



International Arbitration Amendment Act 2010

No. 97, 2010

**An Act to amend the law in relation to international
arbitration, and for related purposes**

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An Act to amend the law in relation to international arbitration, and for related purposes

[Assented to 6 July 2010]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *International Arbitration Amendment Act 2010*.

2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	6 July 2010
2. Schedule 1, items 1 to 5	The day this Act receives the Royal Assent.	6 July 2010
3. Schedule 1, item 6	Immediately after the commencement of Schedule 2 to the <i>Federal Justice System Amendment (Efficiency Measures) Act (No. 1) 2009</i> .	7 December 2009
4. Schedule 1, item 7	The day this Act receives the Royal Assent.	6 July 2010
5. Schedule 1, item 8	The earlier of: (a) the commencement of Schedule 2 to the <i>Federal Justice System Amendment (Efficiency Measures) Act (No. 1) 2009</i> ; and (b) the day this Act receives the Royal Assent.	7 December 2009 (paragraph (a) applies)
6. Schedule 1, items 9 to 12	The day this Act receives the Royal Assent.	6 July 2010
7. Schedule 1, item 13	The later of: (a) the day after the commencement of Schedule 2 to the <i>Federal Justice System Amendment (Efficiency Measures) Act (No. 1) 2009</i> ; and (b) the day this Act receives the Royal Assent.	6 July 2010 (paragraph (b) applies)
8. Schedule 1,	The day this Act receives the Royal Assent.	6 July 2010

Commencement information		
Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
items 14 to 24		
9. Schedule 1, item 25	Immediately after the commencement of Schedule 2 to the <i>Federal Justice System Amendment (Efficiency Measures) Act (No. 1) 2009</i> .	7 December 2009
10. Schedule 1, items 26 to 35	The day this Act receives the Royal Assent.	6 July 2010

Note: This table relates only to the provisions of this Act as originally passed by both Houses of the Parliament and assented to. It will not be expanded to deal with provisions inserted in this Act after assent.

- (2) Column 3 of the table contains additional information that is not part of this Act. Information in this column may be added to or edited in any published version of this Act.

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Encouraging international arbitration

Part 1—Amendments

International Arbitration Act 1974

1 At the end of Part I

Add:

2D Objects of this Act

The objects of this Act are:

- (a) to facilitate international trade and commerce by encouraging the use of arbitration as a method of resolving disputes; and
- (b) to facilitate the use of arbitration agreements made in relation to international trade and commerce; and
- (c) to facilitate the recognition and enforcement of arbitral awards made in relation to international trade and commerce; and
- (d) to give effect to Australia's obligations under 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; and
- (e) to give effect to the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985 and amended by the United Nations Commission on International Trade Law on 7 July 2006; and
- (f) to give effect to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States signed by Australia on 24 March 1975.

2 Subsection 3(1)

Insert:

data message means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), email, telegram, telex or teletype.

3 Subsection 3(1)

Insert:

electronic communication means any communication made by means of data messages.

4 At the end of section 3

Add:

- (4) For the avoidance of doubt and without limiting subsection (1), an agreement is in writing if:
 - (a) its content is recorded in any form whether or not the agreement or the contract to which it relates has been concluded orally, by conduct, or by other means; or
 - (b) it is contained in an electronic communication and the information in that communication is accessible so as to be usable for subsequent reference; or
 - (c) it is contained 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 the other.
- (5) For the avoidance of doubt and without limiting subsection (1), a reference in a contract to any document containing an arbitration clause is an arbitration agreement, provided that the reference is such as to make the clause part of the contract.

5 Subsection 8(2)

Repeal the subsection, substitute:

- (2) Subject to this Part, a foreign award may be enforced in a court of a State or Territory as if the award were a judgment or order of that court.

6 Subsection 8(3)

Repeal the subsection, substitute:

- (3) Subject to this Part, a foreign award may be enforced in the Federal Court of Australia as if the award were a judgment or order of that court.

7 Before subsection 8(4)

Insert:

- (3A) The court may only refuse to enforce the foreign award in the circumstances mentioned in subsections (5) and (7).

8 Subsection 8(4)

Omit “subsections (1) and (2) do”, substitute “this section does”.

9 After subsection 8(7)

Insert:

- (7A) To avoid doubt and without limiting paragraph (7)(b), the enforcement of a foreign award would be contrary to public policy if:
- (a) the making of the award was induced or affected by fraud or corruption; or
 - (b) a breach of the rules of natural justice occurred in connection with the making of the award.

