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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

INTERNATIONAL ARBITRATION AMENDMENT BILL 1988

EXPLANATORY MEMORANDUM

(Circulated by Authority of the Attorney-General, the Honourable Lionel Bowen, MP)

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INTERNATIONAL ARBITRATION AMENDMENT BILL 1988

OUTLINE

These amendments to the Arbitration (Foreign Awards and Agreements) Act 1974 ('the Act') mainly arise from the Report of the Working Group, established by the Attorney-General in 1986 to examine the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration.

The Model Law establishes a procedural framework for the conduct of international commercial arbitrations. It contains 36 articles regulating such matters as the composition and jurisdiction of the arbitral tribunal, conduct of the arbitral proceedings, the making of the award, setting aside the award, and the recognition and enforcement of awards.

The International Arbitration Amendment Bill 1988 ('the Bill') will amend the Act:

A. To implement the UNCITRAL Model Law:

- on an 'opt out' basis so that its provisions will apply unless parties expressly exclude it.

B. To include additional provisions to facilitate the conduct of international commercial arbitration proceedings, in particular to provide on an 'opt in' basis for:

- consolidation of arbitral proceedings where there is a common question of law or fact, where the rights to relief in the various proceedings arise out of the same transaction of series of transactions, or where consolidation is desirable for some other specified reason;

- . the payment of interest up to the time of making an award;
- . the payment of interest on a debt under an award;
- . determination of costs to be in the discretion of the arbitral tribunal;

C. To allow the States and Territories to enact identical legislation should they so wish.

FINANCIAL IMPACT STATEMENT

The International Arbitration Amendment Bill will have no direct impact on Commonwealth revenue or expenditure. A favourable indirect impact on Commonwealth tax revenue may be expected as the provisions should increase the attractiveness of Australia as a centre for international arbitration, though the extent of this is difficult to quantify.

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Clauses 1 to 4 Short and long titles, headings

1. Clause 1 identifies the amending legislation, and clauses 2 and 4 identify the Principal Act. Clause 3 inserts a new heading which identifies a new first Part of the Act dealing with preliminary matters.

Clause 5

2. This clause inserts three new sections following section 2 of the Principal Act. The sections:

- extend the application of the amending legislation to all external Territories (see new section 2A);
- provide that the Crown is bound in right of the Commonwealth, of each of the States, of the Northern Territory and of Norfolk Island (see new section 2B);
- preserve the operation of section 9 of the Sea-Carriage of Goods Act 1924 (see new section 2C).

The clause also inserts the new heading:

'PART II - ENFORCEMENT OF FOREIGN AWARDS'

Clause 6

3. This clause repeals sections 5, 6 and 11 of the Principal Act as these are replaced by the new sections 2A, 2B and 2C in clause 5 of the amending legislation.

Clause 7

4. This clause inserts a new Part, 'PART III - INTERNATIONAL COMMERCIAL ARBITRATION', after section 14 of the Principal Act. The new Part, which contains 16 new sections, implements and complements the provisions of the Model Law.

(a) Interpretation

5. This provision identifies the Model law and provides that subject to any contrary intention, a word used in Part III is to have the same meaning as it has in the Model Law (see new section 15).

(b) Model Law to have force of law

6. New section 16 gives the Model Law the force of law in Australia. Adoption of the Model Law unaltered, as a schedule to the Act, has required clarification of some terms. As the Model Law is to have the force of law, this provision provides that the term 'State' used in the Model Law means Australia including the external Territories and, where it is clear from the context, any foreign country. Similarly 'this State' means Australia including the external Territories.

(c) Interpretation of Model Law - use of extrinsic material

7. This provision was inserted to assist a court or an arbitral tribunal in construing the provisions of the Model Law. These bodies should be able to have recourse to the relevant travaux preparatoires and, specifically, the documents of UNCITRAL and its working group in which the Model Law was discussed (see new section 17).

(d) Courts specified for purposes of Article 6 of Model Law

8. Article 6 of the Model Law allows each state enacting the Model law to specify which court is to perform the functions referred to in articles 11(3), 11(4), 13(3), 14, 16(3) and 34(2). These articles give the court an assistant and corrective role in relation to the appointment and challenge of arbitrators, the jurisdiction of arbitral tribunals and the setting aside of arbitral awards. The courts specified to perform these functions are the relevant State or Territory Supreme Courts (see new section 18).

