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**SOUTH AFRICAN LAW REFORM COMMISSION**

**SUMMARY OF AMENDMENTS TO THE COMMISSION’S DRAFT INTERNATIONAL ARBITRATION BILL OF JULY 1998[[1]](#footnote-1)**

**(a) Background to the amendments**

Overview of developments since the Commission’s Report Arbitration: *An International Arbitration Act for South Africa*

1.01 The Draft International Arbitration Bill contained in the Commission’s Report *Arbitration: an International Arbitration Act for South Africa* (July 1998) and the Arbitration Bill for domestic arbitration in the Commission’s *Report on Domestic Arbitration* (May 2001) were based on a consideration of the most appropriate new arbitration legislation available in other jurisdictions at the time, having regard to South Africa’s particular needs. The former report stated explicitly that South Africa’s existing Arbitration Act 42 of 1965 was “totally inadequate” for international arbitration. Compared to modern arbitration statutes, the current Act provides excessive opportunities to involve the court as a tactic for delaying the arbitration process, inadequate powers for the arbitral tribunal to conduct the arbitration in a cost-effective and expeditious manner and insufficient respect for party autonomy (ie the principle that the arbitral tribunal’s jurisdiction is derived from the parties’ agreement to resolve their dispute outside the courts by arbitration).

1.02 Since the publication of the two reports, there have been important developments which have rendered the Commission’s Bills outdated in some respects. The most important development is probably UNCITRAL’s amendments to the Model Law on International Commercial Arbitration, made in 2006. To date, these amendments have been adopted in several Commonwealth and former Commonwealth jurisdictions, including Australia (2010), Hong Kong (2010), Ireland (2010), Mauritius (2008) and New Zealand (2007). Although Hong Kong and Ireland, in their latest legislation, have adopted the Model Law for both domestic and international arbitration, the other three jurisdictions to a greater or lesser extent all distinguish between domestic and international arbitration. The states of the Australian Commonwealth are in the process of adopting new uniform commercial arbitration legislation based on the 2006 version of the Model Law, which will apply exclusively to domestic arbitration, with international arbitration in Australia being regulated exclusively by the Federal International Arbitration Act.[[2]](#footnote-2) The New South Wales Commercial Arbitration Act of 2010, as the first example of the new generation legislation on domestic arbitration in Australia, has been taken into account when updating the Commission’s 2001 Draft Bill for domestic arbitration.

1.03 In non-Model Law jurisdictions, France, an important jurisdiction for international arbitrations, replaced its modern 1981 arbitration legislation in 2011 to ensure that France maintained her competitive advantage as an attractive venue for international arbitration. It is also significant from a South African perspective that the new French legislation retains different regimes for domestic and international arbitration.[[3]](#footnote-3)

1.04 From an African perspective, of the 54 members of the AU (African Union), at least 30[[4]](#footnote-4) now have modern arbitration legislation for international arbitration, and five[[5]](#footnote-5) of these are in the SADC region.[[6]](#footnote-6) Ten of the 30 have adopted the Model Law.[[7]](#footnote-7) Ghana introduced a comprehensive Alternative Dispute Resolution Act in 2010, although the arbitration provisions are not based on the Model Law.[[8]](#footnote-8)

1.05 Of the BRICS grouping, only South Africa does not have modern arbitration legislation. Parties from Brazil are the biggest user of ICC arbitrations in Latin America and Brazil is the most important venue for ICC arbitrations in that region. Both mainland China and Hong Kong are well-established centres for international arbitration and there is growing interest in India as a venue for international arbitration.[[9]](#footnote-9)

1.06 South Africa’s successful staging of the FIFA World Cup was used as an opportunity to draw attention in an article in an international journal to the inadequacy of South Africa’s legislation for international arbitration legislation. The article concludes with an appeal that the ball is now in South Africa’s court to show how hospitable it can be as a place for international arbitration.[[10]](#footnote-10) The Supreme Court of Appeal stated in May 2011 that it is lamentable that a decade after the Commission’s Report on Domestic Arbitration, the Commission’s recommendations are yet to be acted upon.[[11]](#footnote-11)