10 At the end of section 8

Add:

- (9) A court may, if satisfied of any of the matters mentioned in subsection (10), make an order for one or more of the following:
- (a) for proceedings that have been adjourned, or that part of the proceedings that has been adjourned, under subsection (8) to be resumed;
 - (b) for costs against the person who made the application for the setting aside or suspension of the foreign award;
 - (c) for any other order appropriate in the circumstances.
- (10) The matters are:
- (a) the application for the setting aside or suspension of the award is not being pursued in good faith; and
 - (b) the application for the setting aside or suspension of the award is not being pursued with reasonable diligence; and

- (c) the application for the setting aside or suspension of the award has been withdrawn or dismissed; and
 - (d) the continued adjournment of the proceedings is, for any reason, not justified.
- (11) An order under subsection (9) may only be made on the application of a party to the proceedings that have, or a part of which has, been adjourned.

11 Subsection 15(1)

Repeal the subsection, substitute:

- (1) In this Part:

confidential information, in relation to arbitral proceedings, means information that relates to the proceedings or to an award made in the proceedings and includes:

- (a) the statement of claim, statement of defence, and all other pleadings, submissions, statements, or other information supplied to the arbitral tribunal by a party to the proceedings; and
- (b) any evidence (whether documentary or other) supplied to the arbitral tribunal; and
- (c) any notes made by the arbitral tribunal of oral evidence or submissions given before the arbitral tribunal; and
- (d) any transcript of oral evidence or submissions given before the arbitral tribunal; and
- (e) any rulings of the arbitral tribunal; and
- (f) any award of the arbitral tribunal.

disclose, in relation to confidential information, includes giving or communicating the confidential information in any way.

Model Law means the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985 and amended by the United Nations Commission on International Trade Law on 7 July 2006, the English text of which is set out in Schedule 2.

12 Subsection 16(2)

Insert:

arbitration agreement has the meaning given in Option 1 of Article 7 of the Model Law.

13 Section 18

Repeal the section, substitute:

18 Court or authority taken to have been specified in Article 6 of the Model Law

- (1) A court or authority prescribed for the purposes of this subsection is taken to have been specified in Article 6 of the Model Law as a court or authority competent to perform the functions referred to in Article 11(3) of the Model Law.
- (2) A court or authority prescribed for the purposes of this subsection is taken to have been specified in Article 6 of the Model Law as a court or authority competent to perform the functions referred to in Article 11(4) of the Model Law.
- (3) The following courts are taken to have been specified in Article 6 of the Model Law as courts competent to perform the functions referred to in Articles 13(3), 14, 16(3) and 34(2) of the Model Law:
 - (a) if the place of arbitration is, or is to be, in a State—the Supreme Court of that State;
 - (b) if the place of arbitration is, or is to be, in a Territory:
 - (i) the Supreme Court of that Territory; or
 - (ii) if there is no Supreme Court established in that Territory—the Supreme Court of the State or Territory that has jurisdiction in relation to that Territory;
 - (c) in any case—the Federal Court of Australia.

14 After section 18

Insert:

18A Article 12—justifiable doubts as to the impartiality or independence of an arbitrator

- (1) For the purposes of Article 12(1) of the Model Law, there are justifiable doubts as to the impartiality or independence of a person approached in connection with a possible appointment as arbitrator

only if there is a real danger of bias on the part of that person in conducting the arbitration.

- (2) For the purposes of Article 12(2) of the Model Law, there are justifiable doubts as to the impartiality or independence of an arbitrator only if there is a real danger of bias on the part of the arbitrator in conducting the arbitration.

18B Article 17B—preliminary orders

Despite Article 17B of the Model Law:

- (a) no party to an arbitration agreement may make an application for a preliminary order directing another party not to frustrate the purpose of an interim measure requested; and
- (b) no arbitral tribunal may grant such a preliminary order.

18C Article 18—reasonable opportunity to present case

For the purposes of Article 18 of the Model Law, a party to arbitral proceedings is taken to have been given a full opportunity to present the party's case if the party is given a reasonable opportunity to present the party's case.

15 Section 19

Repeal the section, substitute:

19 Articles 17I, 34 and 36 of Model Law—public policy

Without limiting the generality of Articles 17I(1)(b)(ii), 34(2)(b)(ii) and 36(1)(b)(ii) of the Model Law, it is declared, for the avoidance of any doubt, that, for the purposes of those Articles, an interim measure or award is in conflict with, or is contrary to, the public policy of Australia if:

- (a) the making of the interim measure or award was induced or affected by fraud or corruption; or
- (b) a breach of the rules of natural justice occurred in connection with the making of the interim measure or award.