(e) Articles 34 and 36 of Model Law - public policy

9. To avoid confusion in the use of the term 'public policy' a new section 19 has been inserted into the Principal Act. The term 'public policy' is used in sub-paragraphs 34(2)(b)(ii) and 36(1)(b)(ii) of the Model Law. Both articles 34 and 36 have as their object to make certain that the requirements of procedural justice as well as substantive principles of law and justice are complied with in arbitrations. For this reason the new section 19 in the amending legislation seeks to make it clear that instances such as corruption, bribery, fraud and breach of the principles of natural justice are contrary to the public policy of Australia. The provision is expressly limited in its operation to the two sub-paragraphs referred to above so as to avoid any possible inference that the term 'public policy' which is referred to in the New York Convention does not contain those elements.

(f) Chapter VIII of Model Law not to apply in certain cases

10. Article V of the New York Convention, embodied in the new Part II of the Principal Act, and the provisions of Chapter VIII of the Model Law are very similar. In circumstances where both could apply, the provisions of

article V of the New York Convention prevail and Chapter VIII of the Model Law does not apply (see new section 20). This accords with article 1.1 of the Model Law.

(g) Settlement of dispute otherwise than in accordance with Model Law

11. The Model Law is implemented on an 'opt out' basis by the amending legislation. Accordingly, the provisions of the Model Law will apply to an international commercial arbitration (as defined in article 1 of the Model Law) unless the parties agree otherwise, either in the arbitration agreement or in any other agreement in writing (see new section 21).

(h) Application of optional provisions

12. The new section 22 provides that the additional facilitative provisions of new sections 23-27, which govern matters such as consolidation of arbitral proceedings, costs, interest up to making of an award and interest on a debt under an award, will only apply if the parties 'opt in' to those provisions by agreement in writing. The purpose of the provision is to enable parties to apply to their arbitration either the Model Law with no amendments or additions, or the Model Law together with all or any of the facilitative provisions in Division 3.

(i) Orders under article 17 of the Model Law

13. Article 17 of the Model Law empowers arbitral tribunals to order any party to take what it considers to be a necessary interim measure of protection in respect of the subject matter of the dispute, but does not provide for the enforcement of such orders. The amending legislation provides that such orders are enforceable in accordance with Chapter VIII of the Model Law (see new section 23).

(j) Consolidation of arbitral proceedings

14. The new (optional) section 24 provides for the consolidation of arbitral proceedings at the request of a party to those proceedings. However, it is not intended to prevent parties from agreeing to consolidate proceedings if they so wish. Applications may be made on the ground that there is a common question of law or fact, that the rights to relief in the various proceedings arise out of the same transaction or series of transactions, or that there is some other reason that makes consolidation desirable.

15. The section also provides that orders for consolidation may specify the proceedings which are to be consolidated, the time and order in which they are to be heard, and whether some proceedings should be stayed until other proceedings are determined.

16. Where an application for consolidation is made in relation to two or more arbitral proceedings being heard by the same tribunal, the tribunal can determine the application as it thinks fit. However, where more than one tribunal is involved, the tribunal receiving the application is required to consult the other tribunals concerned. After deliberation, if the tribunals agree, a joint order is issued as to how the proceedings are to be consolidated. If the tribunals are unable to agree, the application fails and the proceedings continue as if no application had been made. No recourse to the court is provided for, in recognition of the policy of the Model Law to limit court intervention.

(k) Interest up to making of award

17. Under new (optional) section 25, arbitral tribunals are given power, unless the parties agree otherwise, to order the payment of interest on sums payable under an award. They are empowered to fix a reasonable rate on the whole or any portion

of the money. The discretion to determine a reasonable rate of interest recognises the possibility of awards being made in foreign currencies and the differing interest rates which may be applicable to those currencies. The interest payable may be calculated for the whole or any part of the period between the date on which the award is made and the date on which the cause of action arose.

18. However, tribunals may not award the payment of interest on interest, or on interest which is payable as of right. An award of interest does not affect damages recoverable for the dishonour of a bill of exchange.

