeding with a reference" includes, in a case where 2 arbitrators are unable to agree, giving notice of that fact to the parties and to the umpire.

Cf. Arbitration Act 1950, s. 13 (1), (3) (U.K.)

9. *This section added clauses 10 and 11 to the Second Schedule to the principal Act.*

**10. Additional powers of Court—**(1) The Court shall have, for the purpose of and in relation to a reference, the same power of making orders in respect of any of the matters set out in the First Schedule to this Act as it has for the purpose of and in relation to an action or matter in the Court:

Provided that nothing in the foregoing provision shall be taken to prejudice any power which may be vested in an arbitrator or umpire of making orders with respect to any of the matters aforesaid.

(2) Where relief by way of interpleader is granted and it appears to the Court that the claims in question are matters to which a submission to which the claimants are parties applies, the Court may direct the issue between the claimants to be determined in accordance with the submission.

(3) Where an application is made to set aside an award the Court may order that any money made payable by the award shall be brought into Court or otherwise secured pending the determination of the application.

Cf. Arbitration Act 1950, ss. 5, 12 (6), 23 (3) (U.K.)

Subs. (2) does not apply in statutory arbitrations; see s. 20 of this Act.

**11. Statement of case by arbitrator or umpire—**(1) An arbitrator or umpire may, and shall if so directed by the Court, state—

(a) Any question of law arising in the course of the reference; or

(b) An award or any part of an award—  
in the form of a special case for the decision of the Court.

(2) A special case with respect to an interim award or with respect to a question of law arising in the course of a reference may be stated, or may be directed by the Court to be stated, notwithstanding that proceedings under the reference are still pending.

(3) A decision of the Court under this section shall be deemed to be a judgment of the Court within the meaning of

section 66 of the Judicature Act 1908 (which relates to the jurisdiction of the Court of Appeal to hear and determine appeals from any judgment of the Court), but no appeal shall lie from the decision of the Court on any case stated under paragraph (a) of subsection (1) of this section without the leave of the Court or of the Court of Appeal.

Cf. Arbitration Act 1950, s. 21 (U.K.)

As to the application of this section to applications under ss. 46–51 of the Patents Act 1953, see s. 53 (4) of that Act.

As to the application of this section to building societies' disputes, see s. 113 (2) of the Building Societies Act 1965.

**12. Entry of judgment in terms of award—**Where leave is given under section 13 of the principal Act to enforce an award in the same manner as a judgment or order, judgment may be entered in terms of the award.

Cf. Arbitration Act 1950, s. 26 (U.K.)

**13. Interest on awards—**A sum directed to be paid by an award shall, unless the award otherwise directs, carry interest as from the date of the award and at the same rate as a judgment debt.

Cf. Arbitration Act 1950, s. 20 (U.K.)

As to the rate of interest on judgment debts, see rule 305 of the Code of Civil Procedure.

**14. Provision as to costs—**(1) Any provision in a submission to the effect that the parties or any party thereto shall in any event pay the whole or any part of the costs of the reference or award shall be void; and the principal Act shall in the case of a submission containing any such provision have effect as if that provision were not contained therein:

Provided that nothing herein shall invalidate such a provision when it is part of an agreement to submit to arbitration a dispute which has arisen before the making of such agreement.

(2) If no provision is made by an award with respect to the costs of the reference, any party to the reference may within 14 days of the publication of the award, or such further time as the Court may direct, apply to the arbitrator for an order directing by and to whom such costs shall be paid, and thereupon the arbitrator shall, after hearing any party who may desire to be heard, amend his award by adding thereto

such directions as he may think proper with respect to the payment of the costs of the reference.

Cf. Arbitration Act 1950, s. 18 (3), (4) (U.K.)

Subs. (1) does not apply in statutory arbitrations; see s. 20 of this Act.

**15. Taxation of arbitrator's or umpire's fees—**(1) If in any case an arbitrator or umpire refuses to deliver his award except on payment of the fees demanded by him the Court may, on an application for the purpose, order that the arbitrator or umpire shall deliver the award to the applicant on payment into Court by the applicant of the fees demanded, and further that the fees demanded shall be taxed by the taxing officer and that out of the money paid into Court there shall be paid out to the arbitrator or umpire by way of fees such sum as may be found reasonable on taxation and that the balance of the money, if any, shall be paid out to the applicant.

(2) An application for the purposes of this section may be made by any party to the reference unless the fees demanded have been fixed by a written agreement between him and the arbitrator or umpire.

(3) A taxation of fees under this section may be reviewed in the same manner as a taxation of costs.

(4) The arbitrator or umpire shall be entitled to appear and be heard on any taxation or review of taxation under this section.

Cf. Arbitration Act 1950, s. 19 (U.K.)

See also s. 22 of the principal Act and s. 8 (2) of this Act.

**16. Power of Court to give relief where arbitrator is not impartial or dispute referred involves question of fraud—**(1) Where an agreement between any parties provides that disputes which may arise in the future between them shall be referred to an arbitrator named or designated in the agreement and after a dispute has arisen any party applies, on the ground that the arbitrator so named or designated is not or may not be impartial, for leave to revoke the submission or for an injunction to restrain any other party or the arbitrator from proceeding with the arbitration, it shall not be a ground for refusing the application that the said party at the time when he made the agreement knew, or ought to have known, that the arbitrator by reason of his relation towards any other party to the agreement or of his connection with the subject referred might not be capable of impartiality.

(2) Where an agreement between any parties provides that disputes which may arise in the future between them shall be referred and a dispute which so arises involves the question whether any such party has been guilty of fraud, the Court shall, so far as may be necessary to enable that question to be determined by the Court, have power to order that the agreement shall cease to have effect and power to give leave to revoke any submission made thereunder.

(3) In any case where by virtue of this section the Court has power to order that an agreement shall cease to have effect or to give leave to revoke a submission, the Court may refuse to stay any action brought in breach of the agreement.

Cf. Arbitration Act 1950, s. 24 (U.K.)

This section does not apply in statutory arbitrations; see s. 20 of this Act.

**17. This section amended s. 12 (1) and (2) of the principal Act.**

**18. Limitation of time for commencing arbitration proceedings—**(1), (2) *Repealed by s. 35 (2) of the Limitation Act 1950.*

(3), (4), (5) *See the reprint of the Mercantile Law Act 1908.*

(6) Where the terms of an agreement to refer future disputes to arbitration provide that any claims to which the agreement applies shall be barred unless notice to appoint an arbitrator is given or an arbitrator is appointed or some other step 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 opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may, on such terms, if any, as the justice of the case may require, but without prejudice to the foregoing provisions of this section, extend the time for such period as it thinks proper.

(7), (8) *Repealed by s. 35 (2) of the Limitation Act 1950.*

Cf. Arbitration Act 1950, s. 27 (U.K.)

This section does not apply in statutory arbitrations; see s. 20 of this Act.  
As to the application of the Limitation Act 1950 to arbitrations, see s. 29 of that Act.

**19. Saving for pending arbitrations—**The provisions of this Act shall not affect any arbitration which has been commenced within the meaning of section 18 of this Act

before the date on which this Act comes into operation, but shall apply to any arbitration so commenced after the said date under a submission made before the said date.

*Cf.* Arbitration Act 1950, s. 33 (U.K.)

**20. Application to statutory arbitrations**—This Act, except the provisions thereof set out in the Second Schedule to this Act shall apply in relation to every arbitration under any other Act passed before or after the commencement of this Act as if the arbitration were pursuant to a submission and as if that other Act were a submission, except in so far as this Act is inconsistent with that other Act or with any rules or procedure authorised or recognised thereby:

Provided that this Act shall not apply to any arbitration to which the principal Act does not apply, and no provision of this Act which expressly amends a provision of the principal Act shall apply to any arbitration to which that provision of the principal Act does not apply.

*Cf.* Arbitration Act 1950, s. 31 (U.K.)

*See also* s. 25 of the principal Act.

**21. Amendments of principal Act**—The principal Act is hereby amended in the manner indicated in the Third Schedule hereto.

## SCHEDULES

### FIRST SCHEDULE

Section 10

#### MATTERS IN RESPECT OF WHICH THE COURT MAY MAKE ORDERS

- (1) Security for costs.
- (2) Discovery of documents and interrogatories.
- (3) The giving of evidence by affidavit.
- (4) Examination on oath of any witness before an officer of the Court or any other person, and the issue of a commission or request for the examination of a witness out of the jurisdiction.
- (5) The preservation, interim custody, or sale of any goods which are the subject-matter of the reference.
- (6) Securing the amount in dispute in the reference.
- (7) The detention, preservation, or inspection of any property or thing which is the subject of the reference or as to which any question may arise therein, and authorising for any of the purposes aforesaid any persons to enter upon or into any land or building in the possession of any party to the reference, or authorising any samples to be taken or any observation to be made or experiment to be tried which may be necessary or expedient for the purpose of obtaining full information or evidence.
- (8) Interim injunctions or the appointment of a receiver.

### SECOND SCHEDULE

Section 20

#### PROVISIONS OF ACT WHICH DO NOT APPLY TO STATUTORY ARBITRATION

- Subsection (1) of section 3.
- Section 4.
- Section 5.
- Subsection (2) of section 10.
- Subsection (1) of section 14.
- Section 16.
- Section 18.

### THIRD SCHEDULE

Section 21

#### AMENDMENTS OF PRINCIPAL ACT

*The amendments specified in this Schedule have been incorporated in the reprint of the principal Act.*



## ANALYSIS

- |                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                                                                                                                                        |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>Title</p> <p>1. Short Title</p> <p>2. Interpretation</p> <p>3. Act to bind the Crown</p> <p>4. Registration of awards in Supreme Court</p> <p>5. Effect of registration of award</p> <p>6. Rules of Court as to registration and execution of awards</p> | <p>7. Taking of evidence for use in proceedings under Convention</p> <p>8. Power of Court to stay Court proceedings relating to proceedings under Convention</p> <p>9. Arbitration Act 1908 not to apply to proceedings under Convention</p> <p>10. Status, immunities, and privileges of Centre and staff</p> <p>11. Contributions to expenses of Centre Schedule</p> |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

1979, No. 39

An Act to implement an international Convention on the settlement of investment disputes between States and nationals of other States [12 November 1979]

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:

1. **Short Title**—This Act may be cited as the Arbitration (International Investment Disputes) Act 1979.

2. **Interpretation**—In this Act, unless the context otherwise requires,—

“Award” means an award made pursuant to the Convention; and includes—

- (a) Any decision made pursuant to the Convention that interprets, revises, or annuls an award; and
- (b) Any decision as to costs that, pursuant to the Convention, is to form part of an award:

“Centre” means the International Centre for Settlement of Investment Disputes established pursuant to the Convention:

“Convention” means the Convention on the Settlement of Investment Disputes between States and Nationals of Other States that was opened for signature in Washington on the 18th day of March 1965, a copy of the English text of which is set out in the Schedule to this Act.

3. **Act to bind the Crown**—(1) Subject to subsection (2) of this section, this Act shall bind the Crown.

(2) Nothing in this Act shall make an award enforceable against the Crown in a manner in which a judgment would not be enforceable against the Crown.

4. **Registration of awards in Supreme Court**—(1) Subject to subsection (3) of this section, a person seeking recognition or enforcement of an award shall be entitled to have the award registered in the Supreme Court (whether or not the pecuniary obligations imposed by the award are expressed in New Zealand currency).

(2) In addition to the pecuniary obligations imposed by the award, the award shall be registered for the reasonable costs of and incidental to registration.

(3) If at the date of the application for registration the pecuniary obligations imposed by the award have been—

- (a) Partly satisfied, the award shall be registered only in respect of the balance:
- (b) Wholly satisfied, the award shall not be registered.

5. **Effect of registration of award**—(1) Subject to subsection (2) of this section, an award registered in the Supreme Court shall, in respect of the pecuniary obligations that it imposes, be of the same force and effect for the purposes of execution as if it were a judgment of the Supreme Court given when the award was rendered pursuant to the Convention and entered on the date of registration under this Act; and, in relation to those pecuniary obligations,—

- (a) Proceedings may be taken on the award; and
- (b) The sum for which the award is registered shall carry interest; and



- (c) The Supreme Court shall have the same control over the execution of the award—  
as if the award were such a judgment of the Supreme Court.
- (2) The Supreme Court may stay execution of an award registered in the Supreme Court if—
- (a) Enforcement of the award has been stayed (whether provisionally or otherwise), or annulled, pursuant to the Convention; or
  - (b) An application has been made pursuant to the Convention which, if granted, might result in a stay of enforcement of the award; or
  - (c) It is contrary to the law of New Zealand.

6. Rules of Court as to registration and execution of awards—The power to make rules of Court under section 3 of the Judicature Amendment Act 1930 shall include power to make rules for all or any of the following purposes:

- (a) Prescribing the procedure for applying for registration of an award under this Act; and, in particular, requiring an applicant to give prior notice of his intention to other parties;
- (b) Prescribing the matters to be proved on the application and the manner of proof; and, in particular, requiring the applicant to furnish a copy of the award certified pursuant to the Convention;
- (c) Providing for the service of notice of registration of the award by the applicant on other parties;
- (d) Prescribing, for the purposes of issuing execution of an award expressed in a currency other than that of New Zealand, the manner of conversion into New Zealand currency of the pecuniary obligations imposed by the award and the evidence required in respect thereof.

7. Taking of evidence for use in proceedings under Convention—Sections 48 to 48F of the Evidence Act 1908 (as substituted by section 4 of the Evidence Amendment Act 1962) shall apply, as far as they are applicable and with the necessary modifications, in respect of arbitration proceedings pursuant to the Convention as if—

- (a) Arbitration proceedings pursuant to the Convention were civil proceedings;

- (b) An arbitral tribunal constituted pursuant to the Convention were included in the definition of the term "overseas Court" in section 48;
- (c) The Secretary-General of the Centre were included in the definition of the term "overseas representative" in section 48;
- (d) Subsection (3) of section 48c were omitted, and the following subsection substituted:

(86) 1979 p. 620

8. 6 (that part before paragraph (a)). AMDD (as from 1/1/86)  
by s. 11(2) of 1985 No. 112 (Judicature Amendment Act (No. 2)  
1985) to read:—  
"6. Rules of Court as to registration and execution of  
awards—The power to make rules of Court under section 51C  
of the Judicature Act 1908 shall include power to make rules for  
all or any of the following purposes:"

certified."

8. Power of Court to stay Court proceedings relating to proceedings under Convention—(1) If any party to proceedings pursuant to the Convention (or any person claiming through or under him) commences any legal proceedings in any Court against any other party to the proceedings pursuant to the Convention (or any person claiming through or under him) in respect of any matter to which the proceedings pursuant to the Convention relate, any party to the legal proceedings may at any time apply to the Court to stay the legal proceedings; and the Court may, if satisfied that there is no sufficient reason why the matter should not be dealt with under the Convention, make an order staying the legal proceedings.

(2) The refusal by any Magistrate's Court of an application for a stay of proceedings under this section in any action under the Magistrates' Courts Act 1947 shall not affect the right of the defendant in the action to have the action transferred to the Supreme Court under section 43 (1) of that Act or, as the case may require, to apply under section 43 (2) of that Act for an order that the action be so transferred, and in any such case the time prescribed under that Act for giving notice under the said section 43 shall not begin to run until the stay of proceedings is refused.

9. Arbitration Act 1908 not to apply to proceedings under Convention—Nothing in the Arbitration Act 1908 shall apply in respect of proceedings pursuant to the Convention.

10. Status, immunities, and privileges of Centre and staff—  
(1) Articles 18 and 20 to 24 of the Convention shall have the force of law in New Zealand.

(2) For the purposes of Articles 20 and 21 of the Convention as given the force of law by this section, a statement to the effect that the Centre has waived an immunity in the circumstances specified in the statement, being a statement certified by the Secretary-General of the Centre (or by the person acting as Secretary-General), shall be conclusive evidence.

11. Contributions to expenses of Centre—The Minister of Finance may discharge any obligations of the Government of New Zealand arising under Article 17 of the Convention (which obliges the Contracting States to meet any deficit of the Centre), and any sums required for that purpose shall be paid out of money appropriated by Parliament for the purpose.

## SCHEDULE

## TEXT OF CONVENTION

## CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES

## PREAMBLE

The Contracting States

*Considering* the need for international co-operation for economic development, and the role of private international investment therein;

*Bearing in mind* the possibility that from time to time disputes may arise in connection with such investment between Contracting States and nationals of other Contracting States;

*Recognizing* that while such disputes would usually be subject to national legal processes, international methods of settlement may be appropriate in certain cases;

*Attaching particular importance* to the availability of facilities for international conciliation or arbitration to which Contracting States and nationals of other Contracting States may submit such disputes if they so desire;

*Desiring* to establish such facilities under the auspices of the International Bank for Reconstruction and Development;

*Recognizing* that mutual consent by the parties to submit such disputes to conciliation or to arbitration through such facilities constitutes a binding agreement which requires in particular that due consideration be given to any recommendation of conciliators, and that any arbitral award be complied with; and

*Declaring* that no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration,

*Have agreed* as follows:

## CHAPTER I

## INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

## SECTION 1

## Establishment and Organization

## ARTICLE 1

(1) There is hereby established the International Centre for Settlement of Investment Disputes (hereinafter called the Centre).

(2) The purpose of the Centre shall be to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention.

## SCHEDULE—continued

## ARTICLE 2

The seat of the Centre shall be at the principal office of the International Bank for Reconstruction and Development (hereinafter called the Bank). The seat may be moved to another place by decision of the Administrative Council adopted by a majority of two-thirds of its members.

## ARTICLE 3

The Centre shall have an Administrative Council and a Secretariat and shall maintain a Panel of Conciliators and a Panel of Arbitrators.

## SECTION 2

## The Administrative Council

## ARTICLE 4

(1) The Administrative Council shall be composed of one representative of each Contracting State. An alternate may act as representative in case of his principal's absence from a meeting or inability to act.

(2) In the absence of a contrary designation, each governor and alternate governor of the Bank appointed by a Contracting State shall be *ex officio* its representative and its alternate respectively.

## ARTICLE 5

The President of the Bank shall be *ex officio* Chairman of the Administrative Council (hereinafter called the Chairman) but shall have no vote. During his absence or inability to act and during any vacancy in the office of President of the Bank, the person for the time being acting as President shall act as Chairman of the Administrative Council.

## ARTICLE 6

(1) Without prejudice to the powers and functions vested in it by other provisions of this Convention, the Administrative Council shall

- (a) adopt the administrative and financial regulations of the Centre;
- (b) adopt the rules of procedure for the institution of conciliation and arbitration proceedings;
- (c) adopt the rules of procedure for conciliation and arbitration proceedings (hereinafter called the Conciliation Rules and the Arbitration Rules);
- (d) approve arrangements with the Bank for the use of the Bank's administrative facilities and services;
- (e) determine the conditions of service of the Secretary-General and of any Deputy Secretary-General;
- (f) adopt the annual budget of revenues and expenditures of the Centre;

## SCHEDULE—continued

(g) approve the annual report on the operation of the Centre. The decisions referred to in sub-paragraphs (a), (b), (c) and (f) above shall be adopted by a majority of two-thirds of the members of the Administrative Council.

(2) The Administrative Council may appoint such committees as it considers necessary.

(3) The Administrative Council shall also exercise such other powers and perform such other functions as it shall determine to be necessary for the implementation of the provisions of this Convention.

## ARTICLE 7

(1) The Administrative Council shall hold an annual meeting and such other meetings as may be determined by the Council, or convened by the Chairman, or convened by the Secretary-General at the request of not less than five members of the Council.

(2) Each member of the Administrative Council shall have one vote and, except as otherwise herein provided, all matters before the Council shall be decided by a majority of the votes cast.

(3) A quorum for any meeting of the Administrative Council shall be a majority of its members.

(4) The Administrative Council may establish, by a majority of two-thirds of its members, a procedure whereby the Chairman may seek a vote of the Council without convening a meeting of the Council. The vote shall be considered valid only if the majority of the members of the Council cast their votes within the time limit fixed by the said procedure.

## ARTICLE 8

Members of the Administrative Council and the Chairman shall serve without remuneration from the Centre.

## SECTION 3

## The Secretariat

## ARTICLE 9

The Secretariat shall consist of a Secretary-General, one or more Deputy Secretaries-General and staff.

## ARTICLE 10

(1) The Secretary-General and any Deputy Secretary-General shall be elected by the Administrative Council by a majority of two-thirds of its members upon the nomination of the Chairman for a term of service not exceeding six years and shall be eligible for re-election. After consulting the members of the Administrative Council, the Chairman shall propose one or more candidates for each such office.

(2) The offices of Secretary-General and Deputy Secretary-General shall be incompatible with the exercise of any political function. Neither the Secretary-General nor any Deputy Secretary-General may hold any other employment or engage in any other occupation except with the approval of the Administrative Council.

## SCHEDULE—continued

(3) During the Secretary-General's absence or inability to act, and during any vacancy of the office of Secretary-General, the Deputy Secretary-General shall act as Secretary-General. If there shall be more than one Deputy Secretary-General, the Administrative Council shall determine in advance the order in which they shall act as Secretary-General.

## ARTICLE 11

The Secretary-General shall be the legal representative and the principal officer of the Centre and shall be responsible for its administration, including the appointment of staff, in accordance with the provisions of this Convention and the rules adopted by the Administrative Council. He shall perform the function of registrar and shall have the power to authenticate arbitral awards rendered pursuant to this Convention, and to certify copies thereof.

## SECTION 4

## The Panels

## ARTICLE 12

The Panel of Conciliators and the Panel of Arbitrators shall each consist of qualified persons, designated as hereinafter provided, who are willing to serve thereon.

## ARTICLE 13

(1) Each Contracting State may designate to each Panel four persons who may but need not be its nationals.

(2) The Chairman may designate ten persons to each Panel. The persons so designated to a Panel shall each have a different nationality.

## ARTICLE 14

(1) Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.

(2) The Chairman, in designating persons to serve on the Panels, shall in addition pay due regard to the importance of assuring representation on the Panels of the principal legal systems of the world and of the main forms of economic activity.

## ARTICLE 15

(1) Panel members shall serve for renewable periods of six years.

(2) In case of death or resignation of a member of a Panel, the authority which designated the member shall have the right to designate another person to serve for the remainder of that member's term.

(3) Panel members shall continue in office until their successors have been designated.

## SCHEDULE—continued

## ARTICLE 16

(1) A person may serve on both Panels.