16 Section 21

Repeal the section, substitute:

21 Model Law covers the field

If the Model Law applies to an arbitration, the law of a State or Territory relating to arbitration does not apply to that arbitration.

16A Division 3 of Part III (heading)

Repeal the heading, substitute:

Division 3—Additional provisions

16B Section 22

Repeal the section, substitute:

22 Application of additional provisions

Application to arbitration under Model Law

- (1) This Division applies to any arbitration to which the Model Law applies.

Application of sections 23, 23A, 23B, 23J, 23K, 25, 26 and 27

- (2) Each of the following sections applies to arbitral proceedings commenced in reliance on an arbitration agreement unless the parties to the agreement agree (whether in the agreement or otherwise in writing) that it will not apply:
 - (a) section 23;
 - (b) section 23A;
 - (c) section 23B;
 - (d) section 23J;
 - (e) section 23K;
 - (f) section 25;
 - (g) section 26;
 - (h) section 27.

Application of sections 23C, 23D, 23E, 23F and 23G

- (3) The following sections apply to arbitral proceedings commenced in reliance on an arbitration agreement if the parties to the agreement agree (whether in the agreement or otherwise in writing) that they will apply:

- (a) section 23C;
- (b) section 23D;
- (c) section 23E;
- (d) section 23F;
- (e) section 23G.

Application of section 23H

- (4) Section 23H applies on the death of a party to an arbitration agreement unless the parties to the agreement agree (whether in the agreement or otherwise in writing) that it will not apply.

Application of section 24

- (5) Section 24 applies to arbitral proceedings commenced in reliance on an arbitration agreement if the parties to the agreement agree (whether in the agreement or otherwise in writing) that it will apply.

17 After section 22

Insert:

22A Interpretation

In this Division:

court means:

- (a) in relation to arbitral proceedings that are, or are to be, conducted in a State—the Supreme Court of that State; and
- (b) in relation to arbitral proceedings that are, or are to be, conducted in a Territory:
 - (i) the Supreme Court of the Territory; or
 - (ii) if there is no Supreme Court established in that Territory—the Supreme Court of the State or Territory that has jurisdiction in relation to that Territory; and
- (c) in any case—the Federal Court of Australia.

18 Section 23

Repeal the section, substitute:

23 Parties may obtain subpoenas

- (1) A party to arbitral proceedings commenced in reliance on an arbitration agreement may apply to a court to issue a subpoena under subsection (3).
- (2) However, this may only be done with the permission of the arbitral tribunal conducting the arbitral proceedings.
- (3) The court may, for the purposes of the arbitral proceedings, issue a subpoena requiring a person to do either or both of the following:
 - (a) to attend for examination before the arbitral tribunal;
 - (b) to produce to the arbitral tribunal the documents specified in the subpoena.
- (4) A person must not be compelled under a subpoena issued under subsection (3) to answer any question or produce any document which that person could not be compelled to answer or produce in a proceeding before that court.
- (5) The court must not issue a subpoena under subsection (3) to a person who is not a party to the arbitral proceedings unless the court is satisfied that it is reasonable in all the circumstances to issue it to the person.
- (6) Nothing in this section limits Article 27 of the Model Law.

23A Failure to assist arbitral tribunal

- (1) A party to arbitral proceedings commenced in reliance on an arbitration agreement may apply to a court for an order under subsection (3) if a person:
 - (a) refuses or fails to attend before the arbitral tribunal conducting the arbitral proceedings for examination when required to do so under a subpoena issued under subsection 23(3); or
 - (b) refuses or fails to attend before the arbitral tribunal when required to do so by the arbitral tribunal; or
 - (c) refuses or fails to produce a document that the person is required to produce under a subpoena issued under subsection 23(3); or
 - (d) refuses or fails to produce a document that the person is required to produce by the arbitral tribunal; or