(l) Interest on debt under an award

19. Where an arbitral tribunal makes an award for the payment of money it may also direct, unless the parties agree otherwise, that interest be paid on so much of the money that is not paid, from the date of the award to the date of payment (see new (optional) section 26).

(m) Costs

20. The arbitral tribunal is to have the discretion to award costs in the arbitration, including the fees and expenses of the arbitrator or arbitrators. This provision is also subject to the agreement of the parties. The tribunal has the power to direct the manner in which costs are to be paid, whether in a single sum or separate payments, by whom, and to whom. It may also tax or settle the amount of costs and determine whether it should be on a party and party or solicitor and client basis. If no provision is made in the award with respect to costs, a party may, within 14 days of receiving the award, apply to the arbitral tribunal for a direction as to costs. The tribunal is then required to amend the award by adding to it such directions as it thinks fit.

21. To the extent that costs have not been settled or taxed by the arbitral tribunal they are taxable in the court having jurisdiction under article 34 of the Model Law to hear applications for setting aside the award i.e. State or Territory Supreme Courts (see new (optional) section 27).

(n) Liability of arbitrator

22. Arbitrators are not liable for negligent acts or omissions in the capacity of arbitrator, although they are liable for fraud in that capacity (see new section 28).

(o) Saving of other laws

23. The new Part is not intended to exclude or limit the concurrent operation of a State or Territory law in the same terms as Part III (see new section 29). Such a law must be identical except for unavoidable variations, i.e. those necessary because the provisions are being enacted as the law of a particular State or Territory.

(p) Application of Part

24. The new Part does not apply to international commercial arbitrations conducted pursuant to an agreement concluded before the commencement of the Part unless the parties otherwise agree in writing (see new section 30).

Clause 8

25. This clause provides that the Model Law is to be inserted into the Principal Act as the new Schedule 2.

Clause 9

26. This clause provides for a number of minor amendments to the Principal Act which bring it up to date and take into account its expanded scope.

Schedule 1

27. This schedule contains the UNCITRAL Model Law on international commercial arbitration and provides that the Model Law is to be inserted into the Principal Act as Schedule 2.

THE MODEL LAW

Chapter 1 - General Provisions

Article 1 - Scope of application

28. This Article deals with the substantive scope of application of the Model Law. The Model Law is intended to apply to 'international commercial arbitration'.

29. Although a precise definition of 'international' is desirable, as this factor will determine whether a case will be governed by the Model Law or by the law on domestic arbitration, the definition in article 1 recognises that in practice this is not possible. The definition is in three parts. The first, in sub-paragraph 3(a), is relatively precise and covers most cases. Sub-paragraphs 3(b) and 3(c) widen the scope of the definition with a corresponding decrease in precision.

30. 'Arbitration' is not defined in the Model Law. However, article 2 clarifies its meaning to a certain extent, stating that it means any arbitration, whether or not administered by a permanent arbitral institution. Thus the term 'arbitration' should be taken to include both pure 'ad hoc' arbitration and any type of administered or institutional arbitration. It is also clear from the scope of the Model Law's provisions that 'arbitration' should be construed as including both continuing arbitral proceedings and events before and after such proceedings e.g. the provisions on recognition of arbitration agreements and on arbitral awards.

31. The term 'commercial' is also not defined. Again it is not possible to formulate a precise definition that would cover all cases. However, guidance as to its meaning and an attempt to ensure uniform interpretation of the term is provided by the footnote to the article which contains an illustrative (but not exhaustive) list of commercial relationships. The content of the footnote reflects the intention that the term be construed broadly. The determinative test is not based on what the national law might otherwise regard as commercial.

32. Article 1 also provides that the law is 'subject to any multilateral or bilateral agreement which has effect in this State'. The phrase indicates the intention that the Model Law should not affect the validity and operation of multilateral and bilateral agreements in force in a country adopting the Model Law. In Australia this means the Model Law will be subject to, and therefore will not affect the validity and operation of, treaties devoted to the same subject matter as that dealt with by the Model Law e.g. the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 'New York Convention'). The provisions of the Model Law will also yield to other treaties which contain provisions on arbitration.

