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**SOUTH AFRICAN LAW REFORM COMMISSION**

**SUMMARY OF AMENDMENTS TO THE COMMISSION’S DRAFT ARBITRATION BILL OF MAY 2001**

**(a) Background to the amendments**

In chapter 2 of its *Report on Domestic Arbitration* (May 2001), the Commission summarised the guiding principles on which the Draft Bill for Domestic Arbitration was based in paragraph 2.24 of the report as follows:

“(a) The Draft Bill endeavours to give effect to the objectives of a modern arbitration statute … .

(b) The Draft Bill retains those provisions of the existing legislation which have worked well in practice, with appropriate modifications to ensure the achievement of the objectives of a modern arbitration statute.

(c) The Draft Bill seeks to achieve a reasonable degree of commonality with the relevant provisions of the proposed International Arbitration Bill, particularly as regards the powers of the court and the powers of the arbitral tribunal.

(d) Because of problems currently experienced in South African arbitration practice, the Draft Bill contains provisions based on the English Arbitration Act of 1996. These provisions impose duties on the arbitral tribunal and the parties and confer additional powers on the arbitral tribunal to ensure that the arbitration is conducted fairly but without unnecessary delay and expense.”

In Chapter 2 of its *Report on Domestic Arbitration*, the Commission gave detailed reasons for its recommendation that South Africa should not adopt the Model Law for Domestic Arbitration as well. These were the desirability of retaining certain provisions of the 1965 Act with no equivalent in the Model Law which had worked well in practice; the difficulty of interpreting UNCITRAL’s official English text of the Model Law in a domestic context; and the need to import certain provisions from the English Arbitration Act to promote a quicker and more cost-effective arbitration procedure for resolving more complex disputes. These provisions from the English Act may be found particularly in sections 2(a), 28 (“General duty of tribunal”), 45 (“General duty of parties”) and s 67 (“Power to limit recoverable costs”) of the updated Draft Bill. The necessity for such provisions is demonstrated by recent amendments to some of the best known international arbitration rules to stress the need for more expeditious and cost-effective arbitration proceedings and the use of case management for this purpose (see for example the ICC Arbitration Rules (2012), articles 22 and 24 and Appendix IV and the UNCITRAL Arbitration Rules (2010), article 17(1) and (2)).

On reconsidering the 2001 Draft Bill with a view to updating it, it became clear that there were some unnecessary differences between the International Arbitration Bill and the Bill for Domestic Arbitration, partly because of gaps in the Bill for Domestic Arbitration. These omissions have been rectified in the updated Bill. The 2006 amendments by UNCITRAL to the UNCITRAL Model Law on International Arbitration, which have been incorporated into the Draft International Arbitration Bill, have largely also been included in the Draft Bill for Domestic Arbitration. Certain further amendments have been inspired by additions made to the Model Law in Australia, when it was adopted at state level in 2010 for domestic arbitration (see for example the New South Wales Commercial Arbitration Act 61 of 2010).

**(b) Overview of main updates to the Arbitration Bill of May 2001**

*S 1 Definitions*

A definition of “public body” has been included, which replaces the term “the State” in section 4.

The new definition of “specified authority” corresponds to that in the International Arbitration Bill. Note also the special transitional provision in s 76(5).

*S 3 Application of Act*

As this Act is intended only for domestic arbitration, it is unnecessary for any of its provisions to have extra-territorial application. This is now stated in s 3(2). Compare article 1(2) to schedule 1 of the Draft International Arbitration Bill, which gives extra-territorial effect to a limited number of specified provisions.

*S6 Definition of arbitration agreement and related matters*

The definition has been aligned with that in the International Arbitration Bill schedule 1, article 7, to take account of the 2006 amendments to the Model Law. Two alternative versions of subsection (4) have been included, providing a definition of “electronic communication” for purposes of s 6(3)(b). The first version is based on UNCITRAL’s text of article 7 in the 2006 amendments to the Model Law, option 1. The second simplified version is based on the definitions of “electronic communication” and “data message” in s 1 of ECTA (the Electronic Communications and Transactions Act) 25 of 2002.

*S 8 Effect of death or legal disability of a party*

This provision has been amended to take into account the replacement of judicial management of a company by business rescue proceedings in the new Companies Act 71 of 2008.

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

A new subsection (2) has been added to clarify the availability of the section where an arbitration agreement in a multi-tiered or escalating dispute resolution clause requires the use of mediation or other methods of dispute resolution as a prerequisite to arbitration.

*Chapter 3 Mediation pursuant to an arbitration agreement*

As appears from the Commission’s Report of May 2001, par 3.89, Chapter 3 of the Draft Bill is not intended to regulate the use of mediation comprehensively. As was the case in the International Arbitration Bill, the intention is to encourage the use of private mediation for resolving disputes, by dealing with certain problems that may arise regarding mediation proceedings in the context of an arbitration agreement.

*S 14 Appointment of mediator*

The purpose underlying s 14(2) appears from the comment on s 20(3) below.

*S 18 Appointment of arbitrators*

Subsections (4)-(6) have been inserted to impose the same duty of disclosure on an arbitrator in a domestic arbitration as will apply to an arbitrator in an international arbitration under the proposed South African version of the Model Law, in schedule 1 to the Draft International Arbitration Bill. The test for “justifiable doubts”, also used in s 22(3) below, is taken from *Ndlovu v Minister of Home Affairs* 2011 2 SA 621 (KZD) para 22 at 632B, followed in *Umgeni Water v Hollis NO* [2012] ZAKZDHC 10 paras 34-44.