- (e) appearing as a witness before the arbitral tribunal:
 - (i) refuses or fails to take an oath or to make an affirmation or affidavit when required by the arbitral tribunal to do so; or
 - (ii) refuses or fails to answer a question that the witness is required by the arbitral tribunal to answer; or
 - (f) refuses or fails to do any other thing which the arbitral tribunal may require to assist the arbitral tribunal in the performance of its functions.
- (2) However, an application may only be made under paragraph (1)(b), (d), (e) or (f) with the permission of the arbitral tribunal.
- (3) The court may, for the purposes of the arbitral proceedings, order:
- (a) the person to attend before the court for examination or to produce to the court the relevant document or to do the relevant thing; and
 - (b) the person, or any other person, to transmit to the arbitral tribunal one or more of the following:
 - (i) a record of any evidence given in compliance with the order;
 - (ii) any document produced in compliance with the order, or a copy of the document;
 - (iii) particulars of any other thing done in compliance with the order.
- (4) A person must not be compelled under an order made under subsection (3) to answer any question or produce any document which that person could not be compelled to answer or produce in a proceeding before that court.
- (5) The court must not make an order under subsection (3) in relation to a person who is not a party to the arbitral proceedings unless:
- (a) before the order is made, the person is given an opportunity to make representations to the court; and
 - (b) the court is satisfied that it is reasonable in all the circumstances to make the order in relation to the person.
- (6) Nothing in this section limits Article 27 of the Model Law.

23B Default by party to an arbitration agreement

- (1) This section applies if a party to arbitral proceedings commenced in reliance on an arbitration agreement:
 - (a) refuses or fails to attend before an arbitral tribunal for examination when required to do so under a subpoena issued under subsection 23(3) (regardless of whether an application is made for an order under subsection 23A(3)); or
 - (b) refuses or fails to produce a document to an arbitral tribunal when required to do so under a subpoena issued under subsection 23(3) (regardless of whether an application is made for an order under subsection 23A(3)); or
 - (c) refuses or fails to comply with an order made by a court under subsection 23A(3); or
 - (d) fails within the time specified by an arbitral tribunal, or if no time is specified within a reasonable time, to comply with any other requirement made by the arbitral tribunal to assist it in the performance of its functions.
- (2) The arbitral tribunal may continue with the arbitration proceedings in default of appearance or of the other act and make an award on the evidence before it.
- (3) Nothing in this provision affects any other power which the arbitral tribunal or a court may have in relation to the refusal or failure.

23C Disclosure of confidential information

- (1) The parties to arbitral proceedings commenced in reliance on an arbitration agreement must not disclose confidential information in relation to the arbitral proceedings unless:
 - (a) the disclosure is allowed under section 23D; or
 - (b) the disclosure is allowed under an order made under section 23E and no order is in force under section 23F prohibiting that disclosure; or
 - (c) the disclosure is allowed under an order made under section 23G.
- (2) An arbitral tribunal must not disclose confidential information in relation to arbitral proceedings commenced in reliance on an arbitration agreement unless:
 - (a) the disclosure is allowed under section 23D; or

- (b) the disclosure is allowed under an order made under section 23E and no order is in force under section 23F prohibiting that disclosure; or
- (c) the disclosure is allowed under an order made under section 23G.

23D Circumstances in which confidential information may be disclosed

- (1) This section sets out the circumstances in which confidential information in relation to arbitral proceedings may be disclosed by:
 - (a) a party to the arbitral proceedings; or
 - (b) an arbitral tribunal.
- (2) The information may be disclosed with the consent of all of the parties to the arbitral proceedings.
- (3) The information may be disclosed to a professional or other adviser of any of the parties to the arbitral proceedings.
- (4) The information may be disclosed if it is necessary to ensure that a party to the arbitral proceedings has a full opportunity to present the party's case and the disclosure is no more than reasonable for that purpose.
- (5) The information may be disclosed if it is necessary for the establishment or protection of the legal rights of a party to the arbitral proceedings in relation to a third party and the disclosure is no more than reasonable for that purpose.
- (6) The information may be disclosed if it is necessary for the purpose of enforcing an arbitral award and the disclosure is no more than reasonable for that purpose.
- (7) The information may be disclosed if it is necessary for the purposes of this Act, or the Model Law as in force under subsection 16(1) of this Act, and the disclosure is no more than reasonable for that purpose.
- (8) The information may be disclosed if the disclosure is in accordance with an order made or a subpoena issued by a court.
- (9) The information may be disclosed if the disclosure is authorised or required by another relevant law, or required by a competent

regulatory body, and the person making the disclosure gives written details of the disclosure including an explanation of reasons for the disclosure to:

- (a) if the person is a party to the arbitral proceedings—the other parties to the proceedings and the arbitral tribunal; and
- (b) if the arbitral tribunal is making the disclosure—all the parties to the proceedings.