(2) If a person shall have been designated to serve on the same Panel by more than one Contracting State, or by one or more Contracting States and the Chairman, he shall be deemed to have been designated by the authority which first designated him or, if one such authority is the State of which he is a national, by that State.

(3) All designations shall be notified to the Secretary-General and shall take effect from the date on which the notification is received.

## SECTION 5

## Financing the Centre

## ARTICLE 17

If the expenditure of the Centre cannot be met out of charges for the use of its facilities, or out of other receipts, the excess shall be borne by Contracting States which are members of the Bank in proportion to their respective subscriptions to the capital stock of the Bank, and by Contracting States which are not members of the Bank in accordance with rules adopted by the Administrative Council.

## SECTION 6

## Status, Immunities and Privileges

## ARTICLE 18

The Centre shall have full international legal personality. The legal capacity of the Centre shall include the capacity

- (a) to contract;
- (b) to acquire and dispose of movable and immovable property;
- (c) to institute legal proceedings.

## ARTICLE 19

To enable the Centre to fulfil its functions, it shall enjoy in the territories of each Contracting State the immunities and privileges set forth in this Section.

## ARTICLE 20

The Centre, its property and assets shall enjoy immunity from all legal process, except when the Centre waives this immunity.

## ARTICLE 21

The Chairman, the members of the Administrative Council, persons acting as conciliators or arbitrators or members of a Committee appointed pursuant to paragraph (3) of Article 52, and the officers and employees of the Secretariat

- (a) shall enjoy immunity from legal process with respect to acts performed by them in their exercise of their functions, except when the Centre waives this immunity;

## SCHEDULE—continued

- (b) not being local nationals, shall enjoy the same immunities from immigration restrictions, alien registration requirements and national service obligations, the same facilities as regards exchange restrictions and the same treatment in respect of travelling facilities as are accorded by Contracting States to the representatives, officials and employees of comparable rank of other Contracting States.

## ARTICLE 22

The provisions of Article 21 shall apply to persons appearing in proceedings under this Convention as parties, agents, counsel, advocates, witnesses or experts; provided, however, that subparagraph (b) thereof shall apply only in connection with their travel to and from, and their stay at, the place where the proceedings are held.

## ARTICLE 23

- (1) The archives of the Centre shall be inviolable, wherever they may be.

(2) With regard to its official communications, the Centre shall be accorded by each Contracting State treatment not less favourable than that accorded to other international organizations.

## ARTICLE 24

(1) The Centre, its assets, property and income, and its operations and transactions authorized by this Convention shall be exempt from all taxation and customs duties. The Centre shall also be exempt from liability for the collection or payment of any taxes or customs duties.

(2) Except in the case of local nationals, no tax shall be levied on or in respect of expense allowances paid by the Centre to the Chairman or members of the Administrative Council, or on or in respect of salaries, expense allowances or other emoluments paid by the Centre to officials or employees of the Secretariat.

(3) No tax shall be levied on or in respect of fees or expense allowances received by persons acting as conciliators, or arbitrators, or members of a Committee appointed pursuant to paragraph (3) of Article 52, in proceedings under this Convention, if the sole jurisdictional basis for such tax is the location of the Centre or the place where such proceedings are conducted or the place where such fees or allowances are paid.

## CHAPTER II

## JURISDICTION OF THE CENTRE

## ARTICLE 25

(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another

## SCHEDULE—continued

Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

(2) "National of another Contracting State" means:

(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

(3) Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required.

(4) Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1).

## ARTICLE 26

Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.

## ARTICLE 27

(1) No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.

(2) Diplomatic protection, for the purposes of paragraph (1), shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.

## SCHEDULE—continued

## CHAPTER III

## CONCILIATION

## SECTION 1

## Request for Conciliation

## ARTICLE 28

(1) Any Contracting State or any national of a Contracting State wishing to institute conciliation proceedings shall address a request to that effect in writing to the Secretary-General who shall send a copy of the request to the other party.

(2) The request shall contain information concerning the issues in dispute, the identity of the parties and their consent to conciliation in accordance with the rules of procedure for the institution of conciliation and arbitration proceedings.

(3) The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties of registration or refusal to register.

## SECTION 2

## Constitution of the Conciliation Commission

## ARTICLE 29

(1) The Conciliation Commission (hereinafter called the Commission) shall be constituted as soon as possible after registration of a request pursuant to Article 28.

(2) (a) The Commission shall consist of a sole conciliator or any uneven number of conciliators appointed as the parties shall agree.

(b) Where the parties do not agree upon the number of conciliators and the method of their appointment, the Commission shall consist of three conciliators, one conciliator appointed by each party and the third, who shall be the president of the Commission, appointed by agreement of the parties.

## ARTICLE 30

If the Commission shall not have been constituted within 90 days after notice of registration of the request has been dispatched by the Secretary-General in accordance with paragraph (3) of Article 28, or such other period as the parties may agree, the Chairman shall, at the request of either party and after consulting both parties as far as possible, appoint the conciliator or conciliators not yet appointed.

## ARTICLE 31

(1) Conciliators may be appointed from outside the Panel of Conciliators, except in the case of appointments by the Chairman pursuant to Article 30.

(2) Conciliators appointed from outside the Panel of Conciliators shall possess the qualities stated in paragraph (1) of Article 14.

## SCHEDULE—continued

## SECTION 3

## Conciliation Proceedings

## ARTICLE 32

(1) The Commission shall be the judge of its own competence.

(2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Commission, shall be considered by the Commission which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

## ARTICLE 33

Any conciliation proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Conciliation Rules in effect on the date on which the parties consented to conciliation. If any question of procedure arises which is not covered by this Section or the Conciliation Rules or any rules agreed by the parties, the Commission shall decide the question.

## ARTICLE 34

(1) It shall be the duty of the Commission to clarify the issues in dispute between the parties and to endeavour to bring about agreement between them upon mutually acceptable terms. To that end, the Commission may at any stage of the proceedings and from time to time recommend terms of settlement to the parties. The parties shall cooperate in good faith with the Commission in order to enable the Commission to carry out its functions, and shall give their most serious consideration to its recommendations.

(2) If the parties reach agreement, the Commission shall draw up a report noting the issues in dispute and recording that the parties have reached agreement. If, at any stage of the proceedings, it appears to the Commission that there is no likelihood of agreement between the parties, it shall close the proceedings and shall draw up a report noting the submission of the dispute and recording the failure of the parties to reach agreement. If one party fails to appear or participate in the proceedings, the Commission shall close the proceedings and shall draw up a report noting that party's failure to appear or participate.

## ARTICLE 35

Except as the parties to the dispute shall otherwise agree, neither party to a conciliation proceeding shall be entitled in any other proceeding, whether before arbitrators or in a court of law or otherwise, to invoke or rely on any views expressed or statements or admissions or offers of settlement made by the other party in the conciliation proceedings, or the report or any recommendations made by the Commission.

## SCHEDULE—continued

## CHAPTER IV

## ARBITRATION

## SECTION 1

## Request for Arbitration

## ARTICLE 36

(1) Any Contracting State or any national of a Contracting State wishing to institute arbitration proceedings shall address a request to that effect in writing to the Secretary-General who shall send a copy of the request to the other party.

(2) The request shall contain information concerning the issues in dispute, the identity of the parties and their consent to arbitration in accordance with the rules of procedure for the institution of conciliation and arbitration proceedings.

(3) The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties of registration or refusal to register.

## SECTION 2

## Constitution of the Tribunal

## ARTICLE 37

(1) The Arbitral Tribunal (hereinafter called the Tribunal) shall be constituted as soon as possible after registration of a request pursuant to Article 36.

(2) (a) The Tribunal shall consist of a sole arbitrator or any uneven number of arbitrators appointed as the parties shall agree.

(b) Where the parties do not agree upon the number of arbitrators and the method of their appointment, the Tribunal shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the president of the Tribunal, appointed by agreement of the parties.

## ARTICLE 38

If the Tribunal shall not have been constituted within 90 days after notice of registration of the request has been dispatched by the Secretary-General in accordance with paragraph (3) of Article 36, or such other period as the parties may agree, the Chairman shall, at the request of either party and after consulting both parties as far as possible, appoint the arbitrator or arbitrators not yet appointed. Arbitrators appointed by the Chairman pursuant to this Article shall not be nationals of the Contracting State party to the dispute or of the Contracting State whose national is a party to the dispute.

## SCHEDULE—continued

## ARTICLE 39

The majority of the arbitrators shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute; provided, however, that the foregoing provisions of this Article shall not apply if the sole arbitrator or each individual member of the Tribunal has been appointed by agreement of the parties.

## ARTICLE 40

(1) Arbitrators may be appointed from outside the Panel of Arbitrators, except in the case of appointments by the Chairman pursuant to Article 38.

(2) Arbitrators appointed from outside the Panel of Arbitrators shall possess the qualities stated in paragraph (1) of Article 14.

## SECTION 3

## Powers and Functions of the Tribunal

## ARTICLE 41

(1) The Tribunal shall be the judge of its own competence.

(2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

## ARTICLE 42

(1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

(2) The Tribunal may not bring in a finding of *non liquet* on the ground of silence or obscurity of the law.

(3) The provisions of paragraphs (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute *ex aequo et bono* if the parties so agree.

## ARTICLE 43

Except as the parties otherwise agree, the Tribunal may, if it deems it necessary at any stage of the proceedings,

- (a) call upon the parties to produce documents or other evidence and
- (b) visit the scene connected with the dispute, and conduct such enquiries there as it may deem appropriate.

## ARTICLE 44

Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise

## SCHEDULE—continued

agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.

## ARTICLE 45

(1) Failure of a party to appear or to present his case shall not be deemed an admission of the other party's assertions.

(2) If a party fails to appear or to present his case at any stage of the proceedings the other party may request the Tribunal to deal with the questions submitted to it and to render an award. Before rendering an award, the Tribunal shall notify, and grant a period of grace to, the party failing to appear or to present its case, unless it is satisfied that that party does not intend to do so.

## ARTICLE 46

Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counter-claims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.

## ARTICLE 47

Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.

## SECTION 4

## The Award

## ARTICLE 48

(1) The Tribunal shall decide questions by a majority of the votes of all its members.

(2) The award of the Tribunal shall be in writing and shall be signed by the members of the Tribunal who voted for it.

(3) The award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based.

(4) Any member of the Tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent.

(5) The Centre shall not publish the award without the consent of the parties.

## ARTICLE 49

(1) The Secretary-General shall promptly dispatch certified copies of the award to the parties. The award shall be deemed to have been rendered on the date on which the certified copies were dispatched.

## SCHEDULE—continued

(2) The Tribunal upon the request of a party made within 45 days after the date on which the award was rendered may after notice to the other party decide any question which it had omitted to decide in the award, and shall rectify any clerical, arithmetical or similar error in the award. Its decision shall become part of the award and shall be notified to the parties in the same manner as the award. The periods of time provided for under paragraph (2) of Article 51 and paragraph (2) of Article 52 shall run from the date on which the decision was rendered.

## SECTION 5

## Interpretation, Revision and Annulment of the Award

## ARTICLE 50

(1) If any dispute shall arise between the parties as to the meaning or scope of an award, either party may request interpretation of the award by an application in writing addressed to the Secretary-General.

(2) The request shall, if possible, be submitted to the Tribunal which rendered the award. If this shall not be possible, a new Tribunal shall be constituted in accordance with Section 2 of this Chapter. The Tribunal may, if it considers that the circumstances so require, stay enforcement of the award pending its decision.

## ARTICLE 51

(1) Either party may request revision of the award by an application in writing addressed to the Secretary-General on the ground of discovery of some fact of such a nature as decisively to affect the award, provided that when the award was rendered that fact was unknown to the Tribunal and to the applicant and that the applicant's ignorance of that fact was not due to negligence.

(2) The application shall be made within 90 days after the discovery of such fact and in any event within three years after the date on which the award was rendered.

(3) The request shall, if possible, be submitted to the Tribunal which rendered the award. If this shall not be possible, a new Tribunal shall be constituted in accordance with Section 2 of this Chapter.

(4) The Tribunal may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Tribunal rules on such request.

## ARTICLE 52

(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:

- (a) that the Tribunal was not properly constituted;
- (b) that the Tribunal has manifestly exceeded its powers;



## SCHEDULE—continued

- (c) that there was corruption on the part of a member of the Tribunal;
- (d) that there has been a serious departure from a fundamental rule of procedure; or
- (e) that the award has failed to state the reasons on which it is based.

(2) The application shall be made within 120 days after the date on which the award was rendered except that when annulment is requested on the ground of corruption such application shall be made within 120 days after discovery of the corruption and in any event within three years after the date on which the award was rendered.

(3) On receipt of the request the Chairman shall forthwith appoint from the Panel of Arbitrators an *ad hoc* Committee of three persons. None of the members of the Committee shall have been a member of the Tribunal which rendered the award, shall be of the same nationality as any such member, shall be a national of the State party to the dispute or of the State whose national is a party to the dispute, shall have been designated to the Panel of Arbitrators by either of those States, or shall have acted as a conciliator in the same dispute. The Committee shall have the authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1).

(4) The provisions of Articles 41–45, 48, 49, 53 and 54, and of Chapters VI and VII shall apply *mutatis mutandis* to proceedings before the Committee.

(5) The Committee may, if it considers that circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Committee rules on such request.

(6) If the award is annulled the dispute shall, at the request of either party, be submitted to a new Tribunal constituted in accordance with Section 2 of this Chapter.

## SECTION 6

## Recognition and Enforcement of the Award

## ARTICLE 53

(1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.

(2) For the purposes of this Section, "award" shall include any decision interpreting, revising or annulling such award pursuant to Articles 50, 51 or 52.

## ARTICLE 54

(1) Each Contracting State shall recognise an award rendered pursuant to this Convention as binding and enforce the pecuniary

## SCHEDULE—continued

obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.

(2) A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.

(3) Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.

## ARTICLE 55

Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.

## CHAPTER V

## REPLACEMENT AND DISQUALIFICATION OF CONCILIATORS AND ARBITRATORS

## ARTICLE 56

(1) After a Commission or a Tribunal has been constituted and proceedings have begun, its composition shall remain unchanged; provided, however, that if a conciliator or an arbitrator should die, become incapacitated, or resign, the resulting vacancy shall be filled in accordance with the provisions of Section 2 of Chapter III or Section 2 of Chapter IV.

(2) A member of the Commission or Tribunal shall continue to serve in that capacity notwithstanding that he shall have ceased to be a member of the Panel.

(3) If a conciliator or arbitrator appointed by a party shall have resigned without the consent of the Commission or Tribunal of which he was a member, the Chairman shall appoint a person from the appropriate Panel to fill the resulting vacancy.

## ARTICLE 57

A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14. A party to arbitration proceedings may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV.

## SCHEDULE—continued

## ARTICLE 58

The decision on any proposal to disqualify a conciliator or arbitrator shall be taken by the other members of the Commission or Tribunal as the case may be, provided that where those members are equally divided, or in the case of a proposal to disqualify a sole conciliator or arbitrator, or a majority of the conciliators or arbitrators, the Chairman shall take that decision. If it is decided that the proposal is well-founded the conciliator or arbitrator to whom the decision relates shall be replaced in accordance with the provisions of Section 2 of Chapter III or Section 2 of Chapter IV.

## CHAPTER VI

## COST OF PROCEEDINGS

## ARTICLE 59

The charges payable by the parties for the use of the facilities of the Centre shall be determined by the Secretary-General in accordance with the regulations adopted by the Administrative Council.

## ARTICLE 60

(1) Each Commission and each Tribunal shall determine the fees and expenses of its members within limits established from time to time by the Administrative Council and after consultation with the Secretary-General.

(2) Nothing in paragraph (1) of this Article shall preclude the parties from agreeing in advance with the Commission or Tribunal concerned upon the fees and expenses of its members.

## ARTICLE 61

(1) In the case of conciliation proceedings the fees and expenses of members of the Commission as well as the charges for the use of the facilities of the Centre, shall be borne equally by the parties. Each party shall bear any other expenses it incurs in connection with the proceedings.

(2) In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

## CHAPTER VII

## PLACE OF PROCEEDINGS

## ARTICLE 62

Conciliation and arbitration proceedings shall be held at the seat of the Centre except as hereinafter provided.

## SCHEDULE—continued

## ARTICLE 63

Conciliation and arbitration proceedings may be held, if the parties so agree,

- (a) at the seat of the Permanent Court of Arbitration or of any other appropriate institution, whether private or public, with which the Centre may make arrangements for that purpose; or
- (b) at any other place approved by the Commission or Tribunal after consultation with the Secretary-General.

## CHAPTER VIII

## DISPUTES BETWEEN CONTRACTING STATES

## ARTICLE 64

Any dispute arising between Contracting States concerning the interpretation or application of this Convention which is not settled by negotiation shall be referred to the International Court of Justice by the application of any party to such dispute, unless the States concerned agree to another method of settlement.

## CHAPTER IX

## AMENDMENT

## ARTICLE 65

Any Contracting State may propose amendment of this Convention. The text of a proposed amendment shall be communicated to the Secretary-General not less than 90 days prior to the meeting of the Administrative Council at which such amendment is to be considered and shall forthwith be transmitted by him to all the members of the Administrative Council.

## ARTICLE 66

(1) If the Administrative Council shall so decide by a majority of two-thirds of its members, the proposed amendment shall be circulated to all Contracting States for ratification, acceptance or approval. Each amendment shall enter into force 30 days after dispatch by the depositary of this Convention of a notification to Contracting States that all Contracting States have ratified, accepted or approved the amendment.

(2) No amendment shall affect the rights and obligations under this Convention of any Contracting State or of any of its constituent subdivisions or agencies, or of any national of such State arising out of consent to the jurisdiction of the Centre given before the date of entry into force of the amendment.

## SCHEDULE—continued

## CHAPTER X

## FINAL PROVISIONS

## ARTICLE 67

This Convention shall be open for signature on behalf of States members of the Bank. It shall also be open for signature on behalf of any other State which is a party to the Statute of the International Court of Justice and which the Administrative Council, by a vote of two-thirds of its members, shall have invited to sign the Convention.

## ARTICLE 68

(1) This Convention shall be subject to ratification, acceptance or approval by the signatory States in accordance with their respective constitutional procedures.

(2) This Convention shall enter into force 30 days after the date of deposit of the twentieth instrument of ratification, acceptance or approval. It shall enter into force for each State which subsequently deposits its instrument of ratification, acceptance or approval 30 days after the date of such deposit.

## ARTICLE 69

Each Contracting State shall take such legislative or other measures as may be necessary for making the provisions of this Convention effective in its territories.

## ARTICLE 70

This Convention shall apply to all territories for whose international relations a Contracting State is responsible, except those which are excluded by such State by written notice to the depositary of this Convention either at the time of ratification, acceptance or approval or subsequently.

## ARTICLE 71

Any Contracting State may denounce this Convention by written notice to the depositary of this Convention. The denunciation shall take effect six months after receipt of such notice.

## ARTICLE 72

Notice by a Contracting State pursuant to Article 70 or 71 shall not affect the rights or obligations under this Convention of that State or of any of its constituent subdivisions or agencies or of any national of that State arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary.

## SCHEDULE—continued

## ARTICLE 73

Instruments of ratification, acceptance or approval of this Convention and of amendments thereto shall be deposited with the Bank which shall act as the depositary of this Convention. The depositary shall transmit certified copies of this Convention to States members of the Bank and to any other State invited to sign the Convention.

## ARTICLE 74

The depositary shall register this Convention with the Secretariat of the United Nations in accordance with Article 102 of the Charter of the United Nations and the Regulations thereunder adopted by the General Assembly.

## ARTICLE 75

The depositary shall notify all signatory States of the following:

- (a) signatures in accordance with Article 67;
- (b) deposits of instruments of ratification, acceptance and approval in accordance with Article 73;
- (c) the date on which this Convention enters into force in accordance with Article 68;
- (d) exclusions from territorial application pursuant to Article 70;
- (e) the date on which any amendment of this Convention enters into force in accordance with Article 66; and
- (f) denunciations in accordance with Article 71.

DONE at Washington in the English, French and Spanish languages, all three texts being equally authentic, in a single copy which shall remain deposited in the archives of the International Bank for Reconstruction and Development, which has indicated by its signature below its agreement to fulfil the functions with which it is charged under this Convention.

(Here follow the signatures)

This Act is administered in the Department of Justice.



## ANALYSIS

Title	9. Reciprocal Enforcement of Judgments Act 1934 not to affect enforcement under this Act
1. Short Title and commencement	10. Arbitration Clauses (Protocol) and the Arbitration (Foreign Awards) Act 1933 not to apply to Convention awards enforceable under this Act
2. Interpretation	11. Application of Act
3. Act to bind the Crown	12. Orders in Council and certificates declaring countries to be parties to Convention
4. Power of Court to stay Court proceedings in respect of matters subject to an arbitration agreement	13. Convention awards to be unenforceable in New Zealand if no reciprocity
5. Enforcement of foreign arbitral awards	14. Repeal Schedule
6. Evidence	
7. Refusal of enforcement	
8. Enforcement of Convention awards under other enactments	

## 1982, No. 21

**An Act to implement an international Convention on the recognition and enforcement of foreign arbitral awards**  
[7 October 1982]

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:

**1. Short Title and commencement—**(1) This Act may be cited as the Arbitration (Foreign Agreements and Awards) Act 1982.

(2) This Act shall come into force on the 1st day of January 1983.

**2. Interpretation—**In this Act, unless the context otherwise requires,—

“Arbitration agreement” means an agreement in writing of the kind to which Article II of the Convention relates:

"Convention" means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted at New York by the United Nations Conference on International Commercial Arbitration on the 10th day of June 1958, a copy of the English text of which is set out in the Schedule to this Act:

"Convention award" means an arbitral award to which the Convention applies made pursuant to an arbitration agreement in a country (other than New Zealand) which is a party to the Convention.

**3. Act to bind the Crown—**(1) Subject to subsection (2) of this section, this Act shall bind the Crown.

(2) Nothing in this Act shall make a Convention award enforceable against the Crown in a manner in which a judgment would not be enforceable against the Crown.

Cf. 1979, No. 39, s. 3

**4. Power of Court to stay Court proceedings in respect of matters subject to an arbitration agreement—**(1) If any party to an arbitration agreement to which this section applies (or any person claiming through or under that person) commences any legal proceedings in any Court against any other party to that arbitration agreement (or any person claiming through or under that other party) in respect of any matter in dispute between the parties which the parties have agreed to refer to arbitration pursuant to that arbitration agreement, any party to those proceedings may at any time apply to the Court to stay those proceedings; and the Court shall, unless the arbitration agreement is null and void, inoperative, or incapable of being performed, make an order staying the proceedings.