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

33. Article 2 sets out a number of self-explanatory definitions and rules of interpretation for the purposes of the Model Law. 'Arbitration', 'arbitral tribunal' and 'court' are defined, but not 'award'. UNCITRAL was unable to agree on a satisfactory definition of the term 'award', but it is understood to encompass all kinds of award including partial and interim awards.

Article 3 - Receipt of written communications

34. Article 3 lists a variety of instances in which a written communication by a party is deemed to have been received and not only provides that such cases are conclusive of the fact of receipt but also determines the date of receipt.

Article 4 - Waiver of right to object

35. The effect of this article is that a party is deemed to have waived his or her right to object to a procedural defect where that party knew or ought to have known of the defect and does not state an objection without delay or within a specified time limit. If the party proceeds with the arbitration in these circumstances then he or she is estopped from raising an objection to the defect during subsequent phases of the arbitral proceedings and, perhaps more importantly, after the award is rendered.

Article 5 - Extent of court intervention

36. Article 5 requires that, in matters governed by the Model Law, any instance of court involvement in arbitral proceedings be confined to those listed in the Model Law. This approach is based on the recognition that parties to an arbitration make a conscious decision to exclude court jurisdiction and, in commercial cases, prefer the expediency arbitration offers. The article excludes any general or residual powers given to the courts in the domestic system which are not listed in the Model Law. However, as article 5 limits the role of the courts to issues that are regulated expressly or impliedly by the Model Law, (see articles 6,9,27,35 and 36) it follows that it does not exclude court intervention from matters not regulated in the Model Law. Therefore, the courts still have a role in determining matters such as the arbitrability of the subject matter of the dispute, the impact

of state immunity, the capacity of parties to conclude the arbitration agreement and contractual relations between the parties and the arbitrators or the arbitral institution.

Article 6 - Courts for certain functions of arbitration assistance and supervision

37. The courts designated for the purpose of providing assistance and supervision in arbitration proceedings are the relevant State and Territory Supreme courts. The functions referred to in this article are:

- appointment of an arbitrator (art. 11(3)and (4));
- challenge of an arbitrator (art. 13(3));
- termination of an arbitrator's mandate because of failure to act (art. 14);
- setting aside of an arbitral award (art. 34(2)).

Chapter II - The Arbitration Agreement

Article 7 - Definition and form of arbitration agreement

38. Article 7 describes the arbitration agreement. It recognises not only agreements relating to existing disputes but also those dealing with future disputes. Such agreements must be in writing but will be recognised whether they are in an arbitration clause in a contract or in the form of a separate agreement. Where the arbitration clause is in a separate agreement but identified in the contract, it must be referred to in such a way as to make it part of the contract.

Article 8 - Arbitration agreement and substantive claim before court

39. If a party so requests, a court before which an action is brought in a matter which is the subject of an arbitration agreement is obliged to refer parties to arbitration, unless

it finds that the agreement is null and void, inoperative or incapable of being performed. The referral, however, is dependent on the request from a party to the dispute being made before that party submits his or her first statement on the substance of the dispute. The article also provides that arbitration proceedings may continue, and an award may be made, while the issue is pending before the courts.

Article 9 - Arbitration agreement and interim measures by court

40. Article 9 provides that although courts are excluded from matters properly left for determination by an arbitrator, this exclusion does not apply to interim measures. It is based on the principle that interim measures are compatible with an arbitration agreement. Interim measures are not considered contrary to the intentions of the parties in agreeing to submit a dispute to arbitration, and are conducive to making the arbitration efficient. Accordingly, a request for interim measures may not be relied upon as an objection to the existence or effect of an arbitration agreement.

Chapter III - Composition of Arbitral Tribunal

Article 10 - Number of arbitrators

41. This article recognises the parties' freedom to give effect to their agreement to the exclusion of national law on this issue. Thus the choice of any number of arbitrators will be given effect. However, where parties have not made any specific provision for the number of arbitrators, the article provides that the number shall be three.

Article 11 - Appointment of arbitrators

42. Paragraph 1 of this article is aimed at overcoming possible national bias against particular foreign nationals. However, it is not intended to prevent the parties from

specifying the nationality of arbitrators. Parties are also free to agree on a procedure for appointing arbitrators (paragraph 2). Where agreement cannot be reached, paragraph 3 sets out the procedure to be followed and provides for recourse to the Supreme Court where the necessary procedural steps are not taken within 30 days. Parties may also seek court assistance during the agreed appointment procedure unless that procedure provides other means for securing the appointment (paragraph 4). Court decisions under the article are not appellable.

