

COOK ISLANDS
ARBITRATION ACT 2009
ANALYSIS

Title

1. Short Title and commencement
2. Interpretation
3. Further provision relating to interpretation
4. Act to bind the Crown
5. Purposes of Act and general principles
6. Rules applying to arbitrations in the Cook Islands
7. Arbitrations and awards outside the Cook Islands
8. Provisions applying where place of arbitration not agreed or determined
9. Arbitration under other Acts
10. Arbitrability of disputes
11. Arbitrability not affected by High Court having jurisdiction
12. Powers of arbitral tribunal in deciding disputes
13. Liability of arbitrations
14. Application of sections 14A go 14F
- 14A. Arbitral proceedings must be private
- 14B. Arbitration agreements deemed to prohibit disclosure of confidential information
- 14C. Limits on prohibition on disclosure of confidential information in section 14B
- 14D. Arbitral tribunal may allow disclosure of confidential information in certain circumstances
- 14E. Proceedings to be heard in camera
- 14F. Restrictions on reporting of proceedings heard in camera
15. Certificates concerning parties to conventions
16. Rules
17. Amendments to other Acts
18. Enactments ceasing to have effect
19. Transitional provisions
20. Act passed in substitution for Arbitration Act 1908
21. Appointment of Judges as arbitrators
Schedules

2009, No. 3

An Act to reform the law relating to arbitration

(13 February 2009)

BE IT ENACTED by the Parliament of the Cook Islands in Session assembled and by the authority of the same, as follows:

1. Short Title and commencement - (1) This Act may be cited as the Arbitration Act 2009.

(2) This Act shall come into force on the 1st January 2009.

2. Interpretation - (1) In this Act, unless the context otherwise requires -

"arbitration" means any arbitration whether or not administered by a permanent arbitral institution;

"arbitration agreement" means 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;

"award" means a decision of the arbitral tribunal on the substance of the dispute and includes any interim, interlocutory or partial award;

"confidential information" in relation to arbitral proceedings -

(a) means information that relates to the arbitral proceeding or to an award made in those proceedings, and

(b) includes -

(i) the statement of claim, statement of defence and all other pleadings, submissions, statements or other information supplied to the arbitral tribunal by a party;

(ii) any evidence (whether documentary or otherwise) supplied to the arbitral tribunal;

(iii) any notes made by the arbitral tribunal of oral evidence or submissions given before the arbitral tribunal;

(iv) any transcript of oral evidence or submissions given before the arbitral tribunal;

(v) any rulings of the arbitral tribunal;

(vi) any award of the arbitral tribunal.

"disclose", in relation to confidential information includes publishing or communicating or otherwise supplying the confidential information;

"party" means a party to an arbitration agreement, or, in any case where an arbitration does not involve all of the parties to the arbitration agreement, means a party to the arbitration;

(2) In this Act, unless the context otherwise requires, a reference -

(a) to a Part, section, or Schedule, is a reference to a Part, section, or Schedule of this Act;

(b) in a section to a subsection, is a reference to a subsection of that section;

- (c) in a subsection to a paragraph, is a reference to a paragraph of that subsection;
- (d) in a section to a paragraph, is a reference to a paragraph of that section;
- (e) in a Schedule to an article, is a reference to an article of that Schedule;
- (f) in an article of a Schedule to a paragraph, is a reference to a paragraph of that article;
- (g) in a Schedule to a clause, is a reference to a clause of that Schedule;
- (h) in a clause of a Schedule to a subclause, is a reference to a subclause of that clause;
- (i) in a subclause of a clause of a Schedule, to a paragraph is a reference to a paragraph of that subclause.

3. Further provision relating to interpretation - The material to which an arbitral tribunal or a court may refer in interpreting this Act includes the documents relating to the Model Law referred to in section 5(b) and originating from the United Nations Commission on International Trade Law, or its working group for the preparation of the Model Law.

4. Act to bind the Crown - This Act binds the Crown.

5. Purpose of Act and general principles - (1) The purposes of this Act are to -

- (a) encourage the use of arbitration as an agreed method of resolving commercial and other disputes; and
- (b) promote international consistency of arbitral regimes based on the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on the 21st day of June 1985; and
- (c) promote consistency between the international and domestic arbitral regimes in the Cook Islands; and
- (d) redefine and clarify the limits of judicial review of the arbitral process and of arbitral awards; and
- (e) facilitate the recognition and enforcement of arbitration agreements and arbitral awards; and
- (f) give effect to the obligations of the Government of the Cook Islands under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the English text of which is set out in Schedule 3).