(2) The Court may, in addition to any order made under subsection (1) of this section, make such other orders in relation to any property which is or may be the subject-matter of the dispute between the parties to the arbitration agreement as it thinks fit.

(3) Any order under subsection (1) or subsection (2) of this section may be made subject to such conditions as the Court thinks fit.

(4) This section applies to every arbitration agreement which provides, expressly or by implication, for arbitration in any country other than New Zealand.

(5) Section 5 of the Arbitration Act 1908 shall not apply to any arbitration agreement to which this section applies.

**5. Enforcement of foreign arbitral awards—**(1) Subject to this Act, a Convention award shall be enforceable in New Zealand either by action or in the same manner as an award under the Arbitration Act 1908.

(2) Any Convention award which would be enforceable under this Act shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off, or otherwise in any legal proceedings in New Zealand, and any references in this Act to enforcing a Convention award shall be construed as including references to relying on an award.

Cf. 1933, No. 4, s. 5

**6. Evidence—**(1) The party seeking to enforce a Convention award shall produce to the Court—

- (a) The duly authenticated original award or a duly certified copy thereof; and
- (b) The original arbitration agreement or a duly certified copy thereof.

(2) Where the Convention award or arbitration agreement is in a foreign language, the party seeking to enforce it shall also produce a translation of it in the English language certified as a correct translation by an official or sworn translator, or by a diplomatic or consular agent of the country in which it was made, or in such other manner as the Court may require.

(3) Any document produced under subsection (1) or subsection (2) of this section shall, in the absence of evidence to the contrary, be conclusive evidence of the document which it purports to be or the matters to which it relates, as the case may be.

**7. Refusal of enforcement—**(1) Subject to subsections (2) and (3) of this section, a Convention award shall not be enforceable pursuant to this Act if the person against whom it is sought to enforce it proves that:

- (a) A party to the arbitration agreement under which the Convention award was made, was, under the law applicable to that party, under some incapacity at the time the arbitration agreement was made; or
- (b) The arbitration agreement was not valid under the law to which the parties have subjected it or, if the arbitration agreement is not expressed to be subject to the law of any country, under the law of the country where the Convention award was made; or

- (c) The party against whom it is sought to enforce the Convention award was not given proper notice of the appointment of the arbitrator, or of the arbitration proceedings, or was otherwise unable to present his case in those proceedings; or
  - (d) Subject to subsection (4) of this section, the Convention award deals with a difference not contemplated by, or not falling within the terms of the submission to arbitration, or contains a decision on a matter beyond the scope of the submission; or
  - (e) The composition or appointment of the arbitral authority, or the arbitration procedure was not in accordance with the agreement of the parties, or, in the absence of such agreement, the law of the country where the arbitration took place; or
  - (f) The Convention award has not yet become binding on the parties, or has been set aside or suspended by a competent authority in the country in which, or under the law of which, the award was made.
- (2) The Court may refuse to enforce a Convention award—
- (a) If it relates to a matter that may not lawfully be referred to arbitration under the law of New Zealand; or
  - (b) If the enforcement of the award would be contrary to public policy.
- (3) Where pursuant to this Act it is sought to enforce a Convention award and the Court is satisfied that an application to set aside or suspend that award has been made to a competent authority of the country in which, or under the law of which, it was made, the Court may, if it thinks fit, adjourn the proceedings and may, on the application of the party seeking to enforce that Convention award, order the other party to give security.
- (4) Where a Convention award to which paragraph (d) of subsection (1) of this section applies contains a decision on a matter not contemplated by, or falling within the terms of the submission to arbitration or beyond the scope of the submission which can be severed from a decision on a matter properly contemplated by and within the terms and scope of the submission, the Convention award may be enforced in respect of that latter decision.

**8. Enforcement of Convention awards under other enactments**—Nothing in this Act shall affect the right of any person to the enforcement of a Convention award otherwise than pursuant to this Act.

**9. Reciprocal Enforcement of Judgments Act 1934 not to affect enforcement under this Act**—Nothing in section 8 or section 10 of the Reciprocal Enforcement of Judgments Act 1934 shall affect the enforcement of a Convention award pursuant to this Act.

**10. Arbitration Clauses (Protocol) and the Arbitration (Foreign Awards) Act 1933 not to apply to Convention awards enforceable under this Act**—Nothing in the Arbitration Clauses (Protocol) and the Arbitration (Foreign Awards) Act 1933 shall apply to the enforcement of a Convention award.

**11. Application of Act**—This Act shall apply in respect of any arbitration agreement or Convention award whether made before or after the commencement of this Act.

**12. Orders in Council and certificates declaring countries to be parties to Convention**—(1) The Governor-General may from time to time, by Order in Council, declare any country specified in the order to be a party to the Convention and any order while it remains in force shall be conclusive evidence that the country specified in the order is a party to the Convention.

(2) The Secretary of Foreign Affairs or a Deputy Secretary of Foreign Affairs may from time to time certify in writing that any country, not being a country specified in any Order in Council made under subsection (1) of this section, is or was at the time specified in the certificate a party to the Convention and may at any time revoke such a certificate and any certificate shall in the absence of evidence to the contrary be conclusive evidence that the country specified in the certificate is, or was at the time specified, a party to the Convention.

**13. Convention awards to be unenforceable in New Zealand if no reciprocity**—(1) If the Governor-General is satisfied that the treatment in respect of recognition and enforcement accorded by the courts of any country which is a party to the Convention to an award made in arbitration proceedings in New Zealand is substantially less favourable than that accorded by the courts in New Zealand to a Convention award made in that country, the Governor-General may, by Order in Council, direct that no Convention award made in that country shall be enforceable pursuant to this Act.

(2) Where an order has been made under subsection (1) of this section, no proceedings shall be commenced or continued in any Court in New Zealand to enforce, pursuant to this Act, a Convention award made in a country to which the order applies.

**14. Repeal**—Section 3 of the Arbitration Clauses (Protocol) and the Arbitration (Foreign Awards) Act 1933 is hereby repealed.

## Section 2

## SCHEDULE

## ENGLISH TEXT

CONVENTION ON THE RECOGNITION AND ENFORCEMENT  
OF FOREIGN ARBITRAL AWARDS

## Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

## Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the

## SCHEDULE—continued

meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

## Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

## Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(a) The duly authenticated original award or a duly certified copy thereof;

(b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

## Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

## SCHEDULE—continued

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

## Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V (1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

## Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

## Article VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

## Article IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

## SCHEDULE—continued

## Article X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

## Article XI

In the case of a federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

## Article XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.



## SCHEDULE—continued

## Article XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

## Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

## Article XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

- (a) Signatures and ratifications in accordance with article VIII;
- (b) Accessions in accordance with article IX;
- (c) Declarations and notifications under articles I, X and XI;
- (d) The date upon which this Convention enters into force in accordance with article XII;
- (e) Denunciations and notifications in accordance with article XIII.

## Article XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

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This Act is administered in the Department of Justice.

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## CHAPTER 27

## Arbitration Act, 1950

## ARRANGEMENT OF SECTIONS

## PART I

## GENERAL PROVISIONS AS TO ARBITRATION

*Effect of Arbitration Agreements, &c.*

## Section

1. Authority of arbitrators and umpires to be irrevocable.
2. Death of party.
3. Bankruptcy.
4. Staying court proceedings where there is submission to arbitration.
5. Reference of interpleader issues to arbitration.

*Arbitrators and Umpires*

6. When reference is to a single arbitrator.
7. Power of parties in certain cases to supply vacancy.
8. Umpires.
9. Agreements for reference to three arbitrators.
10. Power of court in certain cases to appoint an arbitrator or umpire.
11. Reference to official referee.

*Conduct of Proceedings, Witnesses, &c.*

12. Conduct of proceedings, witnesses, &c.

*Provisions as to Awards*

13. Time for making award.
14. Interim awards.
15. Specific performance.
16. Awards to be final.
17. Power to correct slips.

*Costs, Fees and Interest*

18. Costs.
19. Taxation of arbitrator's or umpire's fees.
20. Interest on awards.

*Special Cases, Remission and Setting aside of Awards, &c.*

21. Statement of case.
22. Power to remit award.
23. Removal of arbitrator and setting aside of award.
24. Power of court to give relief where arbitrator is not impartial or the dispute involves question of fraud.
25. Power of court where arbitrator is removed or authority of arbitrator is revoked.

*Enforcement of Award*

26. Enforcement of award.

*Miscellaneous*

27. Power of court to extend time for commencing arbitration proceedings.
28. Terms as to costs, &c.
29. Extension of s. 496 of the Merchant Shipping Act, 1894.
30. Crown to be bound.
31. Application of Part I to statutory arbitrations.
32. Meaning of "arbitration agreement".
33. Operation of Part I.
34. Extent of Part I.

## PART II

## ENFORCEMENT OF CERTAIN FOREIGN AWARDS

## Section

35. Awards to which Part II applies.
36. Effect of foreign awards.
37. Conditions for enforcement of foreign awards.
38. Evidence.
39. Meaning of "final award".
40. Saving for other rights, &c.
41. Application of Part II to Scotland.
42. Application of Part II to Northern Ireland.
43. Saving for pending proceedings.

## PART III

## GENERAL

44. Short title, commencement and repeal.

## SCHEDULES:

First Schedule.—Protocol on Arbitration Clauses signed on behalf of His Majesty at a Meeting of the Assembly of the League of Nations held on the twenty-fourth day of September, nineteen hundred and twenty-three.

Second Schedule.—Convention on the Execution of Foreign Arbitral Awards signed at Geneva on behalf of His Majesty on the twenty-sixth day of September, nineteen hundred and twenty-seven.

An Act to consolidate the Arbitration Acts, 1889 to 1934.  
[28th July 1950.]

**B**E it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

## PART I

## GENERAL PROVISIONS AS TO ARBITRATION

*Effect of Arbitration Agreements, &c.*

Authority of arbitrators and umpires to be irrevocable.

1. The authority of an arbitrator or umpire appointed by or by virtue of an arbitration agreement shall, unless a contrary intention is expressed in the agreement, be irrevocable except by leave of the High Court or a judge thereof.

Death of party.

2.—(1) An arbitration agreement shall not be discharged by the death of any party thereto, either as respects the deceased or any other party, but shall in such an event be enforceable by or against the personal representative of the deceased.

(2) The authority of an arbitrator shall not be revoked by the death of any party by whom he was appointed.

(3) Nothing in this section shall be taken to affect the operation of any enactment or rule of law by virtue of which any right of action is extinguished by the death of a person.

3.—(1) Where it is provided by a term in a contract to which a bankrupt is a party that any differences arising thereout or in connection therewith shall be referred to arbitration, the said term shall, if the trustee in bankruptcy adopts the contract, be enforceable by or against him so far as relates to any such differences.

PART I  
—cont.  
Bankruptcy.

(2) Where a person who has been adjudged bankrupt had, before the commencement of the bankruptcy, become a party to an arbitration agreement, and any matter to which the agreement applies requires to be determined in connection with or for the purposes of the bankruptcy proceedings, then, if the case is one to which subsection (1) of this section does not apply, any other party to the agreement or, with the consent of the committee of inspection, the trustee in bankruptcy, may apply to the court having jurisdiction in the bankruptcy proceedings for an order directing that the matter in question shall be referred to arbitration in accordance with the agreement, and that court may, if it is of opinion that, having regard to all the circumstances of the case, the matter ought to be determined by arbitration, make an order accordingly.

4.—(1) If any party to an arbitration agreement, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to those legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court or a judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

(2) Notwithstanding anything in this Part of this Act, if any party to a submission to arbitration made in pursuance of an agreement to which the protocol set out in the First Schedule to this Act applies, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to those legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court or a judge thereof, unless satisfied that the agreement or arbitration has become inoperative or cannot proceed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.

PART I  
—cont.  
Reference of  
interpleader  
issues to  
arbitration.

5. Where relief by way of interpleader is granted and it appears to the High Court that the claims in question are matters to which an arbitration agreement, to which the claimants are parties, applies, the High Court may direct the issue between the claimants to be determined in accordance with the agreement.

#### Arbitrators and Umpires

When reference  
is to a single  
arbitrator.

6. Unless a contrary intention is expressed therein, every arbitration agreement shall, if no other mode of reference is provided, be deemed to include a provision that the reference shall be to a single arbitrator.

Power of  
parties in  
certain cases  
to supply  
vacancy.

7. Where an arbitration agreement provides that the reference shall be to two arbitrators, one to be appointed by each party, then, unless a contrary intention is expressed therein—

- (a) if either of the appointed arbitrators refuses to act, or is incapable of acting, or dies, the party who appointed him may appoint a new arbitrator in his place;
- (b) if, on such a reference, one party fails to appoint an arbitrator, either originally, or by way of substitution as aforesaid, for seven clear days after the other party, having appointed his arbitrator, has served the party making default with notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference and his award shall be binding on both parties as if he had been appointed by consent.

Provided that the High Court or a judge thereof may set aside any appointment made in pursuance of this section.

Umpires.

8.—(1) Unless a contrary intention is expressed therein, every arbitration agreement shall, where the reference is to two arbitrators, be deemed to include a provision that the two arbitrators shall appoint an umpire immediately after they are themselves appointed.

(2) Unless a contrary intention is expressed therein, every arbitration agreement shall, where such a provision is applicable to the reference, be deemed to include a provision that if the arbitrators have delivered to any party to the arbitration agreement, or to the umpire, a notice in writing stating that they cannot agree, the umpire may forthwith enter on the reference in lieu of the arbitrators.

(3) At any time after the appointment of an umpire, however appointed, the High Court may, on the application of any party to the reference and notwithstanding anything to the contrary in the arbitration agreement, order that the umpire shall enter upon the reference in lieu of the arbitrators and as if he were a sole arbitrator.

9.—(1) Where an arbitration agreement provides that the reference shall be to three arbitrators, one to be appointed by each party and the third to be appointed by the two appointed by the parties, the agreement shall have effect as if it provided for the appointment of an umpire, and not for the appointment of a third arbitrator, by the two arbitrators appointed by the parties.

PART I  
—cont.  
Agreements  
for reference  
to three  
arbitrators.

(2) Where an arbitration agreement provides that the reference shall be to three arbitrators to be appointed otherwise than as mentioned in subsection (1) of this section, the award of any two of the arbitrators shall be binding.

10. In any of the following cases—

Power of  
court in  
certain cases  
to appoint an  
arbitrator or  
umpire.

(a) where an arbitration agreement provides that the reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator;

(b) if an appointed arbitrator refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied and the parties do not supply the vacancy;

(c) where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator and do not appoint him, or where two arbitrators are required to appoint an umpire and do not appoint him;

(d) where an appointed umpire or third arbitrator refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or arbitrators do not supply the vacancy;

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint or, as the case may be, concur in appointing, an arbitrator, umpire or third arbitrator, and if the appointment is not made within seven clear days after the service of the notice, the High Court or a judge thereof may, on application by the party who gave the notice, appoint an arbitrator, umpire or third arbitrator who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties.

11. Where an arbitration agreement provides that the reference shall be to an official referee, any official referee to whom application is made shall, subject to any order of the High Court or a judge thereof as to transfer or otherwise, hear and determine the matters agreed to be referred.

*Conduct of Proceedings, Witnesses, &c.*

12.—(1) Unless a contrary intention is expressed therein, every arbitration agreement shall, where such a provision is applicable

Conduct of  
proceedings,  
witnesses, &c.

PART I  
—cont.

to the reference, be deemed to contain a provision that the parties to the reference, and all persons claiming through them respectively, shall, subject to any legal objection, submit to be examined by the arbitrator or umpire, on oath or affirmation in relation to the matters in dispute, and shall, subject as aforesaid, produce before the arbitrator or umpire all documents within their possession or power respectively which may be required or called for, and do all other things which during the proceedings on the reference the arbitrator or umpire may require.

(2) Unless a contrary intention is expressed therein, every arbitration agreement shall, where such a provision is applicable to the reference, be deemed to contain a provision that the witnesses on the reference shall, if the arbitrator or umpire thinks fit, be examined on oath or affirmation.

(3) An arbitrator or umpire shall, unless a contrary intention is expressed in the arbitration agreement, have power to administer oaths to, or take the affirmations of, the parties to and witnesses on a reference under the agreement.

(4) Any party to a reference under an arbitration agreement may sue out a writ of subpoena ad testificandum or a writ of subpoena duces tecum, but no person shall be compelled under any such writ to produce any document which he could not be compelled to produce on the trial of an action, and the High Court or a judge thereof may order that a writ of subpoena ad testificandum or of subpoena duces tecum shall issue to compel the attendance before an arbitrator or umpire of a witness wherever he may be within the United Kingdom.

(5) The High Court or a judge thereof may also order that a writ of habeas corpus ad testificandum shall issue to bring up a prisoner for examination before an arbitrator or umpire.

(6) The High Court shall have, for the purpose of and in relation to a reference, the same power of making orders in respect of—

- (a) security for costs;
- (b) discovery of documents and interrogatories;
- (c) the giving of evidence by affidavit;
- (d) examination on oath of any witness before an officer of the High Court or any other person, and the issue of a commission or request for the examination of a witness out of the jurisdiction;
- (e) the preservation, interim custody or sale of any goods which are the subject matter of the reference;
- (f) securing the amount in dispute in the reference;
- (g) the detention, preservation or inspection of any property or thing which is the subject of the reference or as to which any question may arise therein, and authorising for any of the purposes aforesaid any persons to enter

upon or into any land or building in the possession of any party to the reference, or authorising any samples to be taken or any observation to be made or experiment to be tried which may be necessary or expedient for the purpose of obtaining full information or evidence; and

PART I  
—CONT.

(h) interim injunctions or the appointment of a receiver; as it has for the purpose of and in relation to an action or matter in the High Court:

Provided that nothing in this subsection shall be taken to prejudice any power which may be vested in an arbitrator or umpire of making orders with respect to any of the matters aforesaid.

#### Provisions as to Awards

13.—(1) Subject to the provisions of subsection (2) of section twenty-two of this Act, and anything to the contrary in the arbitration agreement (an arbitrator or umpire shall have power to make an award at any time.)

(2) The time, if any, limited for making an award, whether under this Act or otherwise, may from time to time be enlarged by order of the High Court or a judge thereof, whether that time has expired or not.

(3) The High Court may, on the application of any party to a reference, remove an arbitrator or umpire who fails to use all reasonable dispatch in entering on and proceeding with the reference and making an award, and an arbitrator or umpire who is removed by the High Court under this subsection shall not be entitled to receive any remuneration in respect of his services.

For the purposes of this subsection, the expression "proceeding with a reference" includes, in a case where two arbitrators are unable to agree, giving notice of that fact to the parties and to the umpire.

14. Unless a contrary intention is expressed therein, every arbitration agreement shall, where such a provision is applicable to the reference, be deemed to contain a provision that the arbitrator or umpire may, if he thinks fit, make an interim award, and any reference in this Part of this Act to an award includes a reference to an interim award.

15. Unless a contrary intention is expressed therein, every arbitration agreement shall, where such a provision is applicable to the reference, be deemed to contain a provision that the arbitrator or umpire shall have the same power as the High Court to order specific performance of any contract other than a contract relating to land or any interest in land.

PART I  
—CONT.  
Awards to be final.

16. Unless a contrary intention is expressed therein, every arbitration agreement shall, where such a provision is applicable to the reference, be deemed to contain a provision that the award to be made by the arbitrator or umpire shall be final and binding on the parties and the persons claiming under them respectively.

Power to correct slips.

17. Unless a contrary intention is expressed in the arbitration agreement, the arbitrator or umpire shall have power to correct in an award any clerical mistake or error arising from any accidental slip or omission.

#### Costs, Fees and Interest

Costs.

18.—(1) Unless a contrary intention is expressed therein, every arbitration agreement shall be deemed to include a provision that the costs of the reference and award shall be in the discretion of the arbitrator or umpire, who may direct to and by whom and in what manner those costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof, and may award costs to be paid as between solicitor and client.

(2) Any costs directed by an award to be paid shall, unless the award otherwise directs, be taxable in the High Court.

(3) Any provision in an arbitration agreement to the effect that the parties or any party thereto shall in any event pay their or his own costs of the reference or award or any part thereof shall be void, and this Part of this Act shall, in the case of an arbitration agreement containing any such provision, have effect as if that provision were not contained therein:

Provided that nothing in this subsection shall invalidate such a provision when it is a part of an agreement to submit to arbitration a dispute which has arisen before the making of that agreement.

(4) If no provision is made by an award with respect to the costs of the reference, any party to the reference may, within fourteen days of the publication of the award or such further time as the High Court or a judge thereof may direct, apply to the arbitrator for an order directing by and to whom those costs shall be paid, and thereupon the arbitrator shall, after hearing any party who may desire to be heard, amend his award by adding thereto such directions as he may think proper with respect to the payment of the costs of the reference.

(5) Section sixty-nine of the Solicitors Act, 1932 (which empowers a court before which any proceeding is being heard or is pending to charge property recovered or preserved in the

proceeding with the payment of solicitors' costs) shall apply as if an arbitration were a proceeding in the High Court, and the High Court may make declarations and orders accordingly.

PART I  
—cont.

19.—(1) If in any case an arbitrator or umpire refuses to deliver his award except on payment of the fees demanded by the High Court may, on an application for the purpose, order that the arbitrator or umpire shall deliver the award to the applicant on payment into court by the applicant of the fees demanded, and further that the fees demanded shall be taxed by the taxing officer and that out of the money paid into court there shall be paid out to the arbitrator or umpire by way of such sum as may be found reasonable on taxation and that the balance of the money, if any, shall be paid out to the applicant.

(2) An application for the purposes of this section may be made by any party to the reference unless the fees demanded have been fixed by a written agreement between him and the arbitrator or umpire.

(3) A taxation of fees under this section may be reviewed in the same manner as a taxation of costs.

(4) The arbitrator or umpire shall be entitled to appear and be heard on any taxation or review of taxation under this section.

20. A sum directed to be paid by an award shall, unless the award otherwise directs, carry interest as from the date of the award and at the same rate as a judgment debt.

*Special Cases, Remission and Setting aside of Awards, &c.*

21.—(1) An arbitrator or umpire may, and shall if so directed by the High Court, state—

(a) any question of law arising in the course of the reference; or

(b) an award or any part of an award,

in the form of a special case for the decision of the High Court.

(2) A special case with respect to an interim award or with respect to a question of law arising in the course of a reference may be stated, or may be directed by the High Court to be stated, notwithstanding that proceedings under the reference are still pending.

