

**BILL**

**To amend and consolidate the law relating to international commercial arbitration and the recognition and enforcement of foreign arbitral awards and to provide for the settlement of certain international investment disputes.**

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**To be introduced by the Minister of Justice**

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

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## CHAPTER 1

### *General Provisions*

#### **Purposes of this Act**

1. The purposes of this Act are -
  - (a) to encourage the use of arbitration as an agreed method of resolving international commercial and investment disputes;
  - (b) to implement the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985 for international commercial arbitrations;
  - (c) to facilitate the recognition and enforcement of certain arbitration agreements and arbitral awards;
  - (d) to provide for the settlement of certain international investment disputes; and
  - (e) by doing so, to give effect to the obligations of the Government of South Africa under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965), the English texts of which are set out in Schedules 3 and 4 of this Act.

#### **Interpretation**

2. (1) In Chapters 2 and 3 of this Act, the expression "arbitration agreement" means an arbitration agreement referred to in article 7 of the Model Law and includes:
  - (a) an arbitration clause contained in or incorporated by reference in a bill of lading; and
  - (b) an agreement between the parties otherwise than in writing by referring to terms that are in writing.
- (2) In the event of any inconsistency between the English and Afrikaans texts of this Act, the Model Law and the Conventions contained in Schedules 3 and 4, in each instance the English text shall prevail.

**Exclusion of Act 42 of 1965**

3. (1) Subject to subsection (2), the Arbitration Act 42 of 1965 shall not apply to an arbitration agreement, reference to arbitration or arbitral award covered by this Act.

(2) Section 2 of the Arbitration Act 42 of 1965 ("Matters not subject to arbitration") shall apply for purposes of chapter 3 of this Act.

**This Act binds the State**

4. This Act shall apply to any arbitration in terms of an arbitration agreement to which the State is a party.

**CHAPTER 2*****International Commercial Arbitration*****Definitions**

5. (1) In this Chapter, "the Model Law" means the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985, as adapted in Schedule 1 to this Act.

(2) Unless a contrary intention appears, a word or expression that is used in both this Chapter and in the Model Law (whether or not a particular meaning is given to it by the Model Law) has, in this Chapter, the same meaning as it has in the Model Law.

(3) In this Chapter "conciliation" includes mediation and "conciliator" includes a mediator.

**Model Law to have force of law**

6. Subject to this Act, the Model Law shall have the force of law in South Africa.

**Matters subject to arbitration**

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

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

### **Interpretation of Model Law**

**8.** The material to which an arbitral tribunal or a court may refer in interpreting this Chapter and the Model Law includes the documents referred to in Schedule 2 to this Act.

### **Immunity of arbitrators and arbitral institutions**

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

(2) An arbitral or other institution, authority or person specified in article 6(2) or (3) of the Model Law or designated or requested by the parties, or another arbitral institution to appoint an arbitrator is not liable for any act or omission in the discharge of that function or any other function in relation to an arbitration unless the act or omission is shown to have been in bad faith.

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

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

- (a) the employees of an arbitrator or person, or
- (b) the officers and employees of an arbitral or other institution, authority or person referred to in subsection (2).

### **Consolidation**

**10.** (1) The parties to an arbitration agreement are free to agree -

- (a) that the arbitral proceedings shall be consolidated with other arbitral proceedings, or
- (b) that concurrent hearings shall be held,

on such terms as may be agreed.

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

### **Appointment of conciliator**

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

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

the chairperson for the time being of the authority specified in article 6(2) of the Model Law shall, on the application of any party to the agreement, appoint a conciliator who shall have the same powers as if that conciliator had been appointed in terms of the agreement.