(10) In subsection (9):

another relevant law means:

- (a) a law of the Commonwealth, other than this Act; and
- (b) a law of a State or Territory; and
- (c) a law of a foreign country, or of a part of a foreign country:
 - (i) in which a party to the arbitration agreement has its principal place of business; or
 - (ii) in which a substantial part of the obligations of the commercial relationship are to be performed; or
 - (iii) to which the subject matter of the dispute is most commonly connected.

23E Arbitral tribunal may allow disclosure in certain circumstances

- (1) An arbitral tribunal may make an order allowing a party to arbitral proceedings to disclose confidential information in relation to the proceedings in circumstances other than those mentioned in section 23D.
- (2) An order under subsection (1) may only be made at the request of one of the parties to the arbitral proceedings and after giving each of the parties to the arbitral proceedings the opportunity to be heard.

23F Court may prohibit disclosure in certain circumstances

- (1) A court may make an order prohibiting a party to arbitral proceedings from disclosing confidential information in relation to the arbitral proceedings if:
 - (a) the court is satisfied in the circumstances of the particular case that the public interest in preserving the confidentiality of arbitral proceedings is not outweighed by other

considerations that render it desirable in the public interest for the information to be disclosed; or

- (b) the disclosure is more than is reasonable for that purpose.
- (2) An order under subsection (1) may only be made on the application of a party to the arbitral proceedings and after giving each of the parties to the arbitral proceedings the opportunity to be heard.
- (3) A party to arbitral proceedings may only apply for an order under subsection (1) if the arbitral tribunal has made an order under subsection 23E(1) allowing the disclosure of the information.
- (4) The court may order that the confidential information not be disclosed pending the outcome of the application under subsection (2).
- (5) An order under this section is final.

23G Court may allow disclosure in certain circumstances

- (1) A court may make an order allowing a party to arbitral proceedings to disclose confidential information in relation to the arbitral proceedings in circumstances other than those mentioned in section 23D if:
 - (a) the court is satisfied, in the circumstances of the particular case, that the public interest in preserving the confidentiality of arbitral proceedings is outweighed by other considerations that render it desirable in the public interest for the information to be disclosed; and
 - (b) the disclosure is not more than is reasonable for that purpose.
- (2) An order under subsection (1) may only be made on the application of a person who is or was a party to the arbitral proceedings and after giving each person who is or was a party to the arbitral proceedings the opportunity to be heard.
- (3) A party to arbitral proceedings may only apply for an order under subsection (1) if:
 - (a) the mandate of the arbitral tribunal has been terminated under Article 32 of the Model Law; or
 - (b) a request by the party to the arbitral tribunal to make an order under subsection 23E(1) allowing the disclosure has been refused.

- (4) An order under this section is final.

23H Death of a party to an arbitration agreement

- (1) If a party to an arbitration agreement dies:
- (a) the agreement is not discharged (either in respect of the deceased or any other party); and
 - (b) the authority of an arbitral tribunal is not revoked; and
 - (c) the arbitration agreement is enforceable by or against the personal representative of the deceased.
- (2) Nothing in subsection (1) is 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.

23J Evidence

- (1) An arbitral tribunal may, at any time before the award is issued by which a dispute that is arbitrated by the tribunal is finally decided, make an order:
- (a) allowing the tribunal or a person specified in the order to inspect, photograph, observe or conduct experiments on evidence that is in the possession of a party to the arbitral proceedings and that may be relevant to those proceedings (the *relevant evidence*); and
 - (b) allowing a sample of the relevant evidence to be taken by the tribunal or a person specified in the order.
- (2) The tribunal may only specify a person in the order if the person is:
- (a) a party to the proceedings; or
 - (b) an expert appointed by the tribunal under Article 26 of the Model Law; or
 - (c) an expert appointed by a party to the proceedings with the permission of the tribunal.
- (3) The provisions of the Model Law apply in relation to an order under this section in the same way as they would apply to an interim measure under the Model Law.

23K Security for costs

- (1) An arbitral tribunal may, at any time before the award is issued by which a dispute that is arbitrated by the tribunal is finally decided, order a party to the arbitral proceedings to pay security for costs.
- (2) However, the tribunal must not make such an order solely on the basis that:
 - (a) the party is not ordinarily resident in Australia; or
 - (b) the party is a corporation incorporated or an association formed under the law of a foreign country; or
 - (c) the party is a corporation or association the central management or control of which is exercised in a foreign country.
- (3) The provisions of the Model Law apply in relation to an order under this section in the same way as they would apply to an interim measure under the Model Law.