(3) A decision of the High Court under this section shall be deemed to be a judgment of the Court within the meaning of section twenty-seven of the Supreme Court of Judicature (Consolidation) Act, 1925 (which relates to the jurisdiction of the Court of Appeal to hear and determine appeals from any judgment of the High Court), but no appeal shall lie from the

Statement of  
case.

PART I  
—cont.

Power to  
remit award.

decision of the High Court on any case stated under paragraph (a) of subsection (1) of this section without the leave of the High Court or of the Court of Appeal.

22.—(1) In all cases of reference to arbitration the High Court or a judge thereof may from time to time remit the matter referred, or any of them, to the reconsideration of the arbitrator or umpire.

(2) Where an award is remitted, the arbitrator or umpire shall, unless the order otherwise directs, make his award within three months after the date of the order.

Removal of  
arbitrator and  
setting aside  
of award.

23.—(1) Where an arbitrator or umpire has misconducted himself or the proceedings, the High Court may remove him.

(2) Where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the High Court may set the award aside.

(3) Where an application is made to set aside an award, the High Court may order that any money made payable by the award shall be brought into court or otherwise secured pending the determination of the application.

Power of  
court to give  
relief where  
arbitrator is  
not impartial  
or the dispute  
involves  
question of  
fraud.

24.—(1) Where an agreement between any parties provides that disputes which may arise in the future between them shall be referred to an arbitrator named or designated in the agreement, and after a dispute has arisen any party applies, on the ground that the arbitrator so named or designated is not or may not be impartial, for leave to revoke the authority of the arbitrator or for an injunction to restrain any other party or the arbitrator from proceeding with the arbitration, it shall not be a ground for refusing the application that the said party at the time when he made the agreement knew, or ought to have known, that the arbitrator, by reason of his relation towards any other party to the agreement or of his connection with the subject referred, might not be capable of impartiality.

(2) Where an agreement between any parties provides that disputes which may arise in the future between them shall be referred to arbitration, and a dispute which so arises involves the question whether any such party has been guilty of fraud, the High Court shall, so far as may be necessary to enable the question to be determined by the High Court, have power to order that the agreement shall cease to have effect and power to give leave to revoke the authority of any arbitrator or umpire appointed by or by virtue of the agreement.

(3) In any case where by virtue of this section the High Court has power to order that an arbitration agreement shall cease to have effect or to give leave to revoke the authority of an arbitrator or umpire, the High Court may refuse to stay any action brought in breach of the agreement.

25.—(1) Where an arbitrator (not being a sole arbitrator), or two or more arbitrators (not being all the arbitrators) or an umpire who has not entered on the reference is or are removed by the High Court, the High Court may, on the application of any party to the arbitration agreement, appoint a person or persons to act as arbitrator or arbitrators or umpire in place of the person or persons so removed.

PART I  
—cont.  
Power of court where arbitrator is removed or authority of arbitrator is revoked.

(2) Where the authority of an arbitrator or arbitrators or umpire is revoked by leave of the High Court, or a sole arbitrator or all the arbitrators or an umpire who has entered on the reference is or are removed by the High Court, the High Court may, on the application of any party to the arbitration agreement, either—

- (a) appoint a person to act as sole arbitrator in place of the person or persons removed; or
- (b) order that the arbitration agreement shall cease to have effect with respect to the dispute referred.

(3) A person appointed under this section by the High Court as an arbitrator or umpire shall have the like power to act in the reference and to make an award as if he had been appointed in accordance with the terms of the arbitration agreement.

(4) Where it is provided (whether by means of a provision in the arbitration agreement or otherwise) that an award under an arbitration agreement shall be a condition precedent to the bringing of an action with respect to any matter to which the agreement applies, the High Court, if it orders (whether under this section or under any other enactment) that the agreement shall cease to have effect as regards any particular dispute, may further order that the provision making an award a condition precedent to the bringing of an action shall also cease to have effect as regards that dispute.

#### Enforcement of Award

26. An award on an arbitration agreement may, by leave of the High Court or a judge thereof, be enforced, in the same manner as a judgment or order to the same effect, and where leave is so given, judgment may be entered in terms of the award.

#### Miscellaneous

27. Where the terms of an agreement to refer future disputes to arbitration provide that any claims to which the agreement applies shall be barred unless notice to appoint an arbitrator is given or an arbitrator is appointed or some other step to commence arbitration proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the High Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused,

Power of court to extend time for commencing arbitration proceedings.

#### PART I —cont.

Terms as to costs, &c.

and notwithstanding that the time so fixed has expired, may, on such terms, if any, as the justice of the case may require, but without prejudice to the provisions of any enactment limiting the time for the commencement of arbitration proceedings, extend the time for such period as it thinks proper.

28. Any order made under this Part of this Act may be made on such terms as to costs or otherwise as the authority making the order thinks just:

Provided that this section shall not apply to any order made under subsection (2) of section four of this Act.

Extension of s. 496 of the Merchant Shipping Act, 1894.

29.—(1) In subsection (3) of section four hundred and ninety-six of the Merchant Shipping Act, 1894 (which requires a sum deposited with a wharfinger by an owner of goods to be repaid unless legal proceedings are instituted by the shipowner), the expression "legal proceedings" shall be deemed to include arbitration.

(2) For the purposes of the said section four hundred and ninety-six, as amended by this section, an arbitration shall be deemed to be commenced when one party to the arbitration agreement serves on the other party or parties a notice requiring him or them to appoint or concur in appointing an arbitrator, or, where the arbitration agreement provides that the reference shall be to a person named or designated in the agreement, requiring him or them to submit the dispute to the person so named or designated.

(3) Any such notice as is mentioned in subsection (2) of this section 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 abode in England of that person; or
- (c) by sending it by post in a registered letter addressed to that person at his usual or last known place of abode in England;

as well as in any other manner provided in the arbitration agreement; and where a notice is sent by post in manner prescribed by paragraph (c) of this subsection, service thereof shall, unless the contrary is proved, be deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of post.

Crown to be bound.

30. This Part of this Act (except the provisions of subsection (2) of section four thereof) shall apply to any arbitration to which His Majesty, either in right of the Crown or of the Duchy of Lancaster or otherwise, or the Duke of Cornwall, is a party.



31.—(1) Subject to the provisions of section thirty-three of this Act, this Part of this Act, except the provisions thereof specified in subsection (2) of this section, shall apply to every arbitration under any other Act (whether passed before or after the commencement of this Act) as if the arbitration were pursuant to an arbitration agreement and as if that other Act were an arbitration agreement, except in so far as this Act is inconsistent with that other Act or with any rules or procedure authorised or recognised thereby.

PART I  
—cont.  
Application of  
Part I to  
statutory  
arbitrations.

(2) The provisions referred to in subsection (1) of this section are subsection (1) of section two, section three, subsection (2) of section four, section five, subsection (3) of section eighteen and sections twenty-four, twenty-five, twenty-seven and twenty-nine.

32. In this Part of this Act, unless the context otherwise requires, the expression "arbitration agreement" means a written agreement to submit present or future differences in arbitration, whether an arbitrator is named therein or not.

Meaning of  
"arbitration  
agreement".

33. This Part of this Act shall not affect any arbitration commenced (within the meaning of subsection (2) of section twenty-nine of this Act) before the commencement of this Act, but shall apply to an arbitration so commenced after the commencement of this Act under an agreement made before the commencement of this Act.

Operation of  
Part I.

34. Subsection (2) of section four of this Act shall—

Extent of  
Part I.

- (a) extend to Scotland, with the omission of the words "Notwithstanding anything in this Part of this Act" and with the substitution, for references to staying proceedings, of references to sisting proceedings; and
- (b) extend to Northern Ireland, with the omission of the words "Notwithstanding anything in this Part of this Act";

but, save as aforesaid, none of the provisions of this Part of this Act shall extend to Scotland or Northern Ireland.

## PART II

### ENFORCEMENT OF CERTAIN FOREIGN AWARDS

35.—(1) This Part of this Act applies to any award made after the twenty-eighth day of July, nineteen hundred and twenty-four—

Awards to  
which Part II  
applies.

- (a) in pursuance of an agreement for arbitration to which the protocol set out in the First Schedule to this Act applies; and
- (b) between persons of whom one is subject to the jurisdiction of some one of such Powers as His Majesty, being satisfied that reciprocal provisions have been

## PART II —cont.

- made, may by Order in Council declare to be parties to the convention set out in the Second Schedule to this Act, and of whom the other is subject to the jurisdiction of some other of the Powers aforesaid; and
- (c) in one of such territories as His Majesty, being satisfied that reciprocal provisions have been made, may by Order in Council declare to be territories to which the said convention applies;

and an award to which this Part of this Act applies is in this Part of this Act referred to as "a foreign award".

(2) His Majesty may by a subsequent Order in Council vary or revoke any Order previously made under this section.

(3) Any Order in Council under section one of the Arbitration (Foreign Awards) Act, 1930, which is in force at the commencement of this Act shall have effect as if it had been made under this section.

Effect of  
foreign awards.

36.—(1) A foreign award shall, subject to the provisions of this Part of this Act, be enforceable in England either by action or in the same manner as the award of an arbitrator is enforceable by virtue of section twenty-six of this Act.

(2) Any foreign award which would be enforceable under this Part of this Act shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in England, and any references in this Part of this Act to enforcing a foreign award shall be construed as including references to relying on an award.

Conditions for  
enforcement  
of foreign  
awards.

37.—(1) In order that a foreign award may be enforceable under this Part of this Act it must have—

- (a) been made in pursuance of an agreement for arbitration which was valid under the law by which it was governed;
- (b) been made by the tribunal provided for in the agreement or constituted in manner agreed upon by the parties;
- (c) been made in conformity with the law governing the arbitration procedure;
- (d) become final in the country in which it was made;
- (e) been in respect of a matter which may lawfully be referred to arbitration under the law of England;

and the enforcement thereof must not be contrary to the public policy or the law of England.

(2) Subject to the provisions of this subsection, a foreign award shall not be enforceable under this Part of this Act if the court dealing with the case is satisfied that—

- (a) the award has been annulled in the country in which it was made; or

- (b) the party against whom it is sought to enforce the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case, or was under some legal incapacity and was not properly represented; or
- (c) the award does not deal with all the questions referred or contains decisions on matters beyond the scope of the agreement for arbitration:

Provided that, if the award does not deal with all the questions referred, the court may, if it thinks fit, either postpone the enforcement of the award or order its enforcement subject to the giving of such security by the person seeking to enforce it as the court may think fit.

(3) If a party seeking to resist the enforcement of a foreign award proves that there is any ground other than the non-existence of the conditions specified in paragraphs (a), (b) and (c) of subsection (1) of this section, or the existence of the conditions specified in paragraphs (b) and (c) of subsection (2) of this section, entitling him to contest the validity of the award, the court may, if it thinks fit, either refuse to enforce the award or adjourn the hearing until after the expiration of such period as appears to the court to be reasonably sufficient to enable that party to take the necessary steps to have the award annulled by the competent tribunal.

38.—(1) The party seeking to enforce a foreign award must produce—

- (a) the original award or a copy thereof duly authenticated in manner required by the law of the country in which it was made; and
- (b) evidence proving that the award has become final; and
- (c) such evidence as may be necessary to prove that the award is a foreign award and that the conditions mentioned in paragraphs (a), (b) and (c) of subsection (1) of the last foregoing section are satisfied.

(2) In any case where any document required to be produced under subsection (1) of this section is in a foreign language, it shall be the duty of the party seeking to enforce the award to produce a translation certified as correct by a diplomatic or consular agent of the country to which that party belongs, or certified as correct in such other manner as may be sufficient according to the law of England.

(3) Subject to the provisions of this section, rules of court may be made under section ninety-nine of the Supreme Court of Judicature (Consolidation) Act, 1925, with respect to the evidence which must be furnished by a party seeking to enforce an award under this Part of this Act.

PART II  
—cont.

PART II  
—cont.  
Meaning of  
"final award".

39. For the purposes of this Part of this Act, an award shall not be deemed final if any proceedings for the purpose of contesting the validity of the award are pending in the country in which it was made.

Saving for  
other rights,  
&c.

40. Nothing in this Part of this Act shall—

- (a) prejudice any rights which any person would have had of enforcing in England any award or of availing himself in England of any award if neither this Part of this Act nor Part I of the Arbitration (Foreign Awards) Act 1930, had been enacted; or
- (b) apply to any award made on an arbitration agreement governed by the law of England.

Application of  
Part II to  
Scotland.

41.—(1) The following provisions of this section shall have effect for the purpose of the application of this Part of this Act to Scotland.

(2) For the references to England there shall be substituted references to Scotland.

(3) For subsection (1) of section thirty-six there shall be substituted the following subsection:—

"(1) A foreign award shall, subject to the provisions of this Part of this Act, be enforceable by action, or, if the agreement for arbitration contains consent to the registration of the award in the Books of Council and Session for execution and the award is so registered, it shall, subject as aforesaid, be enforceable by summary diligence."

(4) For subsection (3) of section thirty-eight there shall be substituted the following subsection:—

"(3) The Court of Session shall, subject to the provisions of this section, have power, exercisable by statutory instrument, to make provision by Act of Sederunt with respect to the evidence which must be furnished by a party seeking to enforce in Scotland an award under this Part of this Act, and the Statutory Instruments Act, 1946, shall apply to a statutory instrument containing an Act of Sederunt made under this subsection as if the Act of Sederunt had been made by a Minister of the Crown."

Application of  
Part II to  
Northern  
Ireland.

42.—(1) The following provisions of this section shall have effect for the purpose of the application of this Part of this Act to Northern Ireland.

(2) For the references to England there shall be substituted references to Northern Ireland.

(3) For subsection (1) of section thirty-six there shall be substituted the following subsection:—

"(1) A foreign award shall, subject to the provisions of this Part of this Act, be enforceable either by action or by

the same manner as the award of an arbitrator under the provisions of the Common Law Procedure Amendment Act (Ireland), 1856, was enforceable at the date of the passing of the Arbitration (Foreign Awards) Act, 1930".

PART II  
—cont.

(4) For the reference, in subsection (3) of section thirty-eight, to section ninety-nine of the Supreme Court of Judicature (Consolidation) Act, 1925, there shall be substituted a reference to section sixty-one of the Supreme Court of Judicature (Ireland) Act, 1877, as amended by any subsequent enactment.

43. Any proceedings instituted under Part I of the Arbitration (Foreign Awards) Act, 1930, which are uncompleted at the commencement of this Act may be carried on and completed under this Part of this Act as if they had been instituted thereunder.

### PART III

#### GENERAL

44.—(1) This Act may be cited as the Arbitration Act, 1950. Short title,

(2) This Act shall come into operation on the first day of September, nineteen hundred and fifty.

(3) The Arbitration Act, 1889, the Arbitration Clauses (Protocol) Act, 1924, and the Arbitration Act, 1934, are hereby repealed except in relation to arbitrations commenced (within the meaning of subsection (2) of section twenty-nine of this Act) before the commencement of this Act, and the Arbitration (Foreign Awards) Act, 1930, is hereby repealed; and any reference in any Act or other document to any enactment hereby repealed shall be construed as including a reference to the corresponding provision of this Act.

## SCHEDULES

### FIRST SCHEDULE

Sections 4, 35.

PROTOCOL ON ARBITRATION CLAUSES SIGNED ON BEHALF OF HIS MAJESTY AT A MEETING OF THE ASSEMBLY OF THE LEAGUE OF NATIONS HELD ON THE TWENTY-FOURTH DAY OF SEPTEMBER, NINETEEN HUNDRED AND TWENTY-THREE

The undersigned, being duly authorised, declare that they accept, on behalf of the countries which they represent, the following provisions:—

1. Each of the Contracting States recognises the validity of an agreement whether relating to existing or future differences between parties, subject respectively to the jurisdiction of different Contracting States by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract

relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject.

Each Contracting State reserves the right to limit the obligation mentioned above to contracts which are considered as commercial under its national law. Any Contracting State which avails itself of this right will notify the Secretary-General of the League of Nations, in order that the other Contracting States may be so informed.

2. The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.

The Contracting States agree to facilitate all steps in the procedure which require to be taken in their own territories, in accordance with the provisions of their law governing arbitral procedure applicable to existing differences.

3. Each Contracting State undertakes to ensure the execution by its authorities and in accordance with the provisions of its national laws of arbitral awards made in its own territory under the preceding articles.

4. The tribunals of the Contracting Parties, on being seized of a dispute regarding a contract made between persons to whom Article 1 applies and including an arbitration agreement whether referring to present or future differences which is valid in virtue of the said article and capable of being carried into effect, shall refer the parties on the application of either of them to the decision of the arbitrators.

Such reference shall not prejudice the competence of the judicial tribunals in case the agreement or the arbitration cannot proceed or become inoperative.

5. The present Protocol, which shall remain open for signature by all States, shall be ratified. The ratifications shall be deposited as soon as possible with the Secretary-General of the League of Nations, who shall notify such deposit to all the signatory States.

6. The present Protocol shall come into force as soon as two ratifications have been deposited. Thereafter it will take effect, in the case of each Contracting State, one month after the notification by the Secretary-General of the deposit of its ratification.

7. The present Protocol may be denounced by any Contracting State on giving one year's notice. Denunciation shall be effected by a notification addressed to the Secretary-General of the League, who will immediately transmit copies of such notification to all the other signatory States and inform them of the date of which it was received. The denunciation shall take effect one year after the date on which it was notified to the Secretary-General, and shall operate only in respect of the notifying State.

8. The Contracting States may declare that their acceptance of the present Protocol does not include any or all of the under-mentioned territories: that is to say, their colonies, overseas possessions or territories, protectorates or the territories over which they exercise a mandate.

The said States may subsequently adhere separately on behalf of any territory thus excluded. The Secretary-General of the League of Nations shall be informed as soon as possible of such adhesions. He shall notify such adhesions to all signatory States. They will take effect one month after the notification by the Secretary-General to all signatory States.

The Contracting States may also denounce the Protocol separately on behalf of any of the territories referred to above. Article 7 applies to such denunciation.

## SECOND SCHEDULE

### Section 35.

CONVENTION ON THE EXECUTION OF FOREIGN ARBITRAL AWARDS  
SIGNED AT GENEVA ON BEHALF OF HIS MAJESTY ON THE TWENTY-  
SIXTH DAY OF SEPTEMBER, NINETEEN HUNDRED AND TWENTY-  
SEVEN

### ARTICLE I

In the territories of any High Contracting Party to which the present Convention applies, an arbitral award made in pursuance of an agreement, whether relating to existing or future differences (hereinafter called "a submission to arbitration") covered by the Protocol on Arbitration Clauses, opened at Geneva on September 24, 1923, shall be recognised as binding and shall be enforced in accordance with the rules of the procedure of the territory where the award is relied upon, provided that the said award has been made in a territory of one of the High Contracting Parties to which the present Convention applies and between persons who are subject to the jurisdiction of one of the High Contracting Parties.

To obtain such recognition or enforcement, it shall, further, be necessary:—

- (a) That the award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto;
- (b) That the subject-matter of the award is capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon;
- (c) That the award has been made by the Arbitral Tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure;
- (d) That the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to *opposition*, *appel* or *pourvoi en cassation* (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending;
- (e) That the recognition or enforcement of the award is not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon.

1ST SCH.  
—cont.

2ND SCH.  
—cont.

### ARTICLE 2

Even if the conditions laid down in Article 1 hereof are fulfilled, recognition and enforcement of the award shall be refused if the Court is satisfied:—

- (a) That the award has been annulled in the country in which it was made;
- (b) That the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case; or that, being under a legal incapacity, he was not properly represented;
- (c) That the award does not deal with the differences contemplated by or falling within the terms of the submission to arbitration or that it contains decisions on matters beyond the scope of the submission to arbitration.

If the award has not covered all the questions submitted to the arbitral tribunal, the competent authority of the country where recognition or enforcement of the award is sought can, if it think fit, postpone such recognition or enforcement or grant it subject to such guarantee as that authority may decide.

### ARTICLE 3

If the party against whom the award has been made proves that, under the law governing the arbitration procedure, there is a ground, other than the grounds referred to in Article 1 (a) and (c), and Article 2 (b) and (c), entitling him to contest the validity of the award in a Court of Law, the Court may, if it thinks fit, either refuse recognition or enforcement of the award or adjourn the consideration thereof, giving such party a reasonable time within which to have the award annulled by the competent tribunal.

### ARTICLE 4

The party relying upon an award or claiming its enforcement must supply, in particular:—

- (1) The original award or a copy thereof duly authenticated, according to the requirements of the law of the country in which it was made;
- (2) Documentary or other evidence to prove that the award has become final, in the sense defined in Article 1 (d), in the country in which it was made;
- (3) When necessary, documentary or other evidence to prove that the conditions laid down in Article 1, paragraph 1 and paragraph 2 (a) and (c), have been fulfilled.

A translation of the award and of the other documents mentioned in this Article into the official language of the country where the award is sought to be relied upon may be demanded. Such translation must be certified correct by a diplomatic or consular agent of the country to which the party who seeks to rely upon the award belongs or by a sworn translator of the country where the award is sought to be relied upon.

## ARTICLE 5

The provisions of the above Articles shall not deprive any interested party of the right of availing himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

## ARTICLE 6

The present Convention applies only to arbitral awards made after the coming into force of the Protocol on Arbitration Clauses, opened at Geneva on September 24th, 1923.

## ARTICLE 7

The present Convention, which will remain open to the signature of all the signatories of the Protocol of 1923 on Arbitration Clauses, shall be ratified.

It may be ratified only on behalf of those Members of the League of Nations and non-Member States on whose behalf the Protocol of 1923 shall have been ratified.

Ratifications shall be deposited as soon as possible with the Secretary-General of the League of Nations, who will notify such deposit to all the signatories.

## ARTICLE 8

The present Convention shall come into force three months after it shall have been ratified on behalf of two High Contracting Parties. Thereafter, it shall take effect, in the case of each High Contracting Party, three months after the deposit of the ratification on its behalf with the Secretary-General of the League of Nations.

## ARTICLE 9

The present Convention may be denounced on behalf of any Member of the League or non-Member State. Denunciation shall be notified in writing to the Secretary-General of the League of Nations, who will immediately send a copy thereof, certified to be in conformity with the notification, to all the other Contracting Parties, at the same time informing them of the date on which he received it.

The denunciation shall come into force only in respect of the High Contracting Party which shall have notified it and one year after such notification shall have reached the Secretary-General of the League of Nations.