1.07 The most important decision on arbitration by the South African courts since the Commission’s reports were published is probably that of the Constitutional Court in *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews* CCT 97/07; [2009] ZACC 6, 2009 4 SA 529 (CC) which left no doubt that private arbitration, from a procedural perspective, passes constitutional muster. (Nevertheless as regards the subject-matter of arbitration, in all jurisdictions certain matters are said to be “non-arbitrable” because these matters are reserved for the state courts.[[12]](#footnote-12))

The SA Law Reform Commission’s mandate to update the Bills

1.08 The Department of Justice and Constitutional Affairs has mandated the Commission to update its two Bills. Although the two Bills could be combined into a single statute, the structure of having separate Bills for international arbitration and domestic arbitration has been provisionally retained, when undertaking the updating process.

1.09 In the Introduction to the Report on International Arbitration, it is stated in paragraph 1.7 that:

“The Draft International Arbitration Bill which is the subject of this report is based on three core proposals: the introduction in South Africa of the UNCITRAL Model Law for international arbitrations; the implementation of changes to the legislation on the New York Convention; and the proposed accession by South Africa to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Washington or ICSID Convention of 1965).”

The third core proposal has proved controversial[[13]](#footnote-13) and also involves the complication of South Africa needing to accede to the Washington Convention so that the relevant part of the Draft Bill can be implemented. The Commission stated in paragraph 4.45 of the Report that the inclusion of ICSID arbitration clauses in certain Bilateral Investment Treaties (“BITs”) concluded after 1994 had created the expectation among investors from those countries that South Africa intended to accede to the Washington Convention. However, with hindsight, the first-generation BITs placed too much emphasis on investor protection and not nearly enough on investors’ duties and obligations.[[14]](#footnote-14) The existing treaties need to be replaced with more balanced agreements. In the light of these circumstances, Chapter 4 of the Bill containing provisions to give effect to accession to this Convention has therefore been omitted when updating the Bill.

1.10 The Commission in 1998, while recommending certain additions to the Model Law, proposed that it should be implemented by South Africa with minimum changes, with “change” being used in the sense of a departure from the substance of a provision of the Model Law in order to promote uniformity and the attractiveness of South Africa as a centre for international arbitration.[[15]](#footnote-15) In recommending updates, and following the example of existing Model Law jurisdictions, a slightly less strict approach has been followed, so that certain other changes considered reasonably necessary could be made. This includes certain technical improvements[[16]](#footnote-16) and the omission of a controversial provision.[[17]](#footnote-17)

1.11 As in the Commission’s Bill, the Model Law, as amended in 2006, appears with the recommended modifications as Schedule 1 to the Bill. In this way, following the approach of the legislatures in New Zealand, Australia, Ireland and Zimbabwe, the official English text of the Model Law could be largely retained. This is considered preferable to the approach of jurisdictions like Mauritius, where the Model Law has been incorporated in the text of the Arbitration Act, but rewritten according to the relevant jurisdiction’s legislation drafting style. This approach can present the person applying the statute with the challenge as to whether some apparent changes in meaning, compared with UNCITRAL’s official text, were intended or not. Retaining the text in a schedule also facilitates consultation of the *travaux préparatoires* and court decisions on the relevant provisions of the Model Law in other jurisdictions. This also supports the goal of the Model Law in promoting uniformity.[[18]](#footnote-18)

**(b) Updates to the Draft International Arbitration Bill**

*The long title*

The long title has been amended in two respects. First, specific reference is made to the Model Law as amended in 2006, so that it is immediately clear from the long title that the Act gives effect to the amended version of the Model Law.

Second, for the reason explained in paragraph 1.09 above, the reference to the Washington Convention has been omitted.