19 Subsection 25(1)

Omit “Unless the parties to an arbitration agreement have (whether in the agreement or in any other document in writing) otherwise agreed, where”, substitute “Where”.

20 Section 26

Repeal the section, substitute:

26 Interest on debt under award

- (1) This section applies if:
 - (a) an arbitral tribunal makes an award for the payment of an amount of money; and
 - (b) under the award, the amount is to be paid by a particular day (the *due date*).
- (2) The arbitral tribunal may direct that interest, including compound interest, is payable if the amount is not paid on or before the due date.
- (3) The arbitral tribunal may set a reasonable rate of interest.
- (4) The interest is payable:

- (a) from the day immediately following the due date; and
- (b) on so much of the amount as remains unpaid.

(5) The direction is taken to form part of the award.

21 Subsection 27(1)

Omit “Unless the parties to an arbitration agreement have (whether in the agreement or in any other document in writing) otherwise agreed, the”, substitute “The”.

22 At the end of subsection 27(2)

Add:

; and (d) limit the amount of costs that a party is to pay to a specified amount.

23 After subsection 27(2)

Insert:

(2A) An arbitral tribunal must, if it intends to make a direction under paragraph (2)(d), give the parties to the arbitration agreement notice of that intention sufficiently in advance of the incurring of costs to which it relates, or the taking of any steps in the arbitral proceedings which may be affected by it, for the limit to be taken into account.

23A Section 28

Repeal the section, substitute:

28 Immunity

- (1) An arbitrator is not liable for anything done or omitted to be done by the arbitrator in good faith in his or her capacity as arbitrator.
- (2) An entity that appoints, or fails or refuses to appoint, a person as arbitrator is not liable in relation to the appointment, failure or refusal if it was done in good faith.

23B At the end of Division 4 of Part III

Add:

30A Severability

Without limiting its effect apart from this section, this Part also has the effect it would have if it were confined, by express provision, to arbitrations involving:

- (a) places, persons, matters or things external to Australia; or
- (b) disputes arising in the course of trade or commerce with another country, or between the States; or
- (c) disputes between parties at least one of which is a corporation to which paragraph 51(xx) of the Constitution applies; or
- (d) disputes arising in the course of trade or commerce in a Territory.

24 Subsection 35(2)

Repeal the subsection, substitute:

- (2) An award may be enforced in the Supreme Court of a State or Territory with the leave of that court as if the award were a judgment or order of that court.

25 Subsection 35(4)

Repeal the subsection, substitute:

- (4) An award may be enforced in the Federal Court of Australia with the leave of that court as if the award were a judgment or order of that court.

26 After Part IV

Add:

Part V—General matters

39 Matters to which court must have regard

- (1) This section applies where:
 - (a) a court is considering:
 - (i) exercising a power under section 8 to enforce a foreign award; or

- (ii) exercising the power under section 8 to refuse to enforce a foreign award, including a refusal because the enforcement of the award would be contrary to public policy; or
 - (iii) exercising a power under Article 35 of the Model Law, as in force under subsection 16(1) of this Act, to recognise or enforce an arbitral award; or
 - (iv) exercising a power under Article 36 of the Model Law, as in force under subsection 16(1) of this Act, to refuse to recognise or enforce an arbitral award, including a refusal under Article 36(1)(b)(ii) because the recognition or enforcement of the arbitral award would be contrary to the public policy of Australia; or
 - (v) if, under section 18, the court is taken to have been specified in Article 6 of the Model Law as a court competent to perform the functions referred to in that article—performing one or more of those functions; or
 - (vi) performing any other functions or exercising any other powers under this Act, or the Model Law as in force under subsection 16(1) of this Act; or
 - (vii) performing any function or exercising any power under an agreement or award to which this Act applies; or
 - (b) a court is interpreting this Act, or the Model Law as in force under subsection 16(1) of this Act; or
 - (c) a court is interpreting an agreement or award to which this Act applies; or
 - (d) if, under section 18, an authority is taken to have been specified in Article 6 of the Model Law as an authority competent to perform the functions referred to in Articles 11(3) or 11(4) of the Model Law—the authority is considering performing one or more of those functions.
- (2) The court or authority must, in doing so, have regard to:
- (a) the objects of the Act; and
 - (b) the fact that:
 - (i) arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes; and
 - (ii) awards are intended to provide certainty and finality.
- (3) In this section:
-

arbitral award has the same meaning as in the Model Law.

foreign award has the same meaning as in Part II.

Model Law has the same meaning as in Part III.