The denunciation of the Protocol on Arbitration Clauses shall entail, *ipso facto*, the denunciation of the present Convention.

## ARTICLE 10

The present Convention does not apply to the Colonies, Protectorates or territories under suzerainty or mandate of any High Contracting Party unless they are specially mentioned.

The application of this Convention to one or more of such Colonies, Protectorates or territories to which the Protocol on Arbitration Clauses, opened at Geneva on September 24th, 1923, applies, can be

2ND SCH.  
—cont.

2ND SCH.  
—cont.

effected at any time by means of a declaration addressed to the Secretary-General of the League of Nations by one of the High Contracting Parties.

Such declaration shall take effect three months after the deposit thereof.

The High Contracting Parties can at any time denounce the Convention for all or any of the Colonies, Protectorates or territories referred to above. Article 9 hereof applies to such denunciation.

## ARTICLE 11

A certified copy of the present Convention shall be transmitted by the Secretary-General of the League of Nations to every Member of the League of Nations and to every non-Member State which signs the same.

*Table of Statutes referred to in this Act*

Short Title	Session and Chapter
Common Law Procedure Amendment Act (Ireland), 1856 ...	19 & 20 Vict. c. 102.
Supreme Court of Judicature (Ireland) Act, 1877 ...	40 & 41 Vict. c. 57.
Arbitration Act, 1889 ...	52 & 53 Vict. c. 49.
Merchant Shipping Act, 1894 ...	57 & 58 Vict. c. 60.
Arbitration Clauses (Protocol) Act, 1924 ...	14 & 15 Geo. 5. c. 39.
Supreme Court of Judicature (Consolidation) Act, 1925 ...	15 & 16 Geo. 5. c. 49.
Arbitration (Foreign Awards) Act, 1930 ...	20 Geo. 5. c. 15.
Arbitration Act, 1934 ...	24 & 25 Geo. 5. c. 14.
Statutory Instruments Act, 1946 ...	9 & 10 Geo. 6. c. 34.



# Arbitration Act 1975

## 1975 CHAPTER 3

An Act to give effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.  
[25th February 1975]

**B**E IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

### *Effect of arbitration agreement on court proceedings*

Staying court proceedings where party proves arbitration agreement.

1.—(1) If any party to an arbitration agreement to which this section applies, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to the proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings; and the court, 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, shall make an order staying the proceedings.

(2) This section applies to any arbitration agreement which is not a domestic arbitration agreement; and neither section 4(1) of the Arbitration Act 1950 nor section 4 of the Arbitration Act (Northern Ireland) 1937 shall apply to an arbitration agreement to which this section applies.

1950 c. 27.

1937 c. 8 (N.I.).

(3) In the application of this section to Scotland, for the references to staying proceedings there shall be substituted references to sisting proceedings.

(4) In this section "domestic arbitration agreement" means an arbitration agreement which does not provide, expressly or by implication, for arbitration in a State other than the United Kingdom and to which neither—

- (a) an individual who is a national of, or habitually resident in, any State other than the United Kingdom; nor
- (b) a body corporate which is incorporated in, or whose central management and control is exercised in, any State other than the United Kingdom;

is a party at the time the proceedings are commenced.

### *Enforcement of Convention awards*

2. Sections 3 to 6 of this Act shall have effect with respect to the enforcement of Convention awards; and where a Convention award would, but for this section, be also a foreign award within the meaning of Part II of the Arbitration Act 1950, that Part shall not apply to it.

Replacement of former provisions.

1950 c. 27.

3.—(1) A Convention award shall, subject to the following provisions of this Act, be enforceable—

Effect of Convention awards.

- (a) in England and Wales, either by action or in the same manner as the award of an arbitrator is enforceable by virtue of section 26 of the Arbitration Act 1950;
- (b) in Scotland, either by action or, in a case where the arbitration agreement contains consent to the registration of the award in the Books of Council and Session for execution and the award is so registered, by summary diligence;
- (c) in Northern Ireland, either by action or in the same manner as the award of an arbitrator is enforceable by virtue of section 16 of the Arbitration Act (Northern Ireland) 1937.

(2) Any Convention award which would be enforceable under this Act shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in the United Kingdom; and any reference in this Act to enforcing a Convention award shall be construed as including references to relying on such an award.

4. The party seeking to enforce a Convention award must Evidence, produce—

- (a) the duly authenticated original award or a duly certified copy of it; and

- (b) the original arbitration agreement or a duly certified copy of it; and
- (c) where the award or agreement is in a foreign language, a translation of it certified by an official or sworn translator or by a diplomatic or consular agent.

Refusal of  
enforcement.

5.—(1) Enforcement of a Convention award shall not be refused except in the cases mentioned in this section.

(2) Enforcement of a Convention award may be refused if the person against whom it is invoked proves—

- (a) that a party to the arbitration agreement was (under the law applicable to him) under some incapacity; or
- (b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made; or
- (c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
- (d) (subject to subsection (4) of this section) that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration; or
- (e) that the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country where the arbitration took place; or
- (f) that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.

(3) Enforcement of a Convention award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to enforce the award.

(4) A Convention award which contains decisions on matters not submitted to arbitration may be enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from those on matters not so submitted.

(5) Where an application for the setting aside or suspension of a Convention award has been made to such a competent authority as is mentioned in subsection (2)(f) of this section, the

court before which enforcement of the award is sought may, if it thinks fit, adjourn the proceedings and may, on the application of the party seeking to enforce the award, order the other party to give security.

6. Nothing in this Act shall prejudice any right to enforce or rely on an award otherwise than under this Act or Part II of the Arbitration Act 1950.

Saving.  
1950 c. 27.

#### General

7.—(1) In this Act—

Interpretation.

“arbitration agreement” means an agreement in writing (including an agreement contained in an exchange of letters or telegrams) to submit to arbitration present or future differences capable of settlement by arbitration;

“Convention award” means an award made in pursuance of an arbitration agreement in the territory of a State, other than the United Kingdom, which is a party to the New York Convention; and

“the New York Convention” means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration on 10th June 1958.

(2) If Her Majesty by Order in Council declares that any State specified in the Order is a party to the New York Convention the Order shall, while in force, be conclusive evidence that that State is a party to that Convention.

(3) An Order in Council under this section may be varied or revoked by a subsequent Order in Council.

8.—(1) This Act may be cited as the Arbitration Act 1975.

Short title,  
repeals,  
commence-  
ment and  
extent.

(2) The following provisions of the Arbitration Act 1950 are hereby repealed, that is to say—

- (a) section 4(2);
- (b) in section 28 the proviso;
- (c) in section 30 the words “(except the provisions of subsection (2) of section 4 thereof)”;
- (d) in section 31(2) the words “subsection (2) of section 4”; and
- (e) in section 34 the words from the beginning to “save as aforesaid”.

(3) This Act shall come into operation on such date as the Secretary of State may by order made by statutory instrument appoint.

(4) This Act extends to Northern Ireland.



# Arbitration Act 1979

## 1979 CHAPTER 42

An Act to amend the law relating to arbitrations and for purposes connected therewith. [4th April 1979]

**B**E IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1.—(1) In the Arbitration Act 1950 (in this Act referred to as *Judicial* "the principal Act") section 21 (statement of case for a decision *review of* of the High Court) shall cease to have effect and, without pre- *arbitration* *awards.* *1950 c. 27.* *judice to the right of appeal conferred by subsection (2) below,* the High Court shall not have jurisdiction to set aside or remit an award on an arbitration agreement on the ground of errors of fact or law on the face of the award.

(2) Subject to subsection (3) below, an appeal shall lie to the High Court on any question of law arising out of an award made on an arbitration agreement; and on the determination of such an appeal the High Court may by order—

(a) confirm, vary or set aside the award; or

(b) remit the award to the reconsideration of the arbitrator or umpire together with the court's opinion on the question of law which was the subject of the appeal;

and where the award is remitted under paragraph (b) above the arbitrator or umpire shall, unless the order otherwise directs, make his award within three months after the date of the order.

(3) An appeal under this section may be brought by any of the parties to the reference—

(a) with the consent of all the other parties to the reference; or

(b) subject to section 3 below, with the leave of the court.

(4) The High Court shall not grant leave under subsection (3)(b) above unless it considers that, having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more of the parties to the arbitration agreement; and the court may make any leave which it gives conditional upon the applicant complying with such conditions as it considers appropriate.

(5) Subject to subsection (6) below, if an award is made and, on an application made by any of the parties to the reference,—

(a) with the consent of all the other parties to the reference, or

(b) subject to section 3 below, with the leave of the court, it appears to the High Court that the award does not or does not sufficiently set out the reasons for the award, the court may order the arbitrator or umpire concerned to state the reasons for his award in sufficient detail to enable the court, should an appeal be brought under this section, to consider any question of law arising out of the award.

(6) In any case where an award is made without any reason being given, the High Court shall not make an order under subsection (5) above unless it is satisfied—

(a) that before the award was made one of the parties to the reference gave notice to the arbitrator or umpire concerned that a reasoned award would be required; or

(b) that there is some special reason why such a notice was not given.

(7) No appeal shall lie to the Court of Appeal from a decision of the High Court on an appeal under this section unless—

(a) the High Court or the Court of Appeal gives leave; and

(b) it is certified by the High Court that the question of law to which its decision relates either is one of general public importance or is one which for some other special reason should be considered by the Court of Appeal.

(8) Where the award of an arbitrator or umpire is varied on appeal, the award as varied shall have effect (except for the purposes of this section) as if it were the award of the arbitrator or umpire.



2.—(1) Subject to subsection (2) and section 3 below, on an application to the High Court made by any of the parties to a reference—

*Determination of preliminary point of law by court.*

(a) with the consent of an arbitrator who has entered on the reference or, if an umpire has entered on the reference, with his consent, or

(b) with the consent of all the other parties,

the High Court shall have jurisdiction to determine any question of law arising in the course of the reference.

(2) The High Court shall not entertain an application under subsection (1)(a) above with respect to any question of law unless it is satisfied that—

(a) the determination of the application might produce substantial savings in costs to the parties; and

(b) the question of law is one in respect of which leave to appeal would be likely to be given under section 1(3)(b) above.

(3) A decision of the High Court under this section shall be deemed to be a judgment of the court within the meaning of section 27 of the Supreme Court of Judicature (Consolidation) Act 1925 (appeals to the Court of Appeal), but no appeal shall lie from such a decision unless—

*1925 c. 49.*

(a) the High Court or the Court of Appeal gives leave; and

(b) it is certified by the High Court that the question of law to which its decision relates either is one of general public importance or is one which for some other special reason should be considered by the Court of Appeal.

3.—(1) Subject to the following provisions of this section and section 4 below—

*Exclusion agreements affecting rights under sections 1 and 2.*

(a) the High Court shall not, under section 1(3)(b) above, grant leave to appeal with respect to a question of law arising out of an award, and

(b) the High Court shall not, under section 1(5)(b) above, grant leave to make an application with respect to an award, and

(c) no application may be made under section 2(1)(a) above with respect to a question of law,

if the parties to the reference in question have entered into an agreement in writing (in this section referred to as an “exclusion agreement”) which excludes the right of appeal under section 1 above in relation to that award or, in a case falling within paragraph (c) above, in relation to an award to which the determination of the question of law is material.

(2) An exclusion agreement may be expressed so as to relate to a particular award, to awards under a particular reference or to any other description of awards, whether arising out of the same reference or not; and an agreement may be an exclusion agreement for the purposes of this section whether it is entered into before or after the passing of this Act and whether or not it forms part of an arbitration agreement.

(3) In any case where—

(a) an arbitration agreement, other than a domestic arbitration agreement, provides for disputes between the parties to be referred to arbitration, and

(b) a dispute to which the agreement relates involves the question whether a party has been guilty of fraud, and

(c) the parties have entered into an exclusion agreement which is applicable to any award made on the reference of that dispute,

then, except in so far as the exclusion agreement otherwise provides, the High Court shall not exercise its powers under section 24(2) of the principal Act (to take steps necessary to enable the question to be determined by the High Court) in relation to that dispute.

(4) Except as provided by subsection (1) above, sections 1 and 2 above shall have effect notwithstanding anything in any agreement purporting—

(a) to prohibit or restrict access to the High Court; or

(b) to restrict the jurisdiction of that court; or

(c) to prohibit or restrict the making of a reasoned award.

(5) An exclusion agreement shall be of no effect in relation to an award made on, or a question of law arising in the course of a reference under, a statutory arbitration, that is to say, such an arbitration as is referred to in subsection (1) of section 31 of the principal Act.

(6) An exclusion agreement shall be of no effect in relation to an award made on, or a question of law arising in the course of a reference under, an arbitration agreement which is a domestic arbitration agreement unless the exclusion agreement is entered into after the commencement of the arbitration in which the award is made or, as the case may be, in which the question of law arises.

(7) In this section “domestic arbitration agreement” means an arbitration agreement which does not provide, expressly or by implication, for arbitration in a State other than the United Kingdom and to which neither—

(a) an individual who is a national of, or habitually resident in, any State other than the United Kingdom, nor

(b) a body corporate which is incorporated in, or whose central management and control is exercised in, any State other than the United Kingdom,  
is a party at the time the arbitration agreement is entered into.

4.—(1) Subject to subsection (3) below, if an arbitration award or a question of law arising in the course of a reference relates, in whole or in part, to—

- (a) a question or claim falling within the Admiralty jurisdiction of the High Court, or
- (b) a dispute arising out of a contract of insurance, or
- (c) a dispute arising out of a commodity contract,

an exclusion agreement shall have no effect in relation to the award or question unless either—

- (i) the exclusion agreement is entered into after the commencement of the arbitration in which the award is made or, as the case may be, in which the question of law arises, or
- (ii) the award or question relates to a contract which is expressed to be governed by a law other than the law of England and Wales.

(2) In subsection (1)(c) above “commodity contract” means a contract—

- (a) for the sale of goods regularly dealt with on a commodity market or exchange in England or Wales which is specified for the purposes of this section by an order made by the Secretary of State; and
- (b) of a description so specified.

(3) The Secretary of State may by order provide that subsection (1) above—

- (a) shall cease to have effect; or
- (b) subject to such conditions as may be specified in the order, shall not apply to any exclusion agreement made in relation to an arbitration award of a description so specified;

and an order under this subsection may contain such supplementary, incidental and transitional provisions as appear to the Secretary of State to be necessary or expedient.

(4) The power to make an order under subsection (2) or subsection (3) above shall be exercisable by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(5) In this section “exclusion agreement” has the same meaning as in section 3 above.

Interlocutory orders.

5.—(1) If any party to a reference under an arbitration agreement fails within the time specified in the order or, if no time is so specified, within a reasonable time to comply with an order made by the arbitrator or umpire in the course of the reference, then, on the application of the arbitrator or umpire or of any party to the reference, the High Court may make an order extending the powers of the arbitrator or umpire as mentioned in subsection (2) below.

(2) If an order is made by the High Court under this section, the arbitrator or umpire shall have power, to the extent and subject to any conditions specified in that order, to continue with the reference in default of appearance or of any other act by one of the parties in like manner as a judge of the High Court might continue with proceedings in that court where a party fails to comply with an order of that court or a requirement of rules of court.

1970 c. 31.

(3) Section 4(5) of the Administration of Justice Act 1970 (jurisdiction of the High Court to be exercisable by the Court of Appeal in relation to judge-arbitrators and judge-umpires) shall not apply in relation to the power of the High Court to make an order under this section, but in the case of a reference to a judge-arbitrator or judge-umpire that power shall be exercisable as in the case of any other reference to arbitration and also by the judge-arbitrator or judge-umpire himself.

(4) Anything done by a judge-arbitrator or judge-umpire in the exercise of the power conferred by subsection (3) above shall be done by him in his capacity as judge of the High Court and have effect as if done by that court.

(5) The preceding provisions of this section have effect notwithstanding anything in any agreement but do not derogate from any powers conferred on an arbitrator or umpire, whether by an arbitration agreement or otherwise.

(6) In this section “judge-arbitrator” and “judge-umpire” have the same meaning as in Schedule 3 to the Administration of Justice Act 1970.

Minor amendments relating to awards and appointment of arbitrators and umpires.

6.—(1) In subsection (1) of section 8 of the principal Act (agreements where reference is to two arbitrators deemed to include provision that the arbitrators shall appoint an umpire immediately after their own appointment)—

- (a) for the words “shall appoint an umpire immediately” there shall be substituted the words “may appoint an umpire at any time”; and
- (b) at the end there shall be added the words “and shall do so forthwith if they cannot agree”.

(2) For section 9 of the principal Act (agreements for reference to three arbitrators) there shall be substituted the following section:—

“Majority award of three arbitrators. 9. Unless the contrary intention is expressed in the arbitration agreement, in any case where there is a reference to three arbitrators, the award of any two of the arbitrators shall be binding.”

(3) In section 10 of the principal Act (power of court in certain cases to appoint an arbitrator or umpire) in paragraph (c) after the word “are”, in the first place where it occurs, there shall be inserted the words “required or are” and the words from “or where” to the end of the paragraph shall be omitted.

(4) At the end of section 10 of the principal Act there shall be added the following subsection:—

“(2) In any case where—

(a) an arbitration agreement provides for the appointment of an arbitrator or umpire by a person who is neither one of the parties nor an existing arbitrator (whether the provision applies directly or in default of agreement by the parties or otherwise), and

(b) that person refuses to make the appointment or does not make it within the time specified in the agreement or, if no time is so specified, within a reasonable time,

any party to the agreement may serve the person in question with a written notice to appoint an arbitrator or umpire and, if the appointment is not made within seven clear days after the service of the notice, the High Court or a judge thereof may, on the application of the party who gave the notice, appoint an arbitrator or umpire who shall have the like powers to act in the reference and make an award as if he had been appointed in accordance with the terms of the agreement.”

7.—(1) References in the following provisions of Part I of the principal Act to that Part of that Act shall have effect as if the preceding provisions of this Act were included in that Part, namely,—

(a) section 14 (interim awards);

(b) section 28 (terms as to costs of orders);

(c) section 30 (Crown to be bound);

(d) section 31 (application to statutory arbitrations); and

(e) section 32 (meaning of “arbitration agreement”).

and interpretation of certain provisions of Part I of principal Act.

(2) Subsections (2) and (3) of section 29 of the principal Act shall apply to determine when an arbitration is deemed to be commenced for the purposes of this Act.

1959 c. 22.

(3) For the avoidance of doubt, it is hereby declared that the reference in subsection (1) of section 31 of the principal Act (statutory arbitrations) to arbitration under any other Act does not extend to arbitration under section 92 of the County Courts Act 1959 (cases in which proceedings are to be or may be referred to arbitration) and accordingly nothing in this Act or in Part I of the principal Act applies to arbitration under the said section 92.

Short title, commencement, repeals and extent.

8.—(1) This Act may be cited as the Arbitration Act 1979.

(2) This Act shall come into operation on such day as the Secretary of State may appoint by order made by statutory instrument; and such an order—

(a) may appoint different days for different provisions of this Act and for the purposes of the operation of the same provision in relation to different descriptions of arbitration agreement; and

(b) may contain such supplementary, incidental and transitional provisions as appear to the Secretary of State to be necessary or expedient.

(3) In consequence of the preceding provisions of this Act, the following provisions are hereby repealed, namely—

(a) in paragraph (c) of section 10 of the principal Act the words from “or where” to the end of the paragraph;

(b) section 21 of the principal Act;

1970 c. 31.

(c) in paragraph 9 of Schedule 3 to the Administration of Justice Act 1970, in sub-paragraph (1) the words “21(1) and (2)” and sub-paragraph (2).

(4) This Act forms part of the law of England and Wales only.



COMMERCIAL ARBITRATION ACT, 1984, No. 160

NEW SOUTH WALES.



TABLE OF PROVISIONS.

PART I.—PRELIMINARY.

1. Short title.
2. Commencement.
3. Repeal, transitional and application provisions.
4. Interpretation.
5. Crown to be bound.

PART II.—APPOINTMENT OF ARBITRATORS AND UMPIRES.

6. Presumption of single arbitrator.
7. Presumption as to joint appointment of arbitrator.
8. Default in the exercise of power to appoint arbitrator.
9. Power to appoint new arbitrator or umpire.
10. General power of the Court to fill vacancy.
11. Power of the Court where arbitrator or umpire is removed.
12. Appointment of umpire.
13. Position of person appointed by the Court, etc.

PART III.—CONDUCT OF ARBITRATION PROCEEDINGS.

14. Procedure of arbitrator or umpire.
15. Manner in which decisions are made.
16. Circumstances in which umpires may enter on the arbitration.
17. Parties may obtain subpoenas.

ii

Act No. 160

18. Refusal or failure to attend before arbitrator or umpire, etc.
19. Evidence before arbitrator or umpire.
20. Representation.
21. Effect of appointment of new arbitrator or umpire on evidence previously given and awards and determinations previously made.
22. Determinations to be made according to law or as amiable compositeur.
23. Interim awards.
24. Specific performance.
25. Extension of ambit of arbitration proceedings.
26. Consolidation of arbitration proceedings.
27. Power to seek settlement of disputes otherwise than by arbitration.

PART IV.—AWARDS AND COSTS.

28. Award to be final.
29. Form of award.
30. Power to correct award.
31. Interest up to making of award.
32. Interest on debt under award.
33. Enforcement of award.
34. Costs.
35. Taxation of arbitrator's or umpire's fees and expenses.
36. Costs of abortive arbitration.
37. Duties of parties.

PART V.—POWERS OF THE COURT.

38. Judicial review of awards.
39. Determination of preliminary point of law by Supreme Court.
40. Exclusion agreements affecting rights under sections 38 and 39.
41. Exclusion agreements not to apply in certain cases.
42. Power to set aside award.
43. Court may remit matter for reconsideration.
44. Removal of arbitrator or umpire.
45. Party not prevented from alleging that arbitrator appointed by that party is not impartial, suitable or competent.
46. Delay in prosecuting claims.
47. General power of the Court to make interlocutory orders.
48. Extension of time.
49. Power to impose terms on orders, etc.

## PART VI.—GENERAL PROVISIONS AS TO ARBITRATION.

- 50. Authority of arbitrator or umpire.
- 51. Liability of arbitrator or umpire.
- 52. Death of party.
- 53. Power to stay court proceedings.
- 54. Interpleader.
- 55. Effect of Scott v. Avery clauses.

## PART VII.—RECOGNITION AND ENFORCEMENT OF FOREIGN AWARDS AND AGREEMENTS.

- 56. Interpretation.
- 57. Enforcement of foreign arbitration agreements.
- 58. Recognition of foreign awards.
- 59. Evidence of awards and arbitration agreements.