**Chapter 1**

**General Provisions**

*S 1 Definitions*

The definition of arbitration agreement has been amended as a consequence of the changes to article 7 in Schedule 1, which were made to give effect to the 2006 amendments to the Model Law. See further the discussion of article 7 below.

The definition of “the Model Law” has been updated by referring to the Model Law as amended in 2006. The definition makes it clear that the version in Schedule 1 is the adapted version, and not UNCITRAL’s original version, as amended in 2006.

A definition of “public body” has been included, to replace the term “State” in section 5. The change is intended to facilitate the interpretation of the Act by foreign users in particular.

*S 3 Objects*

The references to investment arbitration and the Washington Convention have been removed from the objects of the Act, for the reason explained in paragraph 2.02 above. The other amendments are of a technical nature.

*S 5 Act binds public bodies*

The reason for this change appears from the explanation for the insertion of the definition of “public body” in section 1 above.

*S 7 Matters subject to international commercial arbitration*

Section 7 of the International Arbitration Bill was used as the basis for section 5(2) and (3) of the Bill for domestic arbitration, regarding the issue of arbitrability in domestic arbitration. Both section 7 and section 5 provide that arbitration is not to be excluded solely on the ground that an enactment confers jurisdiction on a court or other tribunal to determine a matter falling within the terms of the arbitration agreement. Thus sections 21 and 27 of the Competition Act of 1998, in setting out the functions of the Competition Commission and the Competition Tribunal, may not in themselves render certain competition matters to be not arbitrable. However, section 65 of the Competition Act, dealing with civil actions and jurisdiction, may go further. Section 65 provides in part:

“(1) Nothing in *this Act* renders void a provision of an *agreement* that, in terms of *this Act*, is prohibited or may bedeclared void, unless the Competition Tribunal or Competition Appeal Court declares that provision to be void.

(2) If, in any action in a *civil court,* a party raises an issue concerning conduct that is prohibited in terms of *this Act*, that court must not consider that issue on its merits, and –

(a) if the issue raised is one in respect of which the Competition Tribunal or Competition Appeal Court has made an order, the court must apply the determination of the Tribunal or the Competition Appeal Court to the issue; or

(b) otherwise, the court must refer that issue to the Tribunal to be considered on its merits, if the court

is satisfied that –

(i) the issue has not been raised in a frivolous or vexatious manner; and

(ii) the resolution of that issue is required to determine the final outcome of the action.”

Section 65 is concerned with civil jurisdiction and as it confers exclusive jurisdiction on the Competition Tribunal and the Competition Appeal Court, to the exclusion of other civil courts, it is strongly arguable that the restriction should be interpreted so as to apply to a private arbitral tribunal[[19]](#footnote-19) as well. This is against the trend in certain other jurisdictions. In the famous case of *Mitsubishi Motors Corporation v Soler Chrysler- Plymouth Inc*,[[20]](#footnote-20) the US Supreme Court held that issues of civil liability under the Sherman Act were arbitrable and the court therefore enforced an arbitration agreement providing for certain anti-trust claims under the Sherman Act to be submitted to arbitration in Japan.

Section 65 appears to have the effect that competition issues which have to be decided by applying South African substantive law are not arbitrable. It is nevertheless conceivable that an international arbitration being held in South Africa as a convenient forum, in respect of a contractual dispute subject to foreign law, could give rise to issues of foreign competition law (the American Sherman Act for example), which would still be arbitrable, in circumstances where the SA Competition Act is not relevant, because the contract has no effect on the SA economy. It is possible that the recent decision by the Constitutional Court in *Competition Commission of South Africa v Senwes Ltd* [2012] ZACC 6 may indirectly cast some further light on this issue. The effect of section 65 of the Competition Act on arbitrability therefore arguably remains an issue requiring further consideration.

See for another example of a matter which is not arbitrable *Airports Company of South Africa Ltd v ISO Leisure OR Tambo (Pty) Ltd* 2011 4 SA 642 GSJ) paras 43 and 63-68, where it was held that s 7(4) of the Promotion of Administrative Justice Act 3 of 2000 precludes a private arbitrator from deciding an application for review brought in terms of that Act, as this concerns a constitutional matter.