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

- (a) no objection shall be taken to the appointment of such person as an arbitrator, or to that person's conduct of the arbitral proceedings, solely on the ground that that person has previously acted as a conciliator in connection with some or all of the matters referred to arbitration;
- (b) where confidential information has been obtained by a conciliator from a party during conciliation proceedings, the conciliator, before proceeding to act as arbitrator, shall disclose to all other parties to the arbitral proceedings as much of that information as the conciliator considers material to the arbitral proceedings;
- (c) if such person declines to act as an arbitrator, any other person appointed as an arbitrator shall not be required to act as a conciliator unless a contrary intention appears in the arbitration agreement.

(3) Unless a contrary intention appears therein, an arbitration agreement which provides for the appointment of a conciliator shall be deemed to contain a provision that in the event of the conciliation proceedings failing to produce a settlement acceptable to the parties within three months, or such other period to which the parties may agree, of the date of the appointment of the conciliator, or where the conciliator is appointed by name in the agreement, of the receipt by the conciliator of written

notification of the existence of the dispute, the conciliation proceedings shall thereupon terminate.

- (4) The provisions of section 9 shall apply *mutatis mutandis* to –
- (a) an arbitrator acting as conciliator, or the employees of such arbitrator; and
  - (b) the authority referred to in subsection (1) and its officers and employees.

### **Power of arbitral tribunal to act as conciliator**

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

- (2) An arbitrator acting as conciliator -
- (a) may communicate with the parties to the arbitral proceedings collectively or separately; and
  - (b) shall, subject to subsection (3), treat information obtained as conciliator from a party to the arbitration proceedings as confidential unless that party otherwise agrees.

(3) The provisions of section 11(2)(b) shall apply *mutatis mutandis* to an arbitrator resuming arbitration proceedings after acting as conciliator under this section.

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

### **Settlement agreement**

**13.** If the parties to an arbitration agreement settle their dispute by means of conciliation or otherwise prior to the appointment of the arbitral tribunal and enter into a settlement agreement in writing containing the terms of the settlement, that agreement shall be enforced in South Africa as an arbitral award on agreed terms in accordance with articles 35 and 36 of the Model Law, which shall *mutatis mutandis* apply to the enforcement of the settlement agreement.

### **Resort to arbitral proceedings**

**14.** Notwithstanding any agreement to the contrary, a party to an arbitration agreement who is engaged in conciliation proceedings to settle a dispute covered by the arbitration agreement shall not be precluded from commencing arbitration

proceedings if that party is of the opinion that such step is necessary for the preservation of that party's rights.

### **Application of UNCITRAL Conciliation Rules**

**15.** Subject to the provisions of this Act, the parties to an arbitration agreement desirous of settling their dispute by conciliation may agree to use the UNCITRAL Conciliation Rules, the English text of which is set out in Schedule 5 to this Act.

## **CHAPTER 3**

### ***Recognition and enforcement of foreign arbitral awards***

#### **Definitions**

**16. (1)** In this Chapter, unless the context otherwise indicates -

- (i) "certified copy" means a copy authenticated in the manner in which foreign documents may be authenticated to enable them to be produced in any court;
- (ii) "Convention" means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, the English text of which is set out in Schedule 3 to this Act;
- (iii) "court" means a court of a provincial or local division of the High Court of South Africa;
- (iv) "foreign arbitral award" means an arbitral award made in the territory of a state other than South Africa.

(2) For purposes of this Chapter an award shall be deemed to be made at the place of arbitration determined in accordance with the provisions of articles 20(1) and 31(3) of the Model Law.

#### **Application of Convention to South Africa**

**17. (1)** Subject to the provisions of this Chapter, arbitration agreements and foreign arbitral awards shall be recognised and enforced in South Africa as required by the Convention.

(2) The provisions of article 8 of the Model Law shall apply *mutatis mutandis* to arbitration agreements referred to in subsection 1.



### **Recognition and enforcement of foreign arbitral awards**

**18.** (1) A foreign arbitral award shall be recognised as binding on the persons as between whom it was made, and may accordingly be relied on by those persons by way of defence, set-off or otherwise in any legal proceedings in South Africa.