## PART VIII.—MISCELLANEOUS.

- 60. Service of notices.
- 61. Perjury.
- 62. Supreme Court rules.
- 63. District Court rules.
- 64. Regulations.

## SCHEDULE 1.—REPEALS.

SCHEDULE 2.—UNITED NATIONS CONFERENCE ON INTERNATIONAL COMMERCIAL ARBITRATION. CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS.

New South Wales



ANNO TRICESIMO TERTIO

ELIZABETHÆ II REGINÆ

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Act No. 160, 1984.

An Act to make provision with respect to the arbitration of certain disputes and to repeal the Arbitration Act, 1902, and the Arbitration (Foreign Awards and Agreements) Act, 1973, and for other purposes. [Assented to, 14th December, 1984.]

See also Administration of Justice (Commercial Arbitration) Amendment Act, 1984; District Court (Commercial Arbitration) Amendment Act, 1984; Foreign Judgments (Reciprocal Enforcement) (Commercial Arbitration) Amendment Act, 1984; Legal Practitioners (Commercial Arbitration) Amendment Act, 1984; Oaths (Commercial Arbitration) Amendment Act, 1984; Supreme Court (Commercial Arbitration) Amendment Act, 1984; Miscellaneous Acts (Commercial Arbitration) Amendment Act, 1984.

*Commercial Arbitration 1984*

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:—

**PART I.****PRELIMINARY.****Short title.**

1. This Act may be cited as the "Commercial Arbitration Act, 1984".

**Commencement.**

2. (1) Sections 1 and 2 shall commence on the date of assent to this Act.

(2) Except as provided by subsection (1), this Act shall commence on such day as may be appointed by the Governor in respect thereof and as may be notified by proclamation published in the Gazette.

**Repeal, transitional and application provisions.**

3. (1) The Acts mentioned in Schedule 1 are repealed to the extent to which they are in that Schedule expressed to be repealed.

(2) Subject to subsection (3)—

- (a) this Act applies to an arbitration agreement (whether made before or after the commencement of this Act) and to an arbitration under such an agreement; and
- (b) a reference in an arbitration agreement to the Arbitration Act, 1902, or a provision of that Act, shall be construed as a reference to this Act or to the corresponding provision (if any) of this Act.

*Commercial Arbitration 1984*

(3) Where an arbitration was commenced before the commencement of this Act the law governing the arbitration and the arbitration agreement shall be that which would have been applicable if this Act had not been enacted.

(4) Subject to this section, this Act shall apply to arbitrations provided for in any other Act as if—

- (a) the other Act were an arbitration agreement;
- (b) the arbitration were pursuant to an arbitration agreement; and
- (c) the parties to the dispute which, by virtue of the other Act, is referred to arbitration were the parties to the arbitration agreement, except in so far as the other Act otherwise indicates or requires.

(5) For the purposes of this section, an arbitration shall be deemed to have been commenced if—

- (a) a dispute to which the relevant arbitration agreement applies has arisen; and
- (b) a party to the agreement—
  - (i) has served on another party to the agreement a notice requiring that other party to appoint an arbitrator or to join or concur in or approve of the appointment of an arbitrator in relation to the dispute;
  - (ii) has served on another party to the agreement a notice requiring that other party to refer, or to concur in the reference of, the dispute to arbitration; or
  - (iii) has taken any other step contemplated by the agreement, or the law in force at the time the dispute arose, with a view to referring the dispute to arbitration or appointing, or securing the appointment of, an arbitrator in relation to the dispute.

(6) Notwithstanding anything in subsection (4), nothing in this Act shall apply to an arbitration under the Supreme Court Act, 1970, the District Court Act, 1973, or the Arbitration (Civil Proceedings) Act, 1983, or to an arbitration, or class of arbitrations, under any other Act that is prescribed as an arbitration to which, or class of arbitrations to which, this Act does not apply.

*Commercial Arbitration 1984*

(7) Nothing in this Act shall affect the operation of section 19 of the Insurance Act, 1902, or section 130 of the Credit Act, 1984.

**Interpretation.**

4. (1) In this Act, except in so far as the context or subject-matter otherwise indicates or requires—

"arbitration agreement" means an agreement in writing to refer present or future disputes to arbitration;

"award" means final or interim award;

"District Court" means the District Court of New South Wales;

"misconduct" includes corruption, fraud, partiality, bias and a breach of the rules of natural justice;

"party", in relation to an arbitration agreement, includes any person claiming through or under a party to the arbitration agreement;

"power of appointment" or "power to appoint", in relation to an arbitrator or umpire, means a power to appoint an arbitrator or umpire, to join in the appointment of an arbitrator or umpire, to concur in or approve of the appointment of an arbitrator or umpire, or to take any other step in or towards the appointment of an arbitrator or umpire;

"Supreme Court" means the Supreme Court of New South Wales;

"the Court" means, subject to subsection (2), the Supreme Court.

(2) Where—

(a) an arbitration agreement provides that the District Court shall have jurisdiction under this Act; or

(b) the parties to an arbitration agreement have agreed in writing that the District Court shall have jurisdiction under this Act and that agreement is in force,

a reference in this Act to the Court is, in relation to that agreement, a reference to the District Court.

(3) A reference in this Act to the commencement of this Act is a reference to the commencement of this Act except sections 1 and 2.

*Commercial Arbitration 1984***Crown to be bound.**

5. Where the Crown (whether in right of the State of New South Wales or in any other capacity) is a party to an arbitration agreement, the Crown shall be bound by this Act.

**PART II.****APPOINTMENT OF ARBITRATORS AND UMPIRES.****Presumption of single arbitrator.**

6. Unless otherwise agreed in writing by the parties to the arbitration agreement, an arbitration agreement that does not provide for the number of arbitrators to be appointed for the purposes of an arbitration to be conducted under that agreement shall be deemed to provide for the appointment of a single arbitrator.

**Presumption as to joint appointment of arbitrator.**

7. Unless otherwise agreed in writing by the parties to the arbitration agreement, an arbitrator who is to be appointed for the purposes of an arbitration to be conducted under an arbitration agreement shall be jointly appointed by the parties to the agreement.

**Default in the exercise of power to appoint arbitrator.**

8. (1) Where a person who has a power to appoint an arbitrator defaults in the exercise of that power, a party to the relevant arbitration agreement may, by notice in writing—

(a) require the person in default to exercise the power within such period (not being a period of less than 7 days after service of the notice) as may be specified in the notice; and



*Commercial Arbitration 1984*

- (b) propose that in default of that person so doing—
- (i) a person named in the notice ("a default nominee") should be appointed to the office in respect of which the power is exercisable; or
  - (ii) specified arbitrators (being the arbitrators who have prior to the date of the notice been appointed in relation to the arbitration) should be the sole arbitrators in relation to the arbitration.
- (2) A notice under subsection (1) (or, where appropriate, a copy of the notice) must be served upon—
- (a) each party to the arbitration agreement (except the party by whom the notice is given); and
  - (b) each other person (not being a party to the arbitration agreement) who is in default in the exercise of a power of appointment in relation to the office in question,
- and the notice shall be deemed to have been served when service is last effected under this subsection.
- (3) Where a person who is in default in the exercise of a power of appointment fails to exercise the power as required by a notice under subsection (1), then—
- (a) where the notice named a default nominee—that nominee shall be deemed to have been duly appointed to the office in respect of which the power was exercisable; or
  - (b) where the notice proposed that specified arbitrators should be the sole arbitrators in relation to the arbitration—
    - (i) the power to which the notice relates shall lapse;
    - (ii) the arbitrators specified in the notice may enter on the arbitration as if they were the sole arbitrators to be appointed in relation to the arbitration; and
    - (iii) the arbitration agreement shall be construed subject to such modifications (if any) as are necessary to enable those arbitrators effectively to enter on and conduct the arbitration.

*Commercial Arbitration 1984*

(4) The Court may, on the application of a party to an arbitration agreement, set aside an appointment or any other consequence of non-compliance with a notice under this section that takes effect by operation of subsection (3), and may itself make an appointment to the office in respect of which the relevant power of appointment was exercisable.

(5) For the purposes of this section, a person defaults in the exercise of a power of appointment if, after an occasion for the exercise of the power has arisen, that person does not exercise the power within the time fixed by the relevant arbitration agreement or, if no time is so fixed, within a reasonable time.

**Power to appoint new arbitrator or umpire.**

9. Unless otherwise agreed in writing by the parties to the arbitration agreement, where a person has a power to appoint an arbitrator or umpire, that power extends to the appointment of a new arbitrator or umpire in place of an arbitrator or umpire who dies or otherwise ceases to hold office.

**General power of the Court to fill vacancy.**

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

- (a) neither the provisions of the arbitration agreement nor the provisions of this Act (other than this section) provide a method for filling the vacancy;
- (b) the method provided by the arbitration agreement or this Act (other than this section) for filling the vacancy fails or for any reason cannot reasonably be followed; or
- (c) the parties to the arbitration agreement agree that, notwithstanding that the provisions of the arbitration agreement or of this Act (other than this section) provide a method for filling the vacancy, the vacancy should be filled by the Court.

the Court may, on the application of a party to the arbitration agreement, make an appointment to fill the vacancy.

**Power of the Court where arbitrator or umpire is removed.**

11. (1) Where an arbitrator or umpire is removed by the Court, the Court may, on the application of a party to the arbitration agreement—

- (a) appoint a person as arbitrator or umpire in place of the person removed; or
- (b) subject to subsection (2), order that the arbitration agreement shall cease to have effect with respect to the dispute to which the arbitration relates.

(2) Subsection (1) (b) does not apply unless all the parties to the arbitration agreement are domiciled or ordinarily resident in Australia at the time the arbitration agreement is entered into.

(3) Subsection (2) does not apply to an arbitration agreement that is treated as an arbitration agreement for the purposes of this Act by virtue only of the operation of section 3 (4) (a).

**Appointment of umpire.**

12. (1) Unless otherwise agreed in writing by the parties to the arbitration agreement, where an arbitration agreement provides for the appointment of an even number of arbitrators, the arbitrators may appoint an umpire at any time after they are themselves appointed and shall do so forthwith if they fail to determine a matter arising for determination.

(2) An umpire appointed in relation to an arbitration is not required to sit with the arbitrators while the arbitrators are conducting proceedings under the arbitration agreement.

**Position of person appointed by the Court, etc.**

13. An arbitrator or umpire appointed pursuant to a power conferred by this Part shall be deemed to have been appointed pursuant to the provisions of the arbitration agreement.

**PART III.****CONDUCT OF ARBITRATION PROCEEDINGS.****Procedure of arbitrator or umpire.**

14. Subject to this Act and to the arbitration agreement, the arbitrator or umpire may conduct proceedings under that agreement in such manner as the arbitrator or umpire thinks fit.

**Manner in which decisions are made.**

15. Unless a contrary intention is expressed in the arbitration agreement, where an arbitration agreement provides for the appointment of 3 or more arbitrators, any decision to be made in the course of proceedings under that agreement may be made by a majority of the arbitrators and, failing a majority, the decision of the arbitrator appointed by the arbitrators to be chairperson shall be binding.

**Circumstances in which umpires may enter on the arbitration.**

16. (1) Unless otherwise agreed in writing by the parties to the arbitration agreement, an umpire appointed in relation to an arbitration may forthwith enter on the arbitration in place of the arbitrators and as if the umpire were the sole arbitrator in any case where—

- (a) the arbitration agreement fixes a time within which an award is to be made and the arbitrators fail to make the award within that time or any extension of that time granted by the Court under section 48; or
- (b) the arbitrators fail to determine a matter arising for determination and by reason of that failure the dispute cannot be resolved pursuant to the arbitration agreement and at least one of the arbitrators has served on a party to the dispute or the umpire a notice in writing to that effect.

(2) At any time after the appointment of an umpire, the Court may, on the application of a party to the arbitration agreement and notwithstanding anything to the contrary in that agreement or any other agreement (whether

*Commercial Arbitration 1984*

oral or written) made between the parties to the arbitration agreement, order that the umpire shall enter on the arbitration in place of the arbitrators and as if the umpire were the sole arbitrator.

**Parties may obtain subpoenas.**

17. (1) The Court may, on the application of any party to an arbitration agreement, and subject to and in accordance with rules of court, issue a subpoena requiring a person to attend for examination before the arbitrator or umpire or requiring a person to attend for examination before the arbitrator or umpire and to produce to the arbitrator or umpire the document or documents specified in the subpoena.

(2) A person shall not be compelled under any subpoena issued in accordance with subsection (1) to answer any question or produce any document which that person could not be compelled to answer or produce on the trial of an action.

**Refusal or failure to attend before arbitrator or umpire, etc.**

18. (1) Unless a contrary intention is expressed in an arbitration agreement, where any person (whether or not a party to the agreement)—

- (a) refuses or fails to attend before the arbitrator or umpire for examination when required under a subpoena or by the arbitrator or umpire to do so;
- (b) appearing as a witness before the arbitrator or umpire—
  - (i) refuses or fails to take an oath or to make an affirmation or affidavit when required by the arbitrator or umpire to do so;
  - (ii) refuses or fails to answer a question that the witness is required by the arbitrator or umpire to answer; or
  - (iii) refuses or fails to produce a document that the witness is required under a subpoena or by the arbitrator or umpire to produce; or
- (c) refuses or fails to do any other thing which the arbitrator or umpire may require,

*Commercial Arbitration 1984*

a party to the arbitration agreement or the arbitrator or umpire may apply to the Court and the Court may order the person so in default to attend before the Court for examination or to produce to the Court the relevant document or to do the relevant thing.

(2) Where the Court makes an order under subsection (1), it may in addition make orders for the transmission to the arbitrator or umpire of—

- (a) a record of any evidence given pursuant to an order under subsection (1);
- (b) any document produced pursuant to an order under subsection (1) or a copy of any such document; or
- (c) particulars of any thing done pursuant to an order under subsection (1),

and any such evidence, document or thing shall be deemed to have been given, produced or done (as the case requires) in the course of the arbitration proceedings.

(3) If a party to an arbitration agreement—

- (a) refuses or fails to attend before the arbitrator or umpire for examination when required under a subpoena or by the arbitrator or umpire to do so; or
- (b) fails within the time specified by the arbitrator or umpire or, if no time is so specified, within a reasonable time to comply with a requirement of the arbitrator or umpire,

the arbitrator or umpire may continue with the arbitration proceedings in default of appearance or of any other act by the party if in similar proceedings before the Supreme Court the Supreme Court could in the event of such a default continue with the proceedings.

**Evidence before arbitrator or umpire.**

19. (1) Unless a contrary intention is expressed in the arbitration agreement, evidence before the arbitrator or umpire—

- (a) may be given orally or in writing; and
- (b) shall, if the arbitrator or umpire so requires, be given on oath or affirmation or by affidavit.

## Commercial Arbitration 1984

(2) Unless a contrary intention is expressed in the arbitration agreement, an arbitrator or umpire may administer an oath or affirmation or take an affidavit for the purposes of proceedings under that agreement.

(3) Unless otherwise agreed in writing by the parties to an arbitration agreement, an arbitrator or umpire in conducting proceedings under an arbitration agreement is not bound by rules of evidence but may inform himself or herself in relation to any matter in such manner as the arbitrator or umpire thinks fit.

## Representation.

20. (1) Unless otherwise agreed in writing by the parties to the arbitration agreement, a party to an arbitration agreement—

- (a) shall appear before the arbitrator or umpire personally or, where the party is a body of persons, whether corporate or unincorporate, by an officer, employee or agent of the body; and
- (b) may, with the leave of the arbitrator or umpire, be represented by a duly qualified legal practitioner or other representative.

(2) Where by virtue of subsection (1) (b) an arbitrator or umpire has power to grant leave for a party to the arbitration agreement to be represented by a duly qualified legal practitioner or other representative then, without limiting the power of the arbitrator or umpire to grant such leave in any circumstances, the arbitrator or umpire shall grant such leave where the arbitrator or umpire is satisfied—

- (a) that the granting of leave is likely to shorten the length of the arbitration proceedings and reduce the costs of the arbitration; or
- (b) that the applicant would otherwise be unfairly disadvantaged.

(3) Where but for this subsection an arbitrator or umpire would not have power to grant leave for a party to the arbitration agreement to be represented by a duly qualified legal practitioner or other representative, the arbitrator or umpire may, on the application of that party, grant such leave where the arbitrator or umpire is satisfied—

- (a) that the granting of leave is likely to shorten the length of the arbitration proceedings and reduce the costs of the arbitration; or

## Commercial Arbitration 1984

(b) that the applicant would otherwise be unfairly disadvantaged, and, where such leave is granted to a party, that party is entitled, notwithstanding any contrary agreement between the parties to the arbitration agreement, to be represented before the arbitrator or umpire by a duly qualified legal practitioner or other representative.

**Effect of appointment of new arbitrator or umpire on evidence previously given and awards and determinations previously made.**

21. Unless otherwise agreed in writing by the parties to an arbitration agreement, where an umpire enters on the arbitration in place of the arbitrators and as if the umpire were the sole arbitrator or a new arbitrator or umpire is appointed in place of an arbitrator or umpire who dies or otherwise ceases to hold office—

- (a) the umpire or arbitrator shall treat any evidence given, document produced or thing done in the course of the earlier proceedings in the same manner in all respects as if it had been given, produced or done in the course of the proceedings conducted by the umpire or arbitrator;
- (b) any interim award made in the course of the earlier proceedings shall be deemed to have been made by the umpire or arbitrator; and
- (c) the umpire or arbitrator may adopt and act on any determination of a matter made in the course of the earlier proceedings without applying his or her own judgment to the matter.

**Determination to be made according to law or as amiable compositeur. (See UNCITRAL Arbitration Rules Article 33, paragraph 2.)**

22. (1) Unless otherwise agreed in writing by the parties to an arbitration agreement, any question that arises for determination in the course of proceedings under the agreement shall be determined according to law.

(2) If the parties to an arbitration agreement so agree in writing, the arbitrator or umpire may determine any question that arises for determination in the course of proceedings under the agreement as *amiable compositeur* or *ex aequo et bono*.

*Commercial Arbitration 1984***Interim awards.**

23. Unless a contrary intention is expressed in an arbitration agreement, the arbitrator or umpire may make an interim award.

**Specific performance.**

24. Unless a contrary intention is expressed in an arbitration agreement, the arbitrator or umpire shall have power to make an award ordering specific performance of any contract if the Supreme Court would have power to order specific performance of that contract.

**Extension of ambit of arbitration proceedings.**

25. (1) Where—

- (a) pursuant to an arbitration agreement a dispute between the parties to the agreement is referred to arbitration; and
- (b) there is some other dispute between those same parties (whenever the dispute arose), being a dispute to which the same agreement applies,

then, unless the arbitration agreement otherwise provides, the arbitrator or umpire may, upon application being made to the arbitrator or umpire by the parties to the arbitration agreement at any time before a final award is made in relation to the first-mentioned dispute, make an order directing that the arbitration be extended so as to include that other dispute.

(2) An arbitrator or umpire may make an order under subsection (1) on such terms and conditions (if any) as the arbitrator or umpire thinks fit.

**Consolidation of arbitration proceedings.**

26. (1) Where in relation to 2 or more arbitration proceedings it appears to the Court upon the application of all the parties to those proceedings—

- (a) that some common question of law or fact arises in both or all of them;

*Commercial Arbitration 1984*

- (b) that the rights to relief claimed in both or all of them are in respect of or arise out of the same transaction or series of transactions; or

- (c) that for some other reason it is desirable to make an order under this section,

the Court may order those arbitration proceedings to be consolidated on such terms as it thinks just or may order them to be heard at the same time, or one immediately after another, or may order any of them to be stayed until after the determination of any other of them.

(2) Where the Court orders arbitration proceedings to be consolidated under subsection (1) and all the parties to the consolidated arbitration proceedings are in agreement as to the choice of arbitrator or umpire for those proceedings, the arbitrator or umpire shall be appointed by the Court, but if all the parties cannot agree the Court shall have power to appoint an arbitrator or umpire for those proceedings.

(3) Nothing in this section shall be construed as preventing the parties to 2 or more arbitration proceedings from agreeing to consolidate those proceedings and taking such steps as are necessary to effect that consolidation.

**Power to seek settlement of disputes otherwise than by arbitration.**

27. (1) Unless otherwise agreed in writing by the parties to an arbitration agreement, the arbitrator or umpire shall have power to order the parties to a dispute which has arisen and to which that agreement applies to take such steps as the arbitrator or umpire thinks fit to achieve a settlement of the dispute (including attendance at a conference to be conducted by the arbitrator or umpire) without proceeding to arbitration or (as the case requires) continuing with the arbitration.

(2) Where—

- (a) an arbitrator or umpire conducts a conference pursuant to subsection (1); and
- (b) the conference fails to produce a settlement of the dispute acceptable to the parties to the dispute.

*Commercial Arbitration 1984*

no objection shall be taken to the conduct by the arbitrator or umpire of the subsequent arbitration proceedings solely on the ground that the arbitrator or umpire had previously conducted a conference in relation to the dispute.

(3) The time appointed by or under this Act or fixed by an arbitration agreement or by an order under section 48 for doing any act or taking any proceeding in or in relation to an arbitration shall not be affected by a conference conducted by an arbitrator or umpire pursuant to subsection (1).

(4) Nothing in subsection (3) shall be construed as preventing the making of an application to the Court for the making of an order under section 48.

**PART IV.****AWARDS AND COSTS.****Award to be final.**

28. Unless a contrary intention is expressed in an arbitration agreement, the award made by the arbitrator or umpire shall, subject to this Act, be final and binding on the parties to the agreement.

**Form of award.**

29. (1) Unless otherwise agreed in writing by the parties to an arbitration agreement, the arbitrator or umpire shall—

- (a) make the award in writing;
- (b) sign the award; and
- (c) include in the award a statement of the reasons for making the award.

(2) Where an arbitrator or umpire makes an award otherwise than in writing, the arbitrator or umpire shall, upon request by a party within 7 days after the making of the award, give to the party a statement in writing signed by the arbitrator or umpire of the date, the terms of the award and the reasons for making the award.

*Commercial Arbitration 1984***Power to correct award.**

30. Where an award made under an arbitration agreement contains—

- (a) a clerical mistake;
- (b) an error arising from an accidental slip or omission;
- (c) a material miscalculation of figures or a material mistake in the description of any person, thing or matter referred to in the award; or
- (d) a defect of form,

the arbitrator or umpire may correct the award or the Court, on the application of a party to the agreement, may make an order correcting the award.