*S 20 Power of specified authority to appoint an arbitrator*

S 20(3)(b) and (c) are new provisions, which are intended to compensate for the absence of statutory professional qualifications for arbitrators appointed under the Act.

*S 26 Competence of tribunal to rule on its own jurisdiction*

This provision follows article 16 of schedule 1 to the Draft International Arbitration Bill. In the light of cases like *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* [2013] ZASCA 76, this provision will bring badly needed clarity regarding both the extent and effect of the tribunal’s power to rule on its own jurisdiction, and the application of the doctrine of the severability of the arbitration clause in this context.

*S 29 General powers of tribunal*

The provisions in s 29 of the 2001 Draft Bill on interim measures have been deleted, as this matter is now dealt with comprehensively by ss 31-38 below.

*S 31 Power of tribunal to order interim measures*

Sections 31-38 follow article 17 and articles 17A-17G of schedule 1 to the Draft International Arbitration Bill, which adopt the bulk of the 2006 amendments to the Model Law regarding interim measures ordered by the tribunal and their enforcement by the court.

*S 32 Conditions for granting interim measures*

Par (e) of s 31(2), relating to security for costs, is an addition to the definition of interim measures provided by UNCITRAL in article 17(2) of the 2006 amendments to the Model Law. Security for costs is intended as an exceptional measure as it could deprive the impecunious claimant or counterclaimant of the right to pursue a meritorious claim. It is therefore important that the tribunal should form a preliminary view on the chances of success of the claim, when deciding whether or not to order security. (This is also the position adopted by UNCITRAL regarding an interim measure for the preservation of assets out of which the award on the merits can be satisfied (see the International Arbitration Bill schedule 1, articles 17(2)(c) and 17A(1)).

*S 42 Place of arbitration*

This is a new provision, which basically corresponds to article 20 of schedule 1 to the Draft International Arbitration Bill. It is relevant for determining the place of the award for purposes of s 53(4) and (5). S 42 should logically also play a role in determining which high court has supervisory jurisdiction over the arbitration (compare *OMM Design Workshop CC v Segal* 2012 JDR 2324 (KZD)).

*S 43 Commencement of arbitration proceedings*

This is a new provision, which corresponds to article 21 of schedule 1 to the Draft International Arbitration Bill.

*S 44 Confidentiality of arbitration proceedings*

This section endeavours to bring greater certainty on the legal position regarding the confidentiality of arbitration proceedings, while avoiding the complex and highly detailed legislation on this subject in New Zealand and Australia. A “public interest exception” has been added to the provision in the Commission’s 2001 Draft Bill.

*S 47 Summoning of witnesses*

S47(5) has been substituted to take account of the replacement of the Correctional Services Act 8 of 1959 by the Correctional Services Act 111 of 1998 during 2004.

*S 51 Court sanctions for failure to attend or to produce documents*

The Commission’s 2001 Draft Bill largely repeated s 22 of the Arbitration Act, which provided for criminal sanctions against persons who ignored lawful directives by an arbitral tribunal. S 51 now adopts a new approach by providing in effect for court-ordered compliance. It is based on the NSW Commercial Arbitration Act 61 of 2010, s 27B.

*S 53 Form and contents of the award*

This provision has been amplified to align it with article 31(1)-(3) in schedule 1 of the Draft International Arbitration Bill.

*S 56 Termination of proceedings*

This is a new provision, which corresponds to article 32 of schedule 1 to the Draft International Arbitration Bill.

*S 57 Partial awards and provisional orders*

The expression “partial award” has been substituted for “interim award” as the former is now more generally accepted internationally and avoids possible confusion with “interim measures” dealt with in ss 31-38.

*S 66 Costs of arbitral proceedings*

S 66(2) has been added, and corresponds to the new article 31(7) of Schedule 1 to the Draft International Arbitration Bill. It is based on article 37(5) of the 2012 ICC Arbitration Rules and is in line with the objective of the Draft Bill for domestic arbitration to promote expeditious and cost-effective arbitration.

S 66(4) has been amended to reflect *Leadtrain Assessments (Pty) Ltd v Leadtrain (Pty) Ltd* [2013] ZASCA 33, which dealt with the review of costs awards in private arbitration, leaving the decision in *Kathrada v Arbitration Tribunal* 1975 2 SA 673 (A) unchanged in relation to statutory arbitrations.

*S 68 Costs of abortive arbitration*

This is a new provision based on the NSW Commercial Arbitration Act 61 of 2010, s 33D(1) and (2).

*S 71 Court rules*

This is a new provision based on the NSW Commercial Arbitration Act 61 of 2010, s 41(1)(a) and (e) and (2). Several jurisdictions like England and Hong Kong have special High Court Rules applying to arbitration matters to ensure that these are dealt with expeditiously. Ideally, such Rules could arguably play a useful role in South Africa. (See too the Commission’s Report *Arbitration: an International Arbitration Act for South Africa* (1998), para 2.288, where this possibility is also raised.) S 71 has however been drafted in such a way that the commencement of the Act and the effective implementation of its provisions, other than those relating to court proceedings, are in no way dependent on the rule-making power available under s 71 being exercised.