*S 8 Interpretation of Model Law*

The specific list in Schedule 2 of the 1998 Bill has been replaced by a general reference to the *travaux préparatoires.*  A specific list became impractical as a result of the 2006 amendments, the drafting of which spanned several sessions of UNCITRAL and its Working Group, with additional documentation being provided by the Secretariat.

*S 11 Confidentiality of arbitral proceedings*

In its Report *Arbitration: An International Arbitration Act for South Africa* in July 1998, para 2.287, the Commission concluded that the development of the law regarding confidentiality of arbitration was a matter best left to the courts. However, in its 2001 Report, Domestic Arbitration, paras 3.179-3.181, the Commission reconsidered the matter, and because of the uncertainty created by the different attitudes of various national courts to confidentiality, concluded that it was desirable to include a provision, as section 34 to promote legal certainty. As a matter of consistency and logic, this provision should apply to the International Arbitration Bill as well.

There is no doubt that the parties can agree that the arbitration shall be confidential. There is as yet no South African decision on the default position in the absence of an express agreement between the parties. In *Replication Technology Group v Gallo Africa Ltd*,[[21]](#footnote-21) the court considered the English and Australian case law and decided that it was unnecessary to decide if the English rule on confidentiality forms part of South African law, whether on the basis of a term implied by law or a tacit term, as two of the recognized exceptions would in any event apply.[[22]](#footnote-22)

New Zealand and Australia now have very detailed statutory provisions on confidentiality in the context of arbitration proceedings.[[23]](#footnote-23) It is submitted that these provisions are unnecessarily complex. However, the International Arbitration Bill could also be used for investment arbitration, where the State would be a party. Different considerations regarding confidentiality could then apply because of the public interest in transparency regarding aspects of the arbitration. A public interest exception has therefore been included in the Draft Bill, without attempting to limit it to investment arbitration.

*Section 22 Refusal or recognition of enforcement*

The primary purpose of section 22 is to give effect to Article V of the New York Convention which deals with the grounds on which enforcement of a foreign arbitral award may be refused. One of the problems that the Commission identified in the equivalent provision of the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977, namely section 4, was that differences in the wording of section 4 and that of Article V meant that section 4 did not give proper effect to Article V of the Convention. Bearing in mind section 233 of the Constitution (“Application of International Law”), it is therefore advisable to keep to the wording of article V as closely as possible. This will enable South African courts to make best use of foreign jurisprudence, where necessary, in interpreting wording in Article V which has caused difficulty in practice.[[24]](#footnote-24)

**SCHEDULE 1**
UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION

*Article 2A – International origin and general principles*

This 2006 addition by UNCITRAL has been adopted verbatim.

*Article 7 – Definition and form of the arbitration agreement*

The changes are based on the 2006 amendments option I, which basically liberalises the requirement of “writing”. The 1985 version followed the New York Convention by requiring the arbitration agreement to be signed by the parties or to be contained in an exchange of documents between the parties. This requirement did not adequately meet the needs of practice. The Commission was aware of this problem, which it addressed by means of an extended definition of “arbitration agreement” in section 1. Subparagraph (ii) of this definition is clearly covered by the amended article 7(3). The reference to a bill of lading in para (i) of the definition in section 1 has been retained as a precautionary measure to remove any doubt on this point.

UNCITRAL in drafting article 7, option I, clearly identified the function of the writing requirement, namely to achieve certainty as to the content of the agreement. The purpose is therefore not to ensure legally relevant consent. The validity of the arbitration agreement will have to be determined by the applicable law of contract.[[25]](#footnote-25)

*Article 8 – Arbitration agreement and substantive claim before court*

The proposed amendment follows the approach in several other Commonwealth jurisdictions and reflects what actually occurs in practice. The court does not order specific performance of the arbitration agreement, but stays the court proceedings, so that the plaintiff, if it wants to proceed with its claim, is compelled to institute arbitration proceedings.