**Interest up to making of award.**

31. (1) Unless a contrary intention is expressed in an arbitration agreement, but subject to subsection (4), where the arbitrator or umpire determines to make an award for the payment of money (whether on a claim for a liquidated or an unliquidated amount), the arbitrator or umpire shall have power to include in the sum for which the award is made interest at such rate as the arbitrator or umpire may direct (being a rate not exceeding the rate at which interest is prescribed for the purposes of section 95 of the Supreme Court Act, 1970) on the whole or any part of the money for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

(2) Unless a contrary intention is expressed in an arbitration agreement, but subject to subsection (4), where—

- (a) arbitration proceedings have been commenced for the recovery of a debt or liquidated damages; and
- (b) payment of the whole or a part of the debt or damages is made during the currency of the proceedings and prior to or without an award being made in respect of the debt or damages,

the arbitrator or umpire may order that interest be paid at such rate as the arbitrator or umpire may direct (being a rate not exceeding the rate at which interest is prescribed for the purposes of section 95 of the Supreme Court Act, 1970) on the whole or any part of the money paid for the whole or any part of the period between the date when the cause of action arose and the date of the payment.

## Commercial Arbitration 1984

(3) Without limiting subsection (2), arbitration proceedings shall, for the purposes of that subsection, be deemed to have been commenced if—

- (a) a dispute to which the relevant arbitration agreement applies has arisen; and
- (b) a party to the agreement—
  - (i) has served on another party to the agreement a notice requiring that other party to appoint an arbitrator or to join or concur in or approve of the appointment of an arbitrator in relation to the dispute;
  - (ii) has served on another party to the agreement a notice requiring the other party to refer, or to concur in the reference of, the dispute to arbitration; or
  - (iii) has taken any other step contemplated by the agreement or the law in force at the time the dispute arose, with a view to referring the dispute to arbitration or appointing, or securing the appointment of, an arbitrator in relation to the dispute.

(4) This section does not—

- (a) authorise the awarding of interest upon interest;
- (b) apply in relation to any amount upon which interest is payable as of right whether by virtue of an agreement or otherwise; or
- (c) affect the damages recoverable for the dishonour of a bill of exchange.

## Interest on debt under award.

32. Unless a contrary intention is expressed in an arbitration agreement, where the arbitrator or umpire makes an award for the payment of money, the arbitrator or umpire shall have power to direct that interest at the same rate as that at which interest is prescribed for the purposes of section 95 of the Supreme Court Act, 1970, shall be payable on and from the date of the making of the award or such later date as the arbitrator or umpire may specify on so much of the money as is from time to time unpaid and any interest that so accrues shall be deemed to form part of the award.

## Commercial Arbitration 1984

## Enforcement of award.

33. (1) An award made under an arbitration agreement may, by leave of the Court, be enforced in the same manner as a judgment or order of the Court to the same effect, and where leave is so given, judgment may be entered in terms of the award.

(2) A direction as to the payment of interest by an arbitrator or umpire under section 32 shall cease to have effect on and from the date of the entry of judgment with respect to the award under subsection (1).

## Costs.

34. (1) Unless a contrary intention is expressed in the arbitration agreement, the costs of the arbitration (including the fees and expenses of the arbitrator or umpire) shall be in the discretion of the arbitrator or umpire, who may—

- (a) direct to and by whom and in what manner the whole or any part of those costs shall be paid;
- (b) tax or settle the amount of costs to be so paid or any part of those costs; and
- (c) award costs to be taxed or settled as between party and party or as between solicitor and client.

(2) Any costs of the arbitration (other than the fees or expenses of the arbitrator or umpire) that are directed to be paid by an award shall, except so far as taxed or settled by the arbitrator or umpire, be taxable in the Court, on application made by a party to the arbitration agreement.

(3) A provision in an arbitration agreement (being an arbitration agreement that provides for the reference of future disputes to arbitration) to the effect that the parties or a particular party to the agreement shall in any event pay their own costs of the arbitration or any part of those costs shall be void.

(4) If no provision is made by an award with respect to the costs of the arbitration, a party to the arbitration agreement may, within 14 days of the publication of the award, apply to the arbitrator or umpire for

directions as to the payment of those costs, and thereupon the arbitrator or umpire shall, after hearing any party who wishes to be heard, amend the award by adding to it such directions as the arbitrator or umpire may think proper with respect to the payment of the costs of the arbitration.

(5) Where a sum of money has been paid into the Court in accordance with rules made for the purposes of this Act in satisfaction of a claim to which an arbitration agreement applies, the arbitrator or umpire shall, in exercising the discretion as to costs conferred on the arbitrator or umpire by subsection (1), take into account both the fact that money was paid into the Court and the amount of that payment.

(6) Where—

- (a) an arbitrator or umpire has under section 27 (1) ordered the parties to a dispute to attend at a conference to be conducted by the arbitrator or umpire; and
- (b) there is a refusal or failure by one or more than one of those parties to attend at the conference,

the arbitrator or umpire shall, in exercising the discretion as to costs conferred on the arbitrator or umpire by subsection (1), take that refusal or failure into account.

(7) An arbitrator or umpire shall, in exercising the discretion as to costs conferred on the arbitrator or umpire by subsection (1), take into account any refusal or failure by a party to the arbitration agreement to comply with the provisions of section 37.

#### **Taxation of arbitrator's or umpire's fees and expenses.**

35. (1) If an arbitrator or umpire refuses to deliver an award except on payment of the fees and expenses demanded by the arbitrator or umpire, the Court may, on application made by a party to the arbitration agreement, order that—

- (a) the arbitrator or umpire deliver the award to the applicant on such terms as to the payment of the fees and expenses of the arbitrator or umpire as the Court considers appropriate; and
- (b) the fees and expenses demanded by the arbitrator or umpire be taxed in the Court.

(2) Notwithstanding that the amount of the fees or expenses of the arbitrator or umpire may be fixed by the award, those fees or expenses may, on the application of a party to the arbitration agreement or of the arbitrator or umpire, be taxed in the Court.

(3) The arbitrator or umpire and any party to the arbitration agreement shall be entitled to appear and be heard on any taxation under this section.

(4) Where the fees and expenses of an arbitrator or umpire are taxed in the Court, the arbitrator or umpire shall be entitled to be paid by way of fees and expenses only such sum as may be found reasonable on taxation.

#### **Costs of abortive arbitration.**

36. (1) Unless otherwise agreed in writing by the parties to the arbitration agreement, where an arbitration is commenced but for any reason the arbitration fails, the Court may, on the application of a party to the arbitration agreement or the arbitrator or umpire, make such orders in relation to the costs of the arbitration as it thinks just.

(2) For the purposes of this section, where—

- (a) a final award is not made by the arbitrator or umpire before the arbitration terminates; or
- (b) an award made is wholly set aside by the Court,

an arbitration shall be deemed to have failed.

#### **Duties of parties.**

37. The parties to an arbitration agreement shall at all times do all things which the arbitrator or umpire requires to enable a just award to be made and no party shall wilfully do or cause to be done any act to delay or prevent an award being made.



## PART V.

## POWERS OF THE COURT.

## Judicial review of awards.

38. (1) Without prejudice to the right of appeal conferred by subsection (2), the Court shall not have jurisdiction to set aside or remit an award on the ground of error of fact or law on the face of the award.

(2) Subject to subsection (4), an appeal shall lie to the Supreme Court on any question of law arising out of an award.

(3) On the determination of an appeal under subsection (2) the Supreme Court may by order—

- (a) confirm, vary or set aside the award; or
- (b) remit the award, together with the Supreme Court's opinion on the question of law which was the subject of the appeal, to the arbitrator or umpire for reconsideration or, where a new arbitrator or umpire has been appointed, to that arbitrator or umpire for consideration,

and where the award is remitted under paragraph (b) the arbitrator or umpire shall, unless the order otherwise directs, make the award within 3 months after the date of the order.

(4) An appeal under subsection (2) may be brought by any of the parties to the arbitration agreement—

- (a) with the consent of all the other parties to the arbitration agreement; or
- (b) subject to section 40, with the leave of the Supreme Court.

(5) The Supreme Court—

- (a) shall not grant leave under subsection (4) (b) unless it considers that, having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more of the parties to the arbitration agreement; and

- (b) may make any leave which it grants under subsection (4) (b) conditional upon the applicant for that leave complying with such conditions as it considers appropriate.

(6) Where the award of an arbitrator or umpire is varied on an appeal under subsection (2), the award as varied shall have effect (except for the purposes of this section) as if it were the award of the arbitrator or umpire.

## Determination of preliminary point of law by Supreme Court.

39. (1) Subject to subsection (2) and section 40, on an application to the Supreme Court made by any of the parties to an arbitration agreement—

- (a) with the consent of an arbitrator who has entered on the reference or, if an umpire has entered on the reference, with the consent of the umpire; or
- (b) with the consent of all the other parties,

the Supreme Court shall have jurisdiction to determine any question of law arising in the course of the arbitration.

(2) The Supreme Court shall not entertain an application under subsection (1) (a) with respect to any question of law unless it is satisfied that—

- (a) the determination of the application might produce substantial savings in costs to the parties; and
- (b) the question of law is one in respect of which leave to appeal would be likely to be granted under section 38 (4) (b).

## Exclusion agreements affecting rights under sections 38 and 39.

40. (1) Subject to the following provisions of this section and section 41—

- (a) the Supreme Court shall not, under section 38 (4) (b), grant leave to appeal with respect to a question of law arising out of an award; and

*Commercial Arbitration 1984*

(b) no application may be made under section 39 (1) (a) with respect to a question of law,

if there is in force an agreement in writing (in this section and section 41 referred to as an "exclusion agreement") between the parties to the arbitration agreement which excludes the right of appeal under section 38 (2) in relation to the award or, in a case falling within paragraph (b), in relation to an award to which the determination of the question of law is material.

(2) An exclusion agreement may be expressed so as to relate to a particular award, to awards under a particular arbitration agreement or to any other description of awards, whether arising out of the same arbitration agreement or not.

(3) An agreement may be an exclusion agreement for the purposes of this section whether it is entered into before or after the commencement of this Act and whether or not it forms part of an arbitration agreement.

(4) Except as provided by subsection (1), sections 38 and 39 shall have effect notwithstanding anything in any agreement purporting—

- (a) to prohibit or restrict access to the Supreme Court; or
- (b) to restrict the jurisdiction of the Supreme Court.

(5) An exclusion agreement shall be of no effect in relation to an award made on, or a question of law arising in the course of, an arbitration being an arbitration under any other Act.

(6) An exclusion agreement shall be of no effect in relation to an award made on, or a question of law arising in the course of, an arbitration under an arbitration agreement which is a domestic arbitration agreement unless the exclusion agreement is entered into after the commencement of the arbitration in which the award is made or, as the case requires, in which the question of law arises.

(7) In this section, "domestic arbitration agreement" means an arbitration agreement which does not provide, expressly or by implication, for arbitration in a country other than Australia and to which neither—

- (a) an individual who is a national of, or habitually resident in, any country other than Australia; nor

*Commercial Arbitration 1984*

(b) a body corporate which is incorporated in, or whose central management and control is exercised in, any country other than Australia,

is a party at the time the arbitration agreement is entered into.

**Exclusion agreements not to apply in certain cases.**

41. (1) Subject to subsection (3), if an award or a question of law arising in the course of an arbitration relates, in whole or in part, to—

- (a) a question or claim falling within the Admiralty jurisdiction of the Supreme Court;
- (b) a dispute arising out of a contract of insurance; or
- (c) a dispute arising out of a commodity contract,

an exclusion agreement shall have no effect in relation to the award or question unless either—

- (d) the exclusion agreement is entered into after the commencement of the arbitration in which the award is made or, as the case requires, in which the question of law arises; or
- (e) the award or question relates to a contract which is expressed to be governed by a law other than the law of New South Wales.

(2) In subsection (1) (c), "commodity contract" means a contract—

- (a) for the sale of goods regularly dealt with on a commodity market or exchange in New South Wales which is specified for the purposes of this section by a regulation made by the Governor; and
- (b) of a description specified for the purposes of this section by a regulation made by the Governor.

(3) The Governor may by regulation provide that subsection (1)—

- (a) shall cease to have effect; or
- (b) subject to such conditions as may be specified in the regulation, shall not apply to any exclusion agreement made in relation to an award of a description specified in the regulation.

*Commercial Arbitration 1984*

and a regulation made under this subsection may contain such supplementary, incidental and transitional provisions as appear to the Governor to be necessary.

**Power to set aside award.****42. (1) Where—**

(a) there has been misconduct on the part of an arbitrator or umpire or an arbitrator or umpire has misconducted the proceedings; or

(b) the arbitration or award has been improperly procured,

the Court may, on the application of a party to the arbitration agreement, set the award aside either wholly or in part.

(2) Where the arbitrator or umpire has misconducted the proceedings by making an award partly in respect of a matter not referred to arbitration pursuant to the arbitration agreement, the Court may set aside that part of the award if it can do so without materially affecting the remaining part of the award.

(3) Where an application is made under this section to set aside an award, the Court may order that any money made payable by the award shall be paid into court or otherwise secured pending the determination of the application.

**Court may remit matter for reconsideration.**

43. Subject to section 38 (1), the Court may remit any matter referred to arbitration by an arbitration agreement together with any directions it thinks proper to the arbitrator or umpire for reconsideration or, where a new arbitrator or umpire has been appointed, to that arbitrator or umpire for consideration.

**Removal of arbitrator or umpire.****44. Where the Court is satisfied that—**

(a) there has been misconduct on the part of an arbitrator or umpire or an arbitrator or umpire has misconducted the proceedings;

*Commercial Arbitration 1984*

(b) undue influence has been exercised in relation to an arbitrator or umpire; or

(c) an arbitrator or umpire is incompetent or unsuitable to deal with the particular dispute,

the Court may, on the application of a party to the arbitration agreement, remove the arbitrator or umpire.

**Party not prevented from alleging that arbitrator appointed by that party is not impartial, suitable or competent.**

45. (1) A party to an arbitration agreement is not prevented from alleging in any legal proceedings with respect to the agreement that an arbitrator is not or may not be impartial, suitable or competent by reason of a power of appointment having been exercised by that party in relation to the appointment of that arbitrator or by reason of facts or circumstances that that party knew or ought to have known when exercising that power.

(2) For the purposes of this section, where an arbitrator is named or designated in an arbitration agreement, a party to the agreement shall be deemed—

(a) to have exercised a power of appointment in relation to the appointment of that arbitrator; and

(b) to have exercised that power at the time when the party entered into the arbitration agreement.

**Delay in prosecuting claims.**

46. (1) Unless a contrary intention is expressed in an arbitration agreement, it is an implied term of the agreement that in the event of a dispute arising to which the agreement applies it shall be the duty of the claimant to exercise due diligence in the prosecution of the claim.

(2) Where there has been undue delay by a claimant in instituting or prosecuting a claim pursuant to an arbitration agreement, then, on the application of the arbitrator or umpire or of any party to the dispute, the Court may make an order terminating the arbitration proceedings and prohibiting the claimant from commencing further arbitration proceedings in respect of any matter which was the subject of the terminated proceedings.

(3) The Court shall not make an order under subsection (2) unless it is satisfied—

- (a) that the delay has been intentional and contumelious; or
- (b) that—
  - (i) there has been inordinate and inexcusable delay on the part of the claimant or the claimant's advisers; and
  - (ii) the delay will give rise to a substantial risk of it not being possible to have a fair trial of the issues in the arbitration proceedings or is such as is likely to cause or to have caused serious prejudice to the other parties to the arbitration proceedings either as between themselves and the claimant or between each other or between them and a third party.

#### General power of the Court to make interlocutory orders.

47. The Court shall have the same power of making interlocutory orders for the purposes of and in relation to arbitration proceedings as it has for the purposes of and in relation to proceedings in the Court.

#### Extension of time.

48. (1) Subject to subsection (3), the Court shall have power on the application of a party to an arbitration agreement or an arbitrator or umpire to extend the time appointed by or under this Act or fixed by the agreement or by an order under this section for doing any act or taking any proceeding in or in relation to an arbitration.

(2) The Court may make an order under this section although an application for the making of the order was not made until after the expiration of the time appointed or fixed for doing the act or taking the proceeding.

(3) An order shall not be made under this section extending the time within which arbitration proceedings might be commenced unless—

- (a) the Court is satisfied that in the circumstances of the case undue hardship would otherwise be caused; and

- (b) the making of the order would not contravene the provision of any enactment limiting the time for the commencement of arbitration proceedings.

#### Power to impose terms on orders, etc.

49. Subject to this Act, an order, direction or decision made under this Act by the Supreme Court or the District Court may be made on such terms and conditions (including terms and conditions as to costs) as the Supreme Court or the District Court thinks just.

## PART VI.

### GENERAL PROVISIONS AS TO ARBITRATION.

#### Authority of arbitrator or umpire.

50. Subject to this Act, the authority of an arbitrator or umpire is, unless a contrary intention is expressed in the arbitration agreement or the parties to the agreement otherwise agree in writing, irrevocable.

#### Liability of arbitrator or umpire.

51. An arbitrator or umpire is not liable for negligence in respect of anything done or omitted to be done by the arbitrator or umpire in the capacity of arbitrator or umpire but is liable for fraud in respect of anything done or omitted to be done in that capacity.

#### Death of party.

52. (1) Unless a contrary intention is expressed in the arbitration agreement, where a party to an arbitration agreement dies the agreement shall not be discharged (either as respects the deceased or any other party) and the authority of an arbitrator or umpire shall not be revoked by the death of that party but the agreement shall be enforceable by or against the personal representative of the deceased.

*Commercial Arbitration 1984*

(2) Nothing in subsection (1) shall be taken to affect the operation of any enactment or rule of law by virtue of which a right of action is extinguished by the death of a person.

**Power to stay court proceedings.**

53. (1) If a party to an arbitration agreement commences proceedings in a court against another party to the arbitration agreement in respect of a matter agreed to be referred to arbitration by the agreement, that other party may, subject to subsection (2), apply to that court to stay the proceedings and that court, if satisfied—

- (a) that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the agreement; and
- (b) that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary for the proper conduct of the arbitration,

may make an order staying the proceedings and may further give such directions with respect to the future conduct of the arbitration as it thinks fit.

(2) An application under subsection (1) shall not, except with the leave of the court in which the proceedings have been commenced, be made after the applicant has delivered pleadings or taken any other step in the proceedings other than the entry of an appearance.

(3) Notwithstanding any rule of law to the contrary, a party to an arbitration agreement shall not be entitled to recover damages in any court from another party to the agreement by reason that that other party takes proceedings in a court in respect of the matter agreed to be referred to arbitration by the arbitration agreement.

**Interpleader.**

54. Where relief by way of interpleader is granted in any court and it appears to that court that the claims in question are matters to which an arbitration agreement (to which the claimants are parties) applies, the court may, unless it is satisfied that there is sufficient reason why the matters should

*Commercial Arbitration 1984*

not be referred to arbitration in accordance with the agreement, make an order directing the issue between the claimants to be determined in accordance with the agreement.

**Effect of Scott v. Avery clauses.**

55. (1) Where it is provided (whether in an arbitration agreement or some other agreement, whether oral or written) that arbitration or an award pursuant to arbitration proceedings or the happening of some other event in or in relation to arbitration is a condition precedent to the bringing or maintenance of legal proceedings in respect of a matter or the establishing of a defence to legal proceedings brought in respect of a matter, that provision, notwithstanding that the condition contained in it has not been satisfied—

(a) shall not operate to prevent—

- (i) legal proceedings being brought or maintained in respect of that matter; or
- (ii) a defence being established to legal proceedings brought in respect of that matter; and

(b) shall, where no arbitration agreement relating to that matter is subsisting between the parties to the provision, be construed as an agreement to refer that matter to arbitration.

(2) Subsection (1) does not apply to an arbitration agreement unless all the parties to the agreement are domiciled or ordinarily resident in Australia at the time the arbitration agreement is entered into.

(3) Subsection (2) does not apply to an arbitration agreement that is treated as an arbitration agreement for the purposes of this Act by virtue only of the operation of section 3 (4) (a).

## PART VII.

RECOGNITION AND ENFORCEMENT OF FOREIGN AWARDS  
AND AGREEMENTS.

## Interpretation.

56. (1) In this Part, except in so far as the context or subject-matter otherwise indicates or requires—

"agreement in writing" has the same meaning as in the Convention;

"arbitral award" has the same meaning as in the Convention;

"arbitration agreement" means an agreement in writing of the kind referred to in sub-article 1 of article II of the Convention;

"Convention" means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in 1958 by the United Nations Conference on International Commercial Arbitration at its twenty-fourth meeting, a copy of the English text of which is set out in Schedule 2;

"Convention country" means a country (other than Australia) that is a Contracting State within the meaning of the Convention;

"foreign award" means an arbitral award made, in pursuance of an arbitration agreement, in a country other than Australia, being an arbitral award in relation to which the Convention applies.

(2) In this Part, where the context so admits, "enforcement", in relation to a foreign award, includes the recognition of the award as binding for any purpose.

(3) For the purposes of this Part, a body corporate shall be taken to be ordinarily resident in a country if, and only if, it is incorporated or has its principal place of business in that country.

(4) Nothing in this Part affects the right of any person to the enforcement of a foreign award otherwise than in pursuance of this Part.

## Enforcement of foreign arbitration agreements.

## 57. (1) Where—

- (a) the procedure in relation to arbitration under an arbitration agreement is governed, whether by virtue of the express terms of the agreement or otherwise, by the law of a Convention country;
- (b) the procedure in relation to arbitration under an arbitration agreement is governed, whether by virtue of the express terms of the agreement or otherwise, by the law of a country not being Australia or a Convention country, and a party to the agreement is Australia or a State or Territory or a person who was, at the time when the agreement was made, domiciled or ordinarily resident in Australia;
- (c) a party to an arbitration agreement is the Government of a Convention country or of part of a Convention country or the Government of a State or Territory of a Convention country, being a State or Territory to which the Convention extends; or
- (d) a party to an arbitration agreement is a person who was, at the time when the agreement was made, domiciled or ordinarily resident in a country that is a Convention country,

this section applies to the agreement.

## (2) Subject to this Part, where—

- (a) proceedings instituted by a party to an arbitration agreement to which this section applies against another party to the agreement are pending in a court; and
- (b) the proceedings involve the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration,

on the application of a party to the agreement, the court shall, by order, upon such conditions (if any) as it thinks fit, stay the proceedings or so much of the proceedings as involves the determination of that matter, as the case requires, and refer the parties to arbitration in respect of that matter.