(2) Subject to the provisions of sections 19, 20 and 21, a foreign arbitral award shall, on application, be made an order of court and may then be enforced in the same manner as any judgment or order to the same effect.

### **Evidence to be produced by a party seeking recognition or enforcement**

**19.** A party seeking the recognition or enforcement of a foreign arbitral award shall produce -

- (a) (i) the original foreign arbitral award concerned and the original arbitration agreement in terms of which that award was made, authenticated in the manner in which foreign documents may be authenticated to enable them to be produced in any court; or
- (ii) a certified copy of that award and of that agreement; and
- (b) if that award or agreement is in any language other than one of the official languages of South Africa, a sworn translation thereof into one of such official languages, authenticated in the manner in which foreign documents may be authenticated to enable them to be produced in any court;

provided that the court may accept other documentary evidence as to the existence of the foreign arbitral award and arbitration agreement as sufficient proof in appropriate circumstances.

### **Refusal of recognition or enforcement**

**20.** (1) Recognition or enforcement of a foreign arbitral award shall, subject to the provisions of subsection 2, not be refused.

(2) Recognition or enforcement of a foreign arbitral award may be refused if -

- (a) the court finds that -
  - (i) a reference to arbitration is not permissible in South Africa in respect of the subject-matter of the dispute concerned; or
  - (ii) enforcement of the award concerned would be contrary to public policy in South Africa; or

- (b) the party against whom the award is invoked, proves to the satisfaction of the court that -
- (i) a party to the arbitration agreement concerned had no capacity to contract under the law applicable to that party, or that the said agreement is invalid under the law to which the parties have subjected it, or failing any indication thereon, under the law of the country in which the award was made; or
  - (ii) that party did not receive the required notice of the appointment of the arbitrator or of the arbitration proceedings concerned or was otherwise not able to present that party's case; or
  - (iii) the award deals with a dispute not contemplated by or falling within the provisions of the relevant reference to arbitration, or that it contains decisions on matters beyond the scope of the reference to arbitration: Provided that if the decisions on matters referred to arbitration can be separated from those on matters not so referred, that part of the award which contains decisions on matters referred to arbitration may be recognised or enforced by a court under section 19; or
  - (iv) the constitution of the arbitration tribunal or the arbitration procedure was not in accordance with the relevant arbitration agreement or, failing such agreement, with the law of the country in which the arbitration took place; or
  - (v) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.

(3) If an application for setting aside or suspension of an award has been made to a competent authority referred to in subsection 2(b)(v), the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

### **Saving of other bases for recognition and enforcement**

21. Nothing in this Chapter affects any other right to rely on or to enforce a foreign arbitral award, including the right conferred by article 35 of the Model Law.

## **CHAPTER 4**

### ***Settlement of International Investment Disputes***

#### **Definitions**

22. In this Chapter, unless the context otherwise indicates -

- (i) "award" means an award rendered pursuant to the Convention and includes any decision interpreting, revising or annulling any award, being a decision pursuant to the Convention, and any decision as to costs which under the Convention is to form part of the award;
- (ii) "Centre" means the International Centre for Settlement of Investment Disputes established pursuant to the Convention;
- (iii) "Contracting State" means a State which has ratified or acceded to the Convention and includes a territory to which the Convention applies by virtue of article 70 thereof;
- (iv) "Convention" means the Convention on the Settlement of Investment Disputes between States and Nationals of Other States which was opened for signature in Washington on 18 March 1965, the English text of which is set out in Schedule 4 to this Act.

### **Application of Convention to South Africa**

23. (1) Articles 18 and 20 to 24 and Chapters II to VII of the Convention have the force of law in South Africa in accordance with the provisions of this Act.

(2) Nothing in the Arbitration Act 42 of 1965 or in Chapters 2 and 3 of this Act applies to a dispute within the jurisdiction of the Centre or to an award made under the Convention.

### **Recognition and enforcement of awards**

24. (1) An award may be enforced by entry as a final judgment of the High Court in terms of the award.