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

Article 9 of the original 1985 text merely stated that the granting of interim measures by a court was not inconsistent with the arbitration agreement. It was however silent on the scope of the court’s powers and did not give guidance on when a party should approach the arbitral tribunal for such measures, rather than the court. The Commission produced carefully worded provisions to fill these gaps, which were refined after public comment. These proposals have been retained in preference to article 17J of UNCITRAL’s 2006 amendments. Article 17J is an example of a “lowest common denominator” type provision, which provides that the court basically has the same power to issue an interim measure in relation to arbitration proceedings as it has in relation to proceedings in court. The Commission’s more focused provisions are clearly preferable and have been retained, but have been moved to Chapter IVA of the Model Law as article 17H to keep to the structure of the amended Model Law.

*Article 12 – Grounds for challenge*

Article 12 of the Model Law uses the following test for bias: “if circumstances exist that give rise to justifiable doubts as to that arbitrator’s impartiality or independence”. Australia amended its International Arbitration Act of 1974 and included in its uniform state Commercial Arbitration Acts an explanation of this test, namely that a real danger of bias is required. This test, developed by the English courts, is regarded as more stringent than the “reasonable apprehension of bias test”, making it more difficult to remove an arbitrator. South African courts have consistently applied the same test for the removal of an arbitrator as applies to the recusal of a judge: see for example *Umgeni Water v Hollis NO* [2012] ZAKZDHC 10 paras 34-44 which applied the test formulated in *Ndlovu v Minister of Home Affairs* 2011 2 SA 621 (KZD). An explanation of “justifiable doubts” has therefore been included in article 12, based on the *Ndlovu* case para 22 at 632B, namely: “justifiable doubts require substantial grounds for contending that a reasonable apprehension of bias would be entertained by a reasonable person in possession of the correct facts.” This makes it clear that no change in the existing law is intended as well as explaining to foreign users what that law is.

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

The change in wording in paragraph (3) makes it possible for a court to review a negative jurisdictional ruling by the arbitral tribunal before the award on the merits. This is particularly important in the case of a partial negative ruling, where for example the tribunal’s jurisdiction to decide interrelated issues is challenged and the tribunal decides on one of the issues that it has no jurisdiction, but has jurisdiction on the others, in the process making it impossible for the tribunal to render a fair award. The amendment would thus enable a court to deal effectively with the situation that arose in *Badenhorst-Schetler v Nel* 2001 3 SA 631 (C), without having to rely on common-law powers.

*Chapter IVA – Interim measures*

By far the most substantial amendments by UNCITRAL in 2006 concerned the subject of the granting of interim measures by the arbitral tribunal and the enforcement of such measures by the court. The detailed provisions contained in the 2006 amendments indicate the practical importance of this topic in modern international arbitration. In updating the Bill, a study was made of the responses of New Zealand, Ireland, Hong Kong, Mauritius and Australia to the 2006 amendments in their legislation giving effect to the amendments. The most controversial aspect facing UNCITRAL was whether or not the amendments should empower the arbitral tribunal to grant interim measure on an *ex parte* basis. The delegates at the various sessions of UNCITRAL’s working group were sharply divided on this point and eventually a compromise was adopted. The tribunal was permitted to grant “preliminary orders” on an *ex parte* basis, but these preliminary orders were not subject to court enforcement (see articles 17B and 17C, which also provide that the preliminary orders are of short duration unless the tribunal converts them into interim measures after hearing both parties). Of the five jurisdictions referred to above, three adopted the provisions on preliminary orders and two, Australia and Mauritius, rejected the provisions. It is submitted that the latter approach is clearly preferable.