Article 12 - Grounds for challenge

43. Article 12 implements the principle that arbitrators shall be impartial and independent. An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his or her impartiality or independence, or if the arbitrator does not possess qualifications agreed to by the parties. Prospective arbitrators therefore have a duty to disclose circumstances that might cast doubt on their impartiality and independence so that appointment of an unsuitable candidate can be avoided. Once an arbitrator has been appointed, that appointment can only be challenged on the grounds specified in paragraph 2. A party may challenge an arbitrator whom he or she has appointed only for reasons of which he or she becomes aware after the appointment has been made. This would include events or attitudes in the conduct of the proceedings which reveal bias on the part of an arbitrator.

Article 13 - Challenge procedure

44. Subject to one restriction, parties are free to agree on a procedure for challenging an arbitrator. Parties may not exclude recourse to the court provided for in paragraph 3. This applies irrespective of whether the parties have appointed some other body to make the final decision on the challenge.

45. Where parties have not agreed on the procedure for challenge, paragraph 2 provides that a party may challenge an arbitrator by sending a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws, or the other party agrees to the challenge, the arbitral tribunal decides on the challenge.

Article 14 - Failure or impossibility to act

46. Article 14 deals with the termination of the appointment of an arbitrator who is unable to perform his or her functions or for other reasons fails to act. An arbitrator's mandate will be terminated if he or she withdraws from the office, or if the parties agree on termination. Otherwise the court specified in article 6, i.e. the relevant State or Territory Supreme Court, may be requested to decide on termination of the mandate. To facilitate the withdrawal of an arbitrator (where an arbitrator voluntarily withdraws, or a party consents to the termination of the arbitrator's mandate) the Model Law precludes any inference being drawn as to the validity of the grounds on which the termination was sought.

Article 15 - Appointment of substitute arbitrator

47. This article deals with the appointment of a substitute arbitrator. It covers not only the situation of termination contemplated by articles 13 and 14 but also the arbitrator's withdrawal from office for any other reason and the revocation of his or her mandate by agreement of the parties. The appointment of a substitute arbitrator is to be made under the same rules that applied to the appointment of the arbitrator who is being replaced. Those rules may be the rules laid down either by the arbitration agreement or by the Model Law.

Chapter lV - Jurisdiction of Arbitral Tribunal

Article 16 - Competence to rule on own jurisdiction

48. Article 16 expresses the principle that the arbitral tribunal may determine whether it has jurisdiction. Accordingly, the arbitral tribunal is vested with the power to rule on its own jurisdiction including any objections in respect of the existence or validity of the arbitration agreement. This power, however, is ultimately subject to control by the court. Time limits for raising objections are imposed by the Model Law in order to ensure that any objections are raised without delay. Although not expressly stated in the Model Law, a party who fails to raise a plea as required under article 16(2) is implicitly precluded from raising such objections not only during the later stages of the arbitral proceedings but also in other contexts, for example in setting aside or enforcement proceedings, unless the objection relates to defects such as violation of public policy or non-arbitrability. Such defects cannot be cured by submission to the proceedings and are not therefore subject to the time limits in paragraph 2.

49. Article 16(3) grants the arbitral tribunal discretion to rule on a plea referred to in paragraph 2, either as a preliminary question, or as an award on the merits. The reason for this is that, while issues of jurisdiction are fundamental to the arbitral process, in some circumstances the question of jurisdiction may be introduced with the substantive issue. In the latter circumstances it may be appropriate to combine the ruling on jurisdiction with a partial or complete decision on the merits of the case.

Article 17 - Power of arbitral tribunal to order interim measures

50. The purpose of this provision is to enable arbitral tribunals to make orders that prevent or minimise any disadvantage that may be due to the duration of the arbitral proceedings. The interim order may only be addressed to parties to the arbitration and must relate to the subject matter of the dispute, since the arbitral tribunal's jurisdiction derives from the arbitration agreement. The scope of the article is therefore considerably narrower than the measures that a court is able to take under article 9. Included in article 17 would be orders to preserve goods or trade secrets, if these are the subject matter of the dispute, to secure evidence, and orders to stabilise the relationship of the parties, e.g. concerning the maintenance and use of machinery or the continuation of construction to avoid irreparable harm.