(2) The High Court is designated for purposes of article 54 of the Convention.

### **Proof of application of Convention**

25. A certificate signed by the Minister of Foreign Affairs and stating that a state is, or was at the time specified, a Contracting State to the Convention shall be *prima facie* proof of the facts stated.

## CHAPTER 5

### *Transitional and Other Provisions*

#### **Transitional provisions**

26. (1) Subject to subsection (2) below, Chapter 2 of this Act shall apply in relation to an arbitration agreement whether entered into before or after the date when Chapter 2 of this Act comes into force, and to every arbitration under such an agreement.

(2) Notwithstanding subsection (1) above, this section shall not apply with respect to any arbitration proceedings which have commenced but have not been concluded on the date when Chapter 2 of this Act comes into force.

(3) For purposes of this section, arbitration proceedings are to be taken as having commenced on the date the parties have agreed they commenced or, failing such agreement, on the date of receipt by the respondent of a request for the dispute to be referred to arbitration.

(4) Chapters 2 and 3 of this Act shall apply to every arbitral award whether made before, on or after the date of commencement of those Chapters, provided that proceedings for the enforcement of an arbitral award under the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977 or proceedings for the enforcement, setting aside or remittal of an award under the Arbitration Act 42 of 1965 which have commenced when Chapters 2 and 3 of this Act come into force shall be continued and concluded as if those Chapters had not yet commenced.

#### **Repeal of laws**

27. The Recognition and Enforcement of Foreign Arbitral Awards Act, 1977 (Act 40 of 1977) is hereby repealed.

#### **Short title and commencement**

28. (1) This Act shall be called the International Arbitration Act, 1998.

(2) This Act will come into force on a date fixed by the President by proclamation in the *Gazette*.

(3) Different dates may be proclaimed for different Chapters.

**SCHEDULE 1**

**UNCITRAL**

**MODEL LAW ON INTERNATIONAL COMMERCIAL**

**ARBITRATION**

**(As adopted by the United Nations Commission on International Trade Law on June 21, 1985, subject to certain changes and additions.)**

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

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## CHAPTER I: GENERAL PROVISIONS

### Article 1 -- Scope of application<sup>1</sup>

(1) This Law applies to international commercial arbitration, subject to any agreement in force between South Africa and any other State or States.

(2) The provisions of this Law, except articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of South Africa.

(3) An arbitration is international if:

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) one of the following places is situated outside the State in which the parties have their places of business:

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

(4) For the purposes of paragraph (3) of this article:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;

(b) if a party does not have a place of business, reference is to be made to his habitual residence.

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

### Article 2 -- Definitions and rules of interpretation

For the purposes of this Law:

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<sup>1</sup> Article headings are for reference purposes only and are not to be used for purposes of interpretation.

- (a) "arbitration" means any arbitration whether or not administered by a permanent arbitral institution;
- (b) "arbitral tribunal" means a sole arbitrator or a panel of arbitrators;
- (c) "court" means a body or organ of the judicial system of a State;
- (d) where a provision of this Law, except article 28, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorise a third party, including an institution, to make that determination;
- (e) where a provision of this Law refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement;
- (f) where a provision of this Law, other than in articles 25(a) and 32(2)(a), refers to a claim, it also applies to a counter-claim, and where it refers to a defence, it also applies to a defence to such counter-claim.

### **Article 3--Receipt of written communications**

- (1) Unless otherwise agreed by the parties,
  - (a) any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address; if none of these can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last-known place of business, habitual residence or mailing address by registered letter or any other means which provides a record of the attempt to deliver it;
  - (b) the communication is deemed to have been received on the day it is so delivered.
- (2) The provisions of this article do not apply to communications in court proceedings.

### **Article 4--Waiver of right to object**

A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating that party's objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived the right to object.

### **Article 5--Extent of court intervention**

In matters governed by this Law, no court shall intervene except where so provided in this Law.