40 Regulations

The Governor-General may make regulations prescribing matters:

- (a) required or permitted by this Act to be prescribed; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

27 Schedule 2

Repeal the Schedule, substitute:

Schedule 2—UNCITRAL Model Law on International Commercial Arbitration (As adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006)

Note: See subsection 15(1).

CHAPTER I. GENERAL PROVISIONS

Article 1. Scope of application¹

(1) This Law applies to international commercial² 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, 17 H, 17 I, 17 J, 35 and 36, apply only if the place of arbitration is in the territory of this State.

Schedule 1 Encouraging international arbitration
Part 1 Amendments

(Article 1(2) has been amended by the Commission at its thirty-ninth session, in 2006)

- (3) An arbitration is international if:
- (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or
 - (b) one of the following places is situated outside the State in which the parties have their places of business:
 - (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;
 - (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or
 - (c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.
- (4) For the purposes of paragraph (3) of this article:
- (a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;
 - (b) if a party does not have a place of business, reference is to be made to his habitual residence.
- (5) This Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law.

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 2 A. International origin and general principles

(As adopted by the Commission at its thirty-ninth session, in 2006)

(1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

(2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

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

Option I

Article 7. Definition and form of arbitration agreement

(As adopted by the Commission at its thirty-ninth session, in 2006)

- (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.
- (3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.
- (4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; “electronic communication” means any communication that the parties make by means of data messages; “data message” means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.
- (5) Furthermore, an arbitration agreement is in writing if it is contained 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 the other.
- (6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.

Option II

Article 7. Definition of arbitration agreement

(As adopted by the Commission at its thirty-ninth session, in 2006)

“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.

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.

CHAPTER IV A. INTERIM MEASURES AND PRELIMINARY ORDERS

(As adopted by the Commission at its thirty-ninth session, in 2006)

Section 1. Interim measures

Article 17. Power of arbitral tribunal to order interim measures

- (1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.
- (2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:
- (a) Maintain or restore the status quo pending determination of the dispute;
 - (b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
 - (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
 - (d) Preserve evidence that may be relevant and material to the resolution of the dispute.

Article 17 A. Conditions for granting interim measures

(1) The party requesting an interim measure under article 17(2)(a), (b) and (c) shall satisfy the arbitral tribunal that:

(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

(2) With regard to a request for an interim measure under article 17(2)(d), the requirements in paragraphs (1)(a) and (b) of this article shall apply only to the extent the arbitral tribunal considers appropriate.

Section 2. Preliminary orders

Article 17 B. Applications for preliminary orders and conditions for granting preliminary orders

(1) Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.

(2) The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.

(3) The conditions defined under article 17A apply to any preliminary order, provided that the harm to be assessed under article 17A(1)(a), is the harm likely to result from the order being granted or not.

Article 17 C. Specific regime for preliminary orders

- (1) Immediately after the arbitral tribunal has made a determination in respect of an application for a preliminary order, the arbitral tribunal shall give notice to all parties of the request for the interim measure, the application for the preliminary order, the preliminary order, if any, and all other communications, including by indicating the content of any oral communication, between any party and the arbitral tribunal in relation thereto.
- (2) At the same time, the arbitral tribunal shall give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practicable time.
- (3) The arbitral tribunal shall decide promptly on any objection to the preliminary order.
- (4) A preliminary order shall expire after twenty days from the date on which it was issued by the arbitral tribunal. However, the arbitral tribunal may issue an interim measure adopting or modifying the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.
- (5) A preliminary order shall be binding on the parties but shall not be subject to enforcement by a court. Such a preliminary order does not constitute an award.

***Section 3. Provisions applicable to interim measures
and preliminary orders***

Article 17 D. Modification, suspension, termination

The arbitral tribunal may modify, suspend or terminate an interim measure or a preliminary order it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

Article 17 E. Provision of security

- (1) The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.
- (2) The arbitral tribunal shall require the party applying for a preliminary order to provide security in connection with the order unless the arbitral tribunal considers it inappropriate or unnecessary to do so.

Article 17 F. Disclosure

- (1) The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the measure was requested or granted.
- (2) The party applying for a preliminary order shall disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal's determination whether to grant or maintain the order, and such obligation shall continue until the party against whom the order has been requested has had an opportunity to present its case. Thereafter, paragraph (1) of this article shall apply.