(3) Where a court makes an order under subsection (2), it may, for the purpose of preserving the rights of the parties, make such interim or supplementary orders as it thinks fit in relation to any property that is the subject of the matter to which the first-mentioned order relates.

*Commercial Arbitration 1984*

(4) For the purposes of subsections (2) and (3), a reference to a party includes a reference to a person claiming through or under a party.

(5) The court shall not make an order under subsection (2) if a court finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

**Recognition of foreign awards.**

58. (1) Subject to this Part, a foreign award is binding by virtue of this Part for all purposes on the parties to the arbitration agreement in pursuance of which it was made.

(2) Subject to this Part, a foreign award may be enforced in a court as if the award had been made in New South Wales in accordance with the law of New South Wales.

**(3) Where—**

(a) at any time, a person seeks the enforcement of a foreign award by virtue of this Part; and

(b) the country in which the award was made is not, at that time, a Convention country,

subsections (1) and (2) do not have effect in relation to the award unless that person is, at that time, domiciled or ordinarily resident in Australia or in a Convention country.

(4) Subject to subsection (5), in any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may, at the request of the party against whom the award is invoked, refuse to enforce the award if that party proves to the satisfaction of the court that—

(a) that party, being a party to the arbitration agreement in pursuance of which the award was made, was, under the law applicable to that party, under some incapacity at the time when the agreement was made;

(b) the arbitration agreement is not valid under the law expressed in the agreement to be applicable to it or, where no law is so expressed to be applicable, under the law of the country where the award was made;

*Commercial Arbitration 1984*

(c) that party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present the case of that party in the arbitration proceedings;

(d) the award deals with a difference not contemplated by, or not falling within the terms of, the submission to arbitration, or contains a decision on a matter beyond the scope of the submission to arbitration;

(e) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(f) the award has not yet become binding on the parties to the arbitration agreement 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.

(5) Where an award to which subsection (4) (d) applies contains decisions on matters submitted to arbitration and those decisions can be separated from decisions on matters not so submitted, that part of the award which contains decisions on matters so submitted may be enforced.

(6) In any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may refuse to enforce the award if it finds that—

(a) the subject-matter of the difference between the parties to the award is not capable of settlement by arbitration under the laws in force in New South Wales; or

(b) to enforce the award would be contrary to public policy.

(7) Where, in any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court is satisfied that an application for the setting aside or suspension of the award has been made to a competent authority of the country in which, or under the law of which, the award was made, the court may, if it considers it proper to do so, adjourn the proceedings, or so much of the proceedings as relates to the award, as the case requires, and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

**Evidence of awards and arbitration agreements.**

59. (1) In any proceedings in which a person seeks the enforcement of a foreign award by virtue of this Part, that person shall produce to the court—

- (a) the duly authenticated original award or a duly certified copy; and
- (b) the original arbitration agreement under which the award purports to have been made or a duly certified copy.

(2) For the purposes of subsection (1), an award shall be deemed to have been duly authenticated, and a copy of an award or agreement shall be deemed to have been duly certified, if—

- (a) it purports to have been authenticated or certified, as the case requires, by the arbitrator or, where the arbitrator is a tribunal, by an officer of that tribunal, and it has not been shown to the court that it was not in fact so authenticated or certified; or
- (b) it has been otherwise authenticated or certified to the satisfaction of the court.

(3) If a document or part of a document produced under subsection (1) is written in a language other than English, there shall be produced with the document a translation, in the English language, of the document or that part, as the case requires, certified to be a correct translation.

(4) For the purposes of subsection (3), a translation shall be certified by a diplomatic or consular agent in Australia of the country in which the award was made or otherwise to the satisfaction of the court.

(5) A document produced to a court in accordance with this section is, upon its production, receivable by the court as prima facie evidence of the matters to which it relates.

**PART VIII.****MISCELLANEOUS.****Service of notices.**

60. Where under this Act a notice is required or permitted to be served on any person, the notice may be served in or out of New South Wales—

- (a) by delivering it personally to the person to be served;
- (b) by leaving it at the usual or last known place of residence or business of the person to be served with a person apparently over the age of 16 years and apparently residing thereat or (in the case of a place of business) apparently in charge of or employed at that place;
- (c) by sending it by post addressed to the person to be served at the usual or last known place of residence or business of that person; or
- (d) by serving it in such other manner as the Court may, on application made to it in that behalf, direct.

**Perjury.**

61. (1) Any person who wilfully and corruptly gives false evidence before any arbitrator, umpire or other person authorised to administer an oath for the purposes of an arbitration shall be guilty of perjury, as if the evidence had been given in the Supreme Court in open court, and may be dealt with, prosecuted and punished accordingly.

(2) Subsection (1) applies where evidence is given in New South Wales before any arbitrator, umpire or other person authorised by the law of New South Wales to administer an oath for the purposes of an arbitration, whether the law governing the arbitration agreement or the proceedings in the arbitration, or any other relevant law, is or is not the law of New South Wales.



*Commercial Arbitration 1984***Supreme Court rules.**

62. (1) Rules of court may be made under the Supreme Court Act, 1970, for carrying the purposes of this Act into effect and, in particular, for or with respect to—

- (a) applications to the Supreme Court under this Act and the costs of such applications;
- (b) the payment or bringing of money into and out of the Supreme Court in satisfaction of claims to which arbitration agreements apply and the investment of such money;
- (c) the examination of witnesses before the Supreme Court or before any other person and the issue of commissions or requests for the examination of witnesses outside New South Wales, for the purposes of an arbitration; and
- (d) any other matter or thing for or with respect to which rules are by this Act authorised or required to be made by the Supreme Court.

(2) Subsection (1) does not limit the rule-making powers conferred by the Supreme Court Act, 1970.

**District Court rules.**

63. (1) Rules of court may be made under the District Court Act, 1973, for or with respect to—

- (a) applications to the District Court under this Act and the costs of such applications;
- (b) the payment or bringing of money into and out of the District Court in satisfaction of claims to which arbitration agreements apply and the investment of such money; and
- (c) any other matter or thing for or with respect to which rules are by this Act authorised or required to be made by the District Court.

(2) Subsection (1) does not limit the rule-making powers conferred by the District Court Act, 1973.

*Commercial Arbitration 1984***Regulations.**

64. The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

**SCHEDULE 1.**

(Sec. 3 (1).)

**REPEALS.**

Arbitration Act, 1902, No. 29—the whole Act.

Supreme Court Act, 1970, No. 52—so much of the Second Schedule as amends the Arbitration Act, 1902.

Arbitration (Foreign Awards and Agreements) Act, 1973, No. 36—the whole Act.

**SCHEDULE 2.**

(Sec. 56 (1).)

**UNITED NATIONS CONFERENCE ON INTERNATIONAL COMMERCIAL ARBITRATION.****CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS.****ARTICLE I**

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extensions under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

## SCHEDULE 2—continued.

## ARTICLE II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

## ARTICLE III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

## ARTICLE IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

- (a) The duly authenticated original award or a duly certified copy thereof;
- (b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

## SCHEDULE 2—continued.

## ARTICLE V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

- (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
- (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
- (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
- (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

- (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
- (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

## ARTICLE VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V (1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

## Commercial Arbitration 1984

## SCHEDULE 2—continued.

## ARTICLE VII

1. The provisions of the present Convention shall not affect the validity of multi-lateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this convention.

## ARTICLE VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

## ARTICLE IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

## ARTICLE X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extensions shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

## Commercial Arbitration 1984

## SCHEDULE 2—continued.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

## ARTICLE XI

In the case of a federal or non-unitary State, the following provisions shall apply:

- (a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;
- (b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;
- (c) A federal State party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

## ARTICLE XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

## ARTICLE XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

*Commercial Arbitration 1984***SCHEDULE 2—continued.**

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

**ARTICLE XIV**

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

**ARTICLE XV**

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

- (a) Signatures and ratifications in accordance with article VIII;
- (b) Accessions in accordance with article IX;
- (c) Declarations and notifications under articles I, X and XI;
- (d) The date upon which this Convention enters into force in accordance with article XII;
- (e) Denunciations and notifications in accordance with article XIII.

**ARTICLE XVI**

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

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**The UNCITRAL model law on international  
commercial arbitration (as adopted by the  
United Nations Commission on International Trade  
Law on 21 June 1985)**

**CHAPTER I. GENERAL PROVISIONS**

**ARTICLE I. SCOPE OF APPLICATION\***

- (1) This Law applies to international commercial\*\* arbitration, subject to any agreement in force between this State and any other State or States.
- (2) The provisions of this Law, except articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State.
- (3) An arbitration is international if:
  - (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or
  - (b) one of the following places is situated outside the State in which the parties have their places of business:
    - (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;
    - (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with

\* Article headings are for reference purposes only and are not to be used for purposes of interpretation.

\*\* The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road.

which the subject-matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

(4) For the purposes of paragraph (3) of this article:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;

(b) if a party does not have a place of business, reference is to be made to his habitual residence.

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

## ARTICLE 2. DEFINITIONS AND RULES OF INTERPRETATION

For the purposes of this Law:

(a) "arbitration" means any arbitration whether or not administered by a permanent arbitral institution;

(b) "arbitral tribunal" means a sole arbitrator or a panel of arbitrators;

(c) "court" means a body or organ of the judicial system of a State;

(d) where a provision of this Law, except article 28, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an institution, to make that determination;

(e) where a provision of this Law refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement;

(f) where a provision of this Law, other than in articles 25 (a) and 32 (2) (a), refers to a claim, it also applies to a counter-claim, and where it refers to a defence, it also applies to a defence to such counter-claim.

## ARTICLE 3. RECEIPT OF WRITTEN COMMUNICATIONS

(1) Unless otherwise agreed by the parties:

(a) any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address; if none of these can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last-known place of business, habitual residence or mailing address by registered letter or any other means which provides a record of the attempt to deliver it;

(b) the communication is deemed to have been received on the day it is so delivered.

(2) The provisions of this article do not apply to communications in court proceedings.

## ARTICLE 4. WAIVER OF RIGHT TO OBJECT

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

## ARTICLE 5. EXTENT OF COURT INTERVENTION

In matters governed by this Law, no court shall intervene except where so provided in this Law.

## ARTICLE 6. COURT OR OTHER AUTHORITY FOR CERTAIN FUNCTIONS OF ARBITRATION ASSISTANCE AND SUPERVISION

The functions referred to in articles 11 (3), 11 (4), 13 (3), 14, 16 (3) and 34 (2) shall be performed by ... [Each State enacting this model law specifies the court, courts or, where referred to therein, other authority competent to perform these functions.]

## CHAPTER II. ARBITRATION AGREEMENT

### ARTICLE 7. DEFINITION AND FORM OF ARBITRATION AGREEMENT

(1) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

### ARTICLE 8. ARBITRATION AGREEMENT AND SUBSTANTIVE CLAIM BEFORE COURT

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

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

### ARTICLE 9. ARBITRATION AGREEMENT AND INTERIM MEASURES BY COURT

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

## CHAPTER III. COMPOSITION OF ARBITRAL TRIBUNAL

### ARTICLE 10. NUMBER OF ARBITRATORS

- (1) The parties are free to determine the number of arbitrators.
- (2) Failing such determination, the number of arbitrators shall be three.

### ARTICLE 11. APPOINTMENT OF ARBITRATORS

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

(2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.

(3) Failing such agreement,

(a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6;

(b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6.

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

(a) a party fails to act as required under such procedure, or

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

(c) a third party, including an institution, fails to perform any function entrusted to it under such procedure,

any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(5) A decision on a matter entrusted by paragraph (3) or (4) of this article to the court or other authority specified in article 6 shall be subject to no appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole

or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

#### ARTICLE 12. GROUNDS FOR CHALLENGE

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

(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

#### ARTICLE 13. CHALLENGE PROCEDURE

(1) The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article.

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

(3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

#### ARTICLE 14. FAILURE OR IMPOSSIBILITY TO ACT

(1) If an arbitrator becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court or other authority specified in article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal.

(2) If, under this article or article 13 (2), an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this article or article 12 (2).

#### ARTICLE 15. APPOINTMENT OF SUBSTITUTE ARBITRATOR

Where the mandate of an arbitrator terminates under article 13 or 14 or because of his withdrawal from office for any other reason or because of the revocation of his mandate by agreement of the parties or in any other case of termination of his mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

### CHAPTER IV. JURISDICTION OF ARBITRAL TRIBUNAL

#### ARTICLE 16. COMPETENCE OF ARBITRAL TRIBUNAL TO RULE ON ITS JURISDICTION

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the



arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

#### ARTICLE 17. POWER OF ARBITRAL TRIBUNAL TO ORDER INTERIM MEASURES

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.

### CHAPTER V. CONDUCT OF ARBITRAL PROCEEDINGS

#### ARTICLE 18. EQUAL TREATMENT OF PARTIES

The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

#### ARTICLE 19. DETERMINATION OF RULES OF PROCEDURE

(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

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

#### ARTICLE 20. PLACE OF ARBITRATION

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

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

#### ARTICLE 21. COMMENCEMENT OF ARBITRAL PROCEEDINGS

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

#### ARTICLE 22. LANGUAGE

(1) The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal.

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

#### ARTICLE 23. STATEMENTS OF CLAIM AND DEFENCE

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

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

#### ARTICLE 24. HEARINGS AND WRITTEN PROCEEDINGS

(1) Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.

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

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

#### ARTICLE 25. DEFAULT OF A PARTY

Unless otherwise agreed by the parties, if, without showing sufficient cause,

(a) the claimant fails to communicate his statement of claim in accordance with article 23 (1), the arbitral tribunal shall terminate the proceedings;

(b) the respondent fails to communicate his statement of defence in accordance with article 23 (1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;

(c) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.

#### ARTICLE 26. EXPERT APPOINTED BY ARBITRAL TRIBUNAL

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

(a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;

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

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

#### ARTICLE 27. COURT ASSISTANCE IN TAKING EVIDENCE

The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.

### CHAPTER VI. MAKING OF AWARD AND TERMINATION OF PROCEEDINGS

#### ARTICLE 28. RULES APPLICABLE TO SUBSTANCE OF DISPUTE

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

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

(3) The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so.

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

#### ARTICLES 29. DECISION-MAKING BY PANEL OF ARBITRATORS

In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. However, questions of procedure may be decided by a presiding arbitrator, if so authorized by the parties or all members of the arbitral tribunal.

#### ARTICLE 30. SETTLEMENT

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

(2) An award on agreed terms shall be made in accordance with the provisions of article 31 and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case.

#### ARTICLE 31. FORM AND CONTENTS OF AWARD

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

(2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30.

(3) The award shall state its date and the place of arbitration as determined in accordance with article 20 (1). The award shall be deemed to have been made at that place.

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

#### ARTICLE 32. TERMINATION OF PROCEEDINGS

(1) The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal in accordance with paragraph (2) of this article.

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

- (a) the claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute;
- (b) the parties agree on the termination of the proceedings;
- (c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of articles 33 and 34 (4).

#### ARTICLE 33. CORRECTION AND INTERPRETATION OF AWARD; ADDITIONAL AWARD

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

- (a) a party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature;
- (b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

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

(2) The arbitral tribunal may correct any error of the type referred to in paragraph (1) (a) of this article on its own initiative within thirty days of the date of the award.

(3) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days.

(4) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation or an additional award under paragraph (1) or (3) of this article.

(5) The provisions of article 31 shall apply to a correction or interpretation of the award or to an additional award.

## CHAPTER VII. RECOURSE AGAINST AWARD

### ARTICLE 34. APPLICATION FOR SETTING ASIDE AS EXCLUSIVE RECOURSE AGAINST ARBITRAL AWARD

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

(2) An arbitral award may be set aside by the court specified in article 6 only if:

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

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

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

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

in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

## CHAPTER VIII. RECOGNITION AND ENFORCEMENT OF AWARDS

### ARTICLE 35. RECOGNITION AND ENFORCEMENT

(1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.

(2) The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. If the award or agreement is not made in an official language of this State, the party shall supply a duly certified translation thereof into such language.\*\*\*

### ARTICLE 36. GROUNDS FOR REFUSING RECOGNITION OR ENFORCEMENT

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

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

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to

\*\*\* The conditions set forth in this paragraph are intended to set maximum standards. It would, thus, not be contrary to the harmonization to be achieved by the model law if a State retained even less onerous conditions.

arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

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

(b) if the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

(2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1) (a) (v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

## SECTION IV. THE AWARD DECISIONS

### ARTICLE 31

1. When there are three arbitrators, any award or other decision of the arbitral tribunal shall be made by a majority of the arbitrators.
2. In the case of questions of procedure, when there is no majority or when the arbitral tribunal so authorizes, the presiding arbitrator may decide on his own, subject to revision, if any, by the arbitral tribunal.

## FORM AND EFFECT OF THE AWARD

### ARTICLE 32

1. In addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory, or partial awards.
2. The award shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out the award without delay.
3. The arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given.
4. An award shall be signed by the arbitrators and it shall contain the date on which and the place where the award was made. Where there are three arbitrators and one of them fails to sign, the award shall state the reason for the absence of the signature.
5. The award may be made public only with the consent of both parties.
6. Copies of the award signed by the arbitrators shall be communicated to the parties by the arbitral tribunal.
7. If the arbitration law of the country where the award is made requires that the award be filed or registered by the arbitral tribunal, the tribunal shall comply with this requirement within the period of time required by law.

## APPLICABLE LAW, *amiable compositeur*

### ARTICLE 33

1. The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the

parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

2. The arbitral tribunal shall decide as *amiable compositeur* or *ex aequo et bono* only if the parties have expressly authorized the arbitral tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration.

3. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

## SETTLEMENT OR OTHER GROUNDS FOR TERMINATION

### ARTICLE 34

1. If, before the award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by both parties and accepted by the tribunal, record the settlement in the form of an arbitral award on agreed terms. The arbitral tribunal is not obliged to give reasons for such an award.

2. If, before the award is made, the continuation of the arbitral proceedings becomes unnecessary or impossible for any reason not mentioned in paragraph 1, the arbitral tribunal shall inform the parties of its intention to issue an order for the termination of the proceedings. The arbitral tribunal shall have the power to issue such an order unless a party raises justifiable grounds for objection.

3. Copies of the order for termination of the arbitral proceedings or of the arbitral award on agreed terms, signed by the arbitrators, shall be communicated by the arbitral tribunal to the parties. Where an arbitral award on agreed terms is made, the provisions of article 32, paragraphs 2 and 4 to 7, shall apply.

## INTERPRETATION OF THE AWARD

### ARTICLE 35

1. Within 30 days after the receipt of the award, either party, with notice to the other party, may request that the arbitral tribunal give an interpretation of the award.

2. The interpretation shall be given in writing within 45 days after the

receipt of the request. The interpretation shall form part of the award and the provisions of article 32, paragraphs 2 to 7, shall apply.

## CORRECTION OF THE AWARD

### ARTICLE 36

1. Within 30 days after the receipt of the award, either party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors, or any errors of similar nature. The arbitral tribunal may within 30 days after the communication of the award make such corrections on its own initiative.

2. Such corrections shall be in writing and the provisions of article 32, paragraphs 2 to 7, shall apply.

## ADDITIONAL AWARD

### ARTICLE 37

1. Within 30 days after the receipt of the award either party, with notice to the other party, may request the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award.

2. If the arbitral tribunal considers the request for an additional award to be justified and considers that the omission can be rectified without any further hearings or evidence, it shall complete its award within 60 days after the receipt of the request.

3. When an additional award is made, the provisions of article 32, paragraphs 2 to 7, shall apply.

## COSTS (ARTICLES 38 TO 40)

### ARTICLE 38

The arbitral tribunal shall fix the costs of arbitration in its award. The term "costs" includes only:

- (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;
- (b) The travel and other expenses incurred by the arbitrators;

(c) The costs of expert advice and of other assistance required by the arbitral tribunal.

(d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;

(e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;

(f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary General of the Permanent Court of Arbitration at The Hague.

### ARTICLE 39

1. The fees of the arbitral tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject-matter, the time spent by the arbitrators and any other relevant circumstances of the case.

2. If an appointing authority has been agreed upon by the parties or designated by the Secretary General of the Permanent Court of Arbitration at The Hague, and if that authority has issued a schedule of fees for arbitrators in international cases which it administers, the arbitral tribunal in fixing its fees shall take that schedule of fees into account to the extent that it considers appropriate in the circumstances of the case.

3. If such appointing authority has not issued a schedule of fees for arbitrators in international cases, any party may at any time request the appointing authority to furnish a statement setting forth the basis for establishing fees which is customarily followed in international cases in which the authority appoints arbitrators. If the appointing authority consents to provide such a statement, the arbitral tribunal in fixing its fees shall take such information into account to the extent that it considers appropriate in the circumstances of the case.

4. In cases referred to in paragraphs 2 and 3, when a party so requests and the appointing authority consents to perform the function, the arbitral tribunal shall fix its fees only after consultation with the appointing authority, which may make any comment it deems appropriate to the arbitral tribunal concerning the fees.

### ARTICLE 40

1. Except as provided in paragraph 2, the costs of arbitration shall in

principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

3. When the arbitral tribunal issues an order for the termination of the arbitral proceedings or makes an award on agreed terms it shall fix the costs of arbitration referred to in article 38 and article 39, paragraph 1, in the text of that order or award.

4. No additional fees may be charged by an arbitral tribunal for interpretation or correction or completion of its award under articles 35 to 37.

## DEPOSIT OF COSTS

### ARTICLE 41

1. The arbitral tribunal, on its establishment, may request each party to deposit an equal amount as an advance for the costs referred to in article 38, paragraphs (a), (b) and (c).

2. During the course of the arbitral proceedings the arbitral tribunal may request supplementary deposits from the parties.

3. If an appointing authority has been agreed upon by the parties or designated by the Secretary General of the Permanent Court of Arbitration at The Hague, and when a party so requests and the appointing authority consents to perform the function, the arbitral tribunal shall fix the amounts of any deposits or supplementary deposits only after consultation with the appointing authority which may make any comments to the arbitral tribunal which it deems appropriate concerning the amount of such deposits and supplementary deposits.

4. If the required deposits are not paid in full within 30 days after the receipt of the request, the arbitral tribunal shall so inform the parties in order that one or another of them may make the required payment. If such payment is not made, the arbitral tribunal may order the suspension or termination of the arbitral proceedings.

5. After the award has been made, the arbitral tribunal shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.