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

(1) The functions referred to in articles 13(3), 14, 16(3) and 34(2) shall be performed by:

- (a) the provincial or local division of the High Court within the area of jurisdiction of which the arbitration is being, is to be, or was held;
- (b) if the place within South Africa where the arbitration is to take place has not yet been determined, the division with jurisdiction over a South African party, or if there is no South African party, the Witwatersrand Local Division until such place is determined.

(2) Subject to paragraph (4) of this article, the functions referred to in article 11(3) and (4) and section 11(1) of the Act shall be performed by the chairperson for the time being of an appropriate authority specified for this purpose by the Chief Justice by notice in the *Government Gazette*.

(3) If the chairperson referred to in paragraph 2 fails or refuses to perform the functions referred to in article 11(3) and (4) or section 11(1) of the Act and the Chief Justice considers it necessary, the Chief Justice may, by notice in the *Government Gazette*, appoint any other appropriate person to exercise the functions of the chairperson of the authority specified in paragraph (2) of this article.

(4) Pending the designation of an appropriate authority under paragraphs (2) and (3) of this article, the functions referred to in article 11(3) and (4) and section 11(1) of the Act shall be performed by the Chief Justice.

## **CHAPTER II: ARBITRATION AGREEMENT**

### **Article 7--Definition and form of arbitration agreement**

(1) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim in defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make the clause part of the contract.

#### **Article 8--Arbitration agreement and substantive claim before court**

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting that party's first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

#### **Article 9--Arbitration agreement and interim measures by court**

(1) It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

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

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

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

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

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

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

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

### **CHAPTER III: COMPOSITION OF ARBITRAL TRIBUNAL**

#### **Article 10--Number of arbitrators**

- (1) The parties are free to determine the number of arbitrators.
- (2) Failing such determination, the number of arbitrators shall be one.

#### **Article 11--Appointment of arbitrators**

- (1) No person shall be precluded by reason of that person's nationality from acting as an arbitrator, unless otherwise agreed by the parties.
- (2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.
- (3) Failing such agreement,
  - (a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the authority specified in article 6;

- (b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, that arbitrator shall be appointed, upon request of a party, by the authority specified in article 6.
- (4) Where, under an appointment procedure agreed upon by the parties,
- (a) a party fails to act as required under such procedure, or
  - (b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or
  - (c) a third party, including an institution, fails to perform any function entrusted to it under such procedure,

any party may request the authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(5) A decision on a matter entrusted by paragraph (3) or (4) of this article to the authority specified in article 6 shall be subject to no appeal. The authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

#### **Article 12--Grounds for challenge**

(1) A person who is approached in connection with that person's possible appointment as an arbitrator shall disclose any circumstances likely to give rise to justifiable doubts as to that person's impartiality or independence. An arbitrator, from the time of appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by that arbitrator.

(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to that arbitrator's impartiality or independence, or if that arbitrator does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by that party, or in whose appointment that party has participated, only for reasons of which that party becomes aware after the appointment has been made.

#### **Article 13--Challenge procedure**

(1) The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article.

(2) Failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court specified in article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

#### **Article 14--Failure or impossibility to act**

(1) If an arbitrator become *de jure* or *de facto* unable to perform the functions of that office or for other reasons fails to act without undue delay, that arbitrator's mandate terminates on withdrawal from office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court specified in article 6 to decide on the termination of the mandate which decision shall be subject to no appeal.

(2) If, under this article or article 13(2), an arbitrator withdraws from office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this article or article 12(2).

#### **Article 15--Appointment of substitute arbitrator**

Where the mandate of an arbitrator terminates under article 13 or 14 or because of withdrawal from office for any other reason or because of the revocation of that arbitrator's mandate by agreement of the parties or in any other case of termination of that mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

### **CHAPTER IV: JURISDICTION OF ARBITRAL TRIBUNAL**

#### **Article 16--Competence of arbitral tribunal to rule on its jurisdiction**

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an

agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that that party has appointed, or participated in appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

#### **Article 17--Power of arbitral tribunal to order interim measures**

(1) Unless otherwise agreed by the parties and subject to paragraph (2) of this article, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.