Article 17 G. Costs and damages

The party requesting an interim measure or applying for a preliminary order shall be liable for any costs and damages caused by the measure or the order to any party if the arbitral tribunal later determines that, in the circumstances, the measure or the order should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

Section 4. Recognition and enforcement of interim measures

Article 17 H. Recognition and enforcement

- (1) An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon

application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article 17 I.

(2) The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension or modification of that interim measure.

(3) The court of the State where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.

Article 17 I. Grounds for refusing recognition or enforcement³

(1) Recognition or enforcement of an interim measure may be refused only:

(a) At the request of the party against whom it is invoked if the court is satisfied that:

- (i) Such refusal is warranted on the grounds set forth in article 36(1)(a)(i), (ii), (iii) or (iv); or
- (ii) The arbitral tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or
- (iii) The interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the State in which the arbitration takes place or under the law of which that interim measure was granted; or

(b) If the court finds that:

- (i) The interim measure is incompatible with the powers conferred upon the court unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or

- (ii) Any of the grounds set forth in article 36(1)(b)(i) or (ii), apply to the recognition and enforcement of the interim measure.

(2) Any determination made by the court on any ground in paragraph (1) of this article shall be effective only for the purposes of the application to recognize and enforce the interim measure. The court where recognition or enforcement is sought shall not, in making that determination, undertake a review of the substance of the interim measure.

Section 5. Court-ordered interim measures

Article 17 J. Court-ordered interim measures

A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration.

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.

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 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 original award or a copy thereof. If the award is not made in an official language of this State, the court may request the party to supply a translation thereof into such language.⁴

(Article 35(2) has been amended by the Commission at its thirty-ninth session, in 2006)

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 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.

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

²The 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 cooperation; carriage of goods or passengers by air, sea, rail or road.

³The conditions set forth in article 17 I are intended to limit the number of circumstances in which the court may refuse to enforce an interim measure. It would not be contrary to the level of harmonization

sought to be achieved by these model provisions if a State were to adopt fewer circumstances in which enforcement may be refused.

⁴The 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.

Part 2—Application

28 Application of items 2 to 4

The amendments made by items 2 to 4 of this Schedule apply in relation to agreements entered into on or after the commencement of those items.

29 Application of items 5 to 9

- (1) The amendments made by items 5, 7 and 9 of this Schedule apply in relation to proceedings to enforce a foreign award brought on or after the commencement of those items.
- (2) The amendment made by item 6 of this Schedule applies in relation to proceedings to enforce a foreign award brought on or after the commencement of that item.
- (3) The amendment made by item 8 of this Schedule applies in relation to proceedings to enforce a foreign award brought on or after the commencement of that item.

30 Application of item 10

The amendment made by item 10 of this Schedule applies whether the proceedings are adjourned before or after the commencement of that item.

31 Application of item 14

- (1) The amendment made by item 14 of this Schedule, to the extent that it relates to Article 12(1) of the Model Law, applies in relation to an approach on or after the commencement of that item in connection with a possible appointment of a person as arbitrator.
- (2) The amendment made by item 14 of this Schedule, to the extent that it relates to Article 12(2) of the Model Law, applies in relation to a person acting as arbitrator on or after the commencement of that item.

32 Application of items 18 to 23

- (1) The amendments made by items 18 to 23 of this Schedule apply in relation to arbitration agreements entered into on or after the commencement of those items.
- (2) To avoid doubt, subitem (1) does not prevent the parties to an arbitration agreement entered into before the commencement of those items from making an agreement, after that commencement, in accordance with section 22 of the *International Arbitration Act 1974*, in relation to any provision inserted or amended by items 18 to 23 of this Schedule.

33 Application of items 24 and 25

- (1) The amendment made by item 24 of this Schedule applies in relation to proceedings to enforce an award brought on or after the commencement of that item.
- (2) The amendment made by item 25 of this Schedule applies in relation to proceedings to enforce an award brought on or after the commencement of that item.

34 Application of item 26

The amendment made by item 26 of this Schedule applies in relation to:

- (a) the exercise of a power; or
- (b) the performance of a function; or
- (c) the interpretation of this Act; or
- (d) the interpretation of the Model Law; or
- (e) the interpretation of an agreement or award;

on or after the commencement of that item.

35 Definitions

In this Part:

foreign award has the same meaning as in Part II of the *International Arbitration Act 1974*.

Model Law has the same meaning as in Part III of that Act.

*[Minister's second reading speech made in—
House of Representatives on 25 November 2009
Senate on 15 June 2010]*

(243/09)

50 *International Arbitration Amendment Act 2010* No. 97, 2010