Chapter V - Conduct of Arbitral Proceedings

Article 18 - Equal treatment of parties

51. Article 18 adopts the basic notion of fairness and provides that it should be followed in all procedural matters. Parties are required to be treated with equality and to be given a full oppertunity to present their case. Arbitral tribunals should abide by this principle when determining the appropriate conduct for hearings and should not require from a party more than may reasonably be expected in the circumstances.

Article 19 - Determination of rules of procedure

52. Article 19 is the most important provision of the Model Law and allows parties to determine their own rules of procedure to meet their specific needs. Parties may prepare their own rules, or refer to standard rules for institutional

supervised or administered arbitration, or for ad hoc arbitration. (This freedom is subject to the Model Law and its mandatory provisions.) Where parties have not agreed on the procedure to be followed, the arbitral tribunal may conduct the arbitration in the manner it considers appropriate. Except where parties have laid down detailed and comprehensive rules of procedure, the arbitral tribunal has considerable discretionary power as the Model Law contains few provisions limiting procedural discretion. For example, arbitrators may select features from different legal systems familiar to the parties (and to them) and allow parties to present their case as they themselves judge best.

Article 20 - Place of arbitration

53. Parties are free to determine the place of arbitration. Where there is no agreement the arbitral tribunal is empowered to determine the place of arbitration. The place of arbitration is significant in that it may be a factor in establishing the international character of the arbitration under article 1(3). Secondly, it is a connecting factor for the 'territorial' applicability of the Model Law. Thirdly, by virtue of article 31(3), it is the place of origin of the award and is therefore relevant in the context of recognition or enforcement proceedings (the place of arbitration determines 'the country in which ... that award was made' in article 36(1)(a)(v)).

54. Article 20(2) recognises that in some circumstances there may be good reasons for the arbitral tribunal to meet elsewhere e.g. for consultations between the arbitrators or to inspect property.

Article 21 - Commencement of arbitral proceedings

55. The point of time at which arbitral proceedings are taken to have commenced is when the request for the dispute to be referred to arbitration is received by the respondent. This

is relevant not only for the purposes of the Model Law but also has other legal consequences e.g. cessation or interruption of any limitation period. Parties may also derogate from this provision and provide for some other commencement date.

Article 22 - Language

56. The determination of the language or languages to be used in an international commercial arbitration is of considerable practical importance. Arbitral proceedings are not subject to any local language requirement. Party autonomy is respected in this regard as the choice of language will affect the expediency and cost of the arbitration. Furthermore, it is the parties who are in the best position to determine what language or languages should be used.

57. Where parties cannot settle on the language to be used, the arbitral tribunal is empowered to determine the issue. In doing so it must take into account the requirement of equality specified by article 18. This, however, does not mean that the language of each party must be adopted as a language to be used in the arbitral proceedings. As regards the language of any documentary evidence, paragraph 2 provides the arbitral tribunal may decide whether, and to what extent, translation is required.

Article 23 - Statements of claim and defence

58. Article 23 deals with the preparation of the case in writing. It requires the claimant to set out, and the respondent to state his or her defence to, the elements of the dispute on which the arbitral tribunal will make its decision. Unless otherwise agreed by the parties, the arbitral tribunal is given discretion to determine whether a party may amend or supplement his or her statement of claim or defence. However, the amendment or supplement must not exceed the scope of the arbitration agreement.

Article 24 - Hearings and written proceedings

59. This article deals with the issue of whether the proceedings are to include oral hearings or to be conducted exclusively on the basis of documents and other materials. Subject to any contrary agreement by the parties, the arbitral tribunal may decide whether or not to hold oral hearings. However, if requested by a party it must hold hearings unless such a request is contrary to an agreement between the parties. Therefore:

(i) where the parties have agreed to oral hearings the tribunal must comply with that agreement;

(ii) where the parties have agreed that written submissions only are to form the basis of proceedings, and one party subsequently requests a hearing, the request must be refused; and

(iii) where no stipulation has been made, the arbitral tribunal must grant a party's request for an oral hearing.