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

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

### **CHAPTER V: CONDUCT OF ARBITRAL PROCEEDINGS**

#### **Article 18--Equal treatment of parties**

The parties shall be treated with equality and each party shall be given a full opportunity of presenting that party's case.

#### **Article 19--Determination of rules of procedure**

(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

(2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

#### **Article 20--Place of arbitration**

(1) The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(2) Notwithstanding the provisions of paragraph (1) of this article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

#### **Article 21--Commencement of arbitral proceedings**

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

#### **Article 22--Language**

(1) The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal.

(2) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

#### **Article 23--Statements of claim and defence**

(1) Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting the claim, the points at issue and the relief or remedy sought, and the respondent shall state the defence in respect of

these particulars, unless the parties have otherwise agreed as to the required elements of such statements. The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

(2) Unless otherwise agreed by the parties, either party may amend or supplement the claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it.

#### **Article 24--Hearings and written proceedings**

(1) Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.

(2) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents.

(3) All statements, documents or other information supplied to the arbitration tribunal by one party shall be communicated to the other party. Also any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

#### **Article 25--Default of a party**

Unless otherwise agreed by the parties, if, without showing sufficient cause,

- (a) the claimant fails to communicate the statement of claim in accordance with article 23(1), the arbitral tribunal shall terminate the proceedings;
- (b) the respondent fails to communicate the statement of defence in accordance with article 23(1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;
- (c) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.

#### **Article 26--Expert appointed by arbitral tribunal**

- (1) Unless otherwise agreed by the parties, the arbitral tribunal
- (a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;
  - (b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for the expert's inspection.
- (2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of a written or oral report, participate in a hearing where the parties have the opportunity to put questions to the expert and to present expert witnesses in order to testify on the points at issue.

#### **Article 27--Court assistance in taking evidence**

- (1) The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.
- (2) For purposes of paragraph (1) -
- (a) the registrar of the High Court or the clerk of a magistrate's court in whose area of jurisdiction the arbitration takes place may on the application of the arbitral tribunal or a party with the approval of the arbitral tribunal issue a subpoena to compel the attendance of a witness before an arbitral tribunal to give evidence or to produce documents;
  - (b) the High Court shall have, for the purpose of the arbitral proceedings, the same power as it has for the purpose of proceedings before that court to make an order for-
    - (i) the issue of a commission or request for taking evidence out of the jurisdiction; and
    - (ii) the preservation of evidence.

### **CHAPTER VI: MAKING OF AWARD AND TERMINATION OF PROCEEDINGS**

#### **Article 28--Rules applicable to substance of dispute**

(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.

(2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

(3) The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorised it to do so.

(4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

#### **Article 29--Decision-making by panel of arbitrators**

In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. However, questions of procedure may be decided by a presiding arbitrator, if so authorised by the parties or all members of the arbitral tribunal.

#### **Article 30--Settlement**

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

(2) An award on agreed terms shall be made in accordance with the provisions of article 31 and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case.

#### **Article 31--Form and contents of award**

(1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.

(2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30.

(3) The award shall state its date and the place of arbitration as determined in accordance with article 20(1). The award shall be deemed to have been made at that place.

(4) After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this article shall be delivered to each party.

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

(6) Unless otherwise agreed by the parties, the award of costs in connection with the reference and the award shall be in the discretion of the arbitration tribunal, which may specify the party entitled to costs, the party who shall pay the costs, the amount of costs or the method of determining that amount, and the manner in which the costs shall be paid, provided that the tribunal's award of costs may be set aside only on the grounds referred to in article 34.

#### **Article 32--Termination of proceedings**

(1) The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal in accordance with paragraph (2) of this article.