The respected commentator Gary Born is of the view that the provisions on preliminary orders were ill-considered and submits two main arguments against these provisions.[[26]](#footnote-26) The first objection is that the unilateral communications between the tribunal and one party only, which preliminary orders entail, undermine the equal treatment of the parties and due process entrenched in articles 18 and 24(2) and (3). The second is regarded by Born as even more fundamental. *Ex parte* relief is based on the applicant’s belief that the other party cannot be trusted to comply with its obligations and must be legally compelled to take certain actions immediately, without the opportunity to evade its obligations. The preliminary orders provided by articles 17B and 17C have no direct coercive effect and therefore cannot accomplish the purpose of *ex parte* relief. A party requiring *ex parte* relief should therefore logically approach the court and not the arbitral tribunal. Born’s contention that articles 17B and 17C are ill-conceived is therefore clearly justified and the references to “preliminary orders” have been omitted from the version of Chapter IVA proposed in the updated Bill.

*Chapter IVA: Numbering of articles*

In drafting the revised Schedule 1, containing the text of the Model Law as amended by UNCITRAL in 2006, the numbering of the 2006 version of the Model Law has been retained as far as possible. However, articles 17B and 17C of the original text have been omitted, for the reasons explained above. Therefore, the provisions in Chapter IVA after article 17A have been renumbered (when compared to UNCITRAL’s original text), so that the articles are numbered consecutively.

*Article 17 – Power of arbitral tribunal to grant interim measures*

“Interim measures” are comprehensively defined in article 17(2), but the Draft Bill, follows the example of the UNCITRAL Arbitration Rules of 2010 by providing that the definition is not exhaustive. Following the example of Mauritius, security for costs is expressly referred to as a separate item in the definition, to remove any doubt as to whether “interim measures” as defined include security for costs. Article 17A imposes certain conditions that must be met before interim measures can be granted. Article 17A(2) gives the tribunal a wider discretion as regards measures contained in item (d) of the definition in article 17(2).

*Article 17H – Court-ordered interim measures*

The reason for the substitution of UNCITRAL’s version of this article (article 17J in UNCITRAL’s text) appears from the discussion of article 9 above.

*Article 31 – Form and contents of award*

A new paragraph (7), based on article 37(5) of the (2012) ICC Arbitration Rules has been added, in the interests of promoting expeditious and cost-effective arbitration.

*Article 35 – Recognition and enforcement*

Paragraph (2) has been amended to reflect the amendment made by UNCITRAL in 2006.