60. The article also requires that parties be given sufficient notice of any hearing. This is to enable the parties to be present at any hearing or meeting of the arbitral tribunal, and is fundamental to enabling parties to participate effectively in the proceedings. Paragraph 3 requires that communications forwarded by one party to the tribunal be also provided to the other party to the dispute. This gives effect to the principle that both parties should have full and equal access to information.

Article 25 - Default of a party

61. Article 25 deals with the situation where a party, in particular the respondent, fails to perform his or her part in the proceedings or disregards an earlier commitment to

arbitration. Where a respondent fails to communicate a statement of defence the arbitration will not be frustrated: article 25(b) obliges the tribunal to continue the proceedings 'without treating such failure in itself as an admission of the claimant's allegations'. If a party fails to appear or to produce documentary evidence, the tribunal can continue the proceedings and make an award on the evidence before it. The provision is of practical importance as it is not uncommon that one of the parties has little interest in co-operating or expediting proceedings. It should also be noted that the arbitral tribunal is not precluded from drawing inferences from a party's failure to produce evidence as requested.

Article 26 - Expert appointed by arbitral tribunal

62. Unless otherwise agreed by the parties, the arbitral tribunal is granted the power to appoint one or more experts to report to it on specific issues and to order a party to co-operate with the expert. It may do this without special authorisation by the parties. In recognition of the principle of party autonomy, the provision is not mandatory. The optional nature of this provision recognises that parties are presumed to know the most appropriate means by which their dispute is to be decided, and that they will have to pay for the expert. In accordance with the principle of fairness laid down in article 18, and unless otherwise agreed, parties are given the opportunity to question an expert and present expert witnesses to testify on points at issue.

Article 27 - Court assistance in taking evidence

63. This provision enables the arbitral tribunal or a party to the arbitration to seek the assistance of the courts in taking evidence. The provision is necessary because under the Model Law and most national laws, the arbitral tribunal does not possess powers of compulsion.

Chapter VI - Making of Award and Termination of Proceedings

Article 28 - Rules applicable to substance of dispute

64. Article 28 deals with the question of which law or rules the arbitral tribunal should apply to the substance of the dispute. This is to be distinguished from the question of the law applicable to the arbitral procedure or the arbitration agreement. The article adopts the policy of giving parties full autonomy to determine the issue. By allowing them to choose 'rules of law', parties may choose provisions of different laws to govern different parts of their relationship, including rules elaborated on the international level. Failing agreement by the parties, the arbitral tribunal decides, in accordance with the relevant conflict of laws rules, which law is to apply.

65. Article 28(3) permits the parties to authorise the arbitral tribunal to decide the arbitration ex aequo et bono or as amiable compositeur. The use of these terms is consistent with the principle that the Model Law should not disregard or prevent established practices. It also reduces the importance of the place of arbitration by recognising types of arbitration which may not normally be used there.

Article 29 - Decision-making by panel of arbitrators

66. This article adopts the 'majority' principle for any award or other decision of the arbitral tribunal, unless the parties agree otherwise. However, for the sake of expediency, the parties or the tribunal may authorise a presiding arbitrator to decide questions of procedure. As this article is not mandatory, parties are free to lay down other requirements and could if they wished require unanimity, although this would be less conducive to reaching decisions and the final settlement of the dispute. It is implicit in the article that the arbitrators may make decisions without being present in the same place.

Article 30 - Settlement

67. Where parties are able to settle their dispute, the Model Law makes the settlement agreement enforceable by providing for it to be recorded in the form of an award. This can, however, only occur at the request of parties and if the arbitral tribunal does not object. There are two reasons for this: first there are fewer dangers of injustice if both parties make the request, and secondly, the tribunal should not be required to accede to a request for settlement if, for example, it suspects fraud, or it believes the settlement terms to be grossly unfair.

Article 31 - Form and contents of award

68. Article 31 requires the arbitral tribunal's award, for the sake of certainty, to be made in writing and signed by the arbitrator or arbitrators. However, consistent with article 29, the signatures of a majority of arbitrators will suffice, provided the reasons for any omitted signature are stated. This provision would cover situations where, for example, one or more arbitrator is unable to sign (for example because of death), or where an arbitrator refuses to sign.