(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when:

- (a) the claimant withdraws the claim, unless the respondent objects thereto and the arbitral tribunal recognises a legitimate interest on the respondent's part in obtaining a final settlement of the dispute;
- (b) the parties agree on the termination of the proceedings;
- (c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of articles 33 and 34(4).

#### **Article 33--Correction and interpretation of award; additional award**

(1) Within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties:

- (a) a party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature;

- (b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within thirty days of receipt of the request. The interpretation shall form part of the award.

(2) The arbitral tribunal may correct any error of the type referred to in paragraph (1)(a) of this article on its own initiative within thirty days of the date of the award.

(3) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days.

(4) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation or an additional award under paragraph (1) or (3) of this article.

(5) The provisions of article 31 shall apply to a correction or interpretation of the award or to an additional award.

## **CHAPTER VII: RECOURSE AGAINST AWARD**

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

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

(2) An arbitral award may be set aside by the court specified in article 6 only if:

- (a) the party making the application furnishes proof that:
  - (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of South Africa; or
  - (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case; or
  - (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the

submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

- (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of South Africa; or
- (ii) the award is in conflict with the public policy of South Africa.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal, unless the party making the application did not know and could not within that period by exercising reasonable care have acquired knowledge by virtue of which an award is liable to be set aside under paragraph 5(b), in which event the period shall commence on the date when such knowledge could have been acquired by exercising reasonable care.

(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

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

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

## **CHAPTER VIII: RECOGNITION AND ENFORCEMENT OF AWARDS**

### **Article 35--Recognition and enforcement**

(1) An arbitral award, irrespective of the country in which it was made, shall be recognised as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.

(2) The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. If the award or agreement is not made in an official language of South Africa, the party shall supply a duly certified translation thereof into such language.

### **Article 36--Grounds for refusing recognition or enforcement**

(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

- (a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:
  - (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
  - (ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case; or
  - (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced; or
  - (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
  - (v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or
- (b) if the court finds that:

- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of South Africa; or
- (ii) the recognition or enforcement of the award would be contrary to the public policy of South Africa.

(2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)(a)(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

(3) For the avoidance of doubt, and without limiting the generality of paragraph (1)(b)(ii) of this article, it is declared that the recognition or enforcement of an award is contrary to the public policy of South Africa if -

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

**SCHEDULE 2****DOCUMENTS WHICH MAY BE CONSULTED AS AN INTERPRETATION  
AID**

The documents to which reference may be made in terms of section 8 of this Act are:

1. The documents listed hereunder of the United Nations Commission on International Trade Law and its working group, namely -

- (a) Report of the Secretary-General: possible features of a model law on international commercial arbitration (A/CN9/207 of 14 May 1981);
- (b) Report of the Working Group on International Contract Practices on the work of its third session (A/CN9/216 of 23 March 1982);
- (c) Report of the Working Group on International Contract Practices on the work of its fourth session (A/CN9/232 of 10 November 1982);
- (d) Report of the Working Group on International Contract Practices on the work of its fifth session (A/CN9/233 of 28 March 1983);
- (e) Report of the Working Group on International Contract Practices on the work of its sixth session (A/CN9/245 of 22 September 1983);
- (f) Report of the Working Group on International Contract Practices on the work of its seventh session (A/CN9/246 of 6 March 1984);
- (g) Analytical compilation of comments by Governments and international organizations on the draft text of a model law on international commercial arbitration: report of the Secretary-General (A/CN9/263 of 19 March 1985), including the three addenda dated 15 April 1985, 21 May 1985 and 31 July 1985;
- (h) Analytical Commentary on draft text of a model law on international commercial arbitration (A/CN9/264 of 25 March 1985); and
- (i) Report of the United Nations Commission on International Trade Law on the work of its eighteenth session (A/40/17 of 21 August 1985).

2. Report on International Arbitration of the South African Law Commission, Project 94, 1998.