1. The Draft International Arbitration Bill in the Commission’s Report of July 1998, was subsequently rewritten by the office of the Chief State Law Advisor in plain English. This version, the 6th draft of 3 March 2000 was subsequently published as Annexure A to the Commission’s Report *Domestic Arbitration* (May 2001) 109-126, was the basis for the updated text explained in this summary. [↑](#footnote-ref-1)
2. See the International Arbitration Act of 1974, as amended, s 21 and the (New South Wales) Commercial Arbitration Act 61 of 2010 s 1(1). The latter statute, as the first example of the new generation legislation on domestic arbitration in Australia, has been taken into account when updating the Commission’s 2001 Draft Bill for domestic arbitration. [↑](#footnote-ref-2)
3. Book IV Title I deals with domestic arbitration, whereas Title II applies to international arbitration, as defined in article 1504: “An arbitration is international when international trade interests are at stake.” In terms of article 1506 certain articles in Title I also apply to international arbitration, on a “contract-out” basis. [↑](#footnote-ref-3)
4. 16 mainly Francophone countries, who are members of OHADA, adopted the Uniform Act on Arbitration in 1999. (OHADA is the French acronym for the Organization for the Harmonization of Business Law in Africa. For its members, see www.ohada.com.) [↑](#footnote-ref-4)
5. Angola, Mauritius, Mozambique, Zambia and Zimbabwe. Angola’s Act is difficult to classify as there is apparently as yet no readily available English translation of the Act. [↑](#footnote-ref-5)
6. For a comprehensive and informative discussion of the arbitration law of individual African states, see L Bosman (ed) *Arbitration in Africa: A Practitioner’s Guide* (Kluwer Law International, 2013). [↑](#footnote-ref-6)
7. These jurisdictions are Egypt (1994), Kenya (1995), Madagascar (1998), Mauritius (2008), Nigeria (1988), Rwanda (2008), Tunisia (1993), Uganda (2002), Zambia (2000) and Zimbabwe (1996). See UNCITRAL’s website www.uncitral.org. [↑](#footnote-ref-7)
8. For an informative discussion of this law see Onyema E “The new Ghana ADR Act 21010 – a critical assessment” (2012) 28 *Arbitration International* 101-124. [↑](#footnote-ref-8)
9. The LCIA (London Court of International Arbitration), a well respected global provider of arbitration services, recently established LCIA India, with offices in New Dehli, India to promote international arbitration in India. (See www.lcia.org.) [↑](#footnote-ref-9)
10. See S Wilske & JG Ewers “Why South Africa should update its international arbitration legislation (2011) 28(1) *J Int’l Arb* 1-13. The authors of the article are lawyers based in Stuttgart, Germany. [↑](#footnote-ref-10)
11. See *Bidoli v Bidoli* [2011] ZASCA 82 para 9. [↑](#footnote-ref-11)
12. The application of the MILCA is restricted to international commercial disputes. While “commercial” has a wide meaning, it is intended to exclude consumer and labour disputes. [↑](#footnote-ref-12)
13. See the DTI’s *Bilateral Investment Treaty Policy Framework Review* (June 2009) para 7.3, 45-46. [↑](#footnote-ref-13)
14. See UNCTAD’s Investment Policy Framework for Sustainable Development (2012) and the response of the Honourable Minister of Trade and Industry Dr Rob Davies in a speech dated 26 July 2012, delivered at the South African launch of UNCTAD’s initiative. [↑](#footnote-ref-14)
15. See *Report on International Arbitration* para 1.13, particularly n 8. [↑](#footnote-ref-15)
16. See, for example the changes to articles 8(1) and 16(3). [↑](#footnote-ref-16)
17. See part (b) below regarding the omission of articles 17B and 17C, which form part of UNCITRAL’s 2006 amendments to the Model Law. [↑](#footnote-ref-17)
18. See P Binder *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (3rd ed 2010, Sweet & Maxwell) 17. [↑](#footnote-ref-18)
19. A private arbitral tribunal is one which acquires jurisdiction in terms of an arbitration agreement between the parties, as opposed to one with compulsory jurisdiction through legislation. [↑](#footnote-ref-19)
20. See US Supreme Court Reports 87 L 2d 444. [↑](#footnote-ref-20)
21. 2009 5 SA 531 (GS). [↑](#footnote-ref-21)
22. See paras 16-17 of the judgment. [↑](#footnote-ref-22)
23. See the New Zealand Arbitration Act of 1996, as amended, ss 14-14E, the Australian International Arbitration Act of 1974, as amended, ss 23C-23G and the NSW Commerical Arbitration Act 2010, ss 27E-27I. [↑](#footnote-ref-23)
24. See for example C Marian “Proper Notice – common problems in interpreting Article V(1)(b) of the New York Convention in Light of the *Lernmorniiproekt* decision of the Swedish Supreme Court” (2012) 28 *Arbitration International* 545-566, regarding the meaning of “proper notice” in Article V(1)(b) of the Convention and s 21(2)(b)(iii) of the Draft Bill. [↑](#footnote-ref-24)
25. See Binder *International Commercial Arbitration* 106-120 for a detailed discussion of the background to and wording of article 7, option I. [↑](#footnote-ref-25)
26. See Gary B Born *International Commercial Arbitration* (3rd edition, 2009, Kluwer) vol II, 2016-2019. See also Binder *International Commercial Arbitration* 250-251 and Blackaby & Partasides *Redfern and Hunter on International Arbitration* (5th ed) 77 para 1.236, 323-324 paras 5.29-5.30 (particularly n 42) and 447 par 7.22. [↑](#footnote-ref-26)