69. The practice of stating the reasons upon which the award is based is more common in some legal systems than in others. Paragraph 2 recognises this and allows parties to waive the requirement by agreement. The Model Law neither requires nor prohibits dissenting opinions and therefore does not interfere with either practice.

70. The date and the place at which the award is made are significant in the context of recognition and enforcement and any possible recourse against the award. For this reason paragraph 3 provides that the award shall state its date and the place of arbitration, which shall be deemed to be the place of the award. This also recognises that the making of

the award is a legal act but not necessarily a single act: deliberations may occur in various places, by telephone or by correspondence.

71. A signed copy of the award must be delivered to the parties. This is relevant for the purposes of correction and interpretation of the award, recourse against the award and recognition and enforcement of the award.

Article 32 - Termination of proceedings

72. Article 32 provides guidance to the arbitral tribunal in the last phase of the proceedings. It regulates the termination of the mandate of the arbitral tribunal and provides certainty as to the point in time of the termination of proceedings. The latter may be relevant to matters unrelated to the arbitration itself e.g. the running of a limitation period, or the possibility of instituting court proceedings.

Article 33 - Correction and interpretation of awards and additional awards

73. Article 33 extends the mandate of the arbitral tribunal beyond the making of the award for the purposes of clarification and rectification. This is to help prevent the continuation of disputes or the institution of setting aside proceedings. The measures allowed are correction of typographical or clerical errors, interpretation of parts of the award and the making of an additional award as to any claim presented at the arbitral proceedings but erroneously omitted from the award. Time limits are prescribed for these procedures although they may be extended at the discretion of the arbitral tribunal. The arbitral tribunal may also be given an opportunity to cure procedural defects listed in article 34(2) if the court, in setting aside proceedings, remits the case to the arbitral tribunal in accordance with article 34(4).

Chapter VII - Recourse Against Award

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

74. An application for setting aside an award constitutes the exclusive recourse to a court against an award. The application must be made within three months of receipt of the award. A party retains the right to defend himself or herself against an award by requesting refusal of recognition or enforcement in proceedings instituted by the other party under articles 35 and 36.

75. The list of reasons for setting aside an award in paragraph 2 is exhaustive. Those reasons are essentially the same as those set out in article V of the New York Convention. Where a party has made an application to the arbitral tribunal under article 33, an application may not be made under article 34 until three months after that request has been disposed of by the arbitral tribunal.

76. Paragraph 4 provides for a procedure similar to remission. The purpose of this provision is to enable the arbitral tribunal to cure a particular defect and thereby save the award from being set aside by the court. This also avoids the neccesity of having the whole dispute re-heard.

Chapter VIII - Recognition and Enforcement of Awards

Article 35 - Recognition and enforcement

77. This article distinguishes recognition from enforcement, the former constituting only the necessary precondition for enforcement. Recognition may also be important in the context of other proceedings where a particular award may be relied on. Recognition of an award as binding means that it will be binding between the parties as from the date of the award.

Enforcement of the award is by application in writing to the competent court (not necessarily one of the courts specified for the purposes of article 6).

78. Paragraph 2 is modelled on article IV of the New York Convention and sets out the conditions for recognition and enforcement. It also requires that the party relying on the award supply, where necessary, a duly certified translation of the award to the court.

Article 36 - Grounds for refusing recognition or enforcement

79. Article 36 is an almost literal adoption of article V of the New York Convention. In general terms it requires the party resisting enforcement to furnish proof that:

- a party to the agreement was under some incapacity;
- the agreement was invalid under the law to which it was subject;
- the party was not given proper notice or was otherwise unable to present his or her case;
- the award deals with a dispute not contemplated by or within the scope of the submission to arbitration; or
- the composition of the arbitral tribunal was not in accordance with the agreement of the parties.

A court may also set aside or refuse to recognise or enforce an award if it finds:

- the subject matter of the dispute is not capable of settlement by arbitration under Australian law; or

. the recognition or enforcement of the award would be contrary to public policy.

Schedule 2

80. The Schedule sets out miscellaneous minor amendments to the Principal Act which allow for the inclusion of the Model Law and remove references to Papua New Guinea.

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