(2) The provisions of this Act are founded upon the following principles and shall be construed accordingly:

- (a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;

(b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest.

6. Rules applying to arbitrations in the Cook Islands - (1) If the place of arbitration is, or would be, in the Cook Islands -

(a) the provisions of Schedule 1; and

(b) those provisions of Schedule 2 (if any), which apply to that arbitration under subsection (2),

apply in respect of the arbitration.

(2) A provision of Schedule 2 applies -

(a) to an arbitration referred to in subsection (1) which is an international arbitration as defined in article 1(3) of Schedule 1 only if the parties so agree; and

(b) to every other arbitration referred to in subsection (1), unless the parties agree otherwise.

7. Arbitrations and awards outside the Cook Islands - If the place of arbitration is not in the Cook Islands, articles 8, 9, 48 and 49 of Schedule 1, with any necessary modifications, apply in respect of the arbitration.

8. Provisions applying where place of arbitration not agreed or determined - If it still has to be agreed or determined whether the place of arbitration will be in the Cook Islands, articles 8 and 9 of Schedule 1, with any necessary modifications, apply in respect of the arbitration.

9. Arbitration under other Acts - (1) Where a provision of this Act is inconsistent with a provision of any other enactment, that other enactment shall, to the extent of the inconsistency, prevail.

(2) Subject to subsection (1), where a provision of this Act applies to an arbitration under any other enactment, the provisions of that other enactment shall be read as if it were an arbitration agreement.

10. Arbitrability of disputes - Any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless the arbitration agreement is contrary to public policy or, under any other law, such a dispute is not capable of determination by arbitration.

11. Arbitrability not affected by High Court having jurisdiction - The fact that an enactment confers jurisdiction in respect of any matter on the High Court but does not refer to the determination of that matter by arbitration does not, of itself, indicate that a dispute about that matter is not capable of determination by arbitration.

12. Powers of arbitral tribunal in deciding disputes - (1) An arbitration agreement, unless otherwise agreed by the parties, is deemed to provide that an arbitral tribunal may -

(a) award any remedy or relief that could have been ordered by the High Court if the

dispute had been the subject of civil proceedings in that Court;

(b) award interest on the whole or any part of any sum which -

(i) is awarded to any party, for the whole or any part of the period up to the date of the award; or

(ii) is in issue in the arbitral proceedings but is paid before the date of the award, for the whole or any part of the period up to the date of payment.

(2) Nothing in this section affects the application of section 14 or article 47(2)(b) or article 49(1)(b) of Schedule 1.

13. Liability of arbitrators - An arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith.

14. Application of sections 14A to 14F - Except as the parties may otherwise agree in writing (whether in the arbitration agreement or otherwise), sections 14A to 14F apply to every arbitration for which the place arbitration is, or would be, the Cook Islands.

14A. Arbitral proceedings must be private - An arbitral tribunal must conduct the arbitral proceedings in private.

14B. Arbitration agreements deemed to prohibit disclosure of confidential information - Subject to section 16 every arbitration agreement to which this section applies is deemed to provide that the parties and the arbitral tribunal must not disclose confidential information.

14C. Limits on prohibition on disclosure of confidential information in section 14B - A party or an arbitral tribunal may disclose confidential information -

(a) to a professional or other adviser of any of the parties; or

(b) if both the following matters apply:

(i) disclosure is necessary -

(A) to ensure that a party has a full opportunity to present the party's case, as required under article 18 of Schedule 1; or

(B) for the establishment or protection of a party's legal rights in relation to a third party; or

(C) for the making and prosecution of an application to a court under this Act; and

(ii) the disclosure is no more than what is reasonably required to serve any of the purposes referred to in subparagraph (i)(A) to (C); or

(c) if the disclosure is in accordance with an order made, or issued, by a court; or

(d) if both the following matters apply:

(i) the disclosure is authorised or required by law (except this Act) or is required by a competent regulatory body; and

(ii) the party who, or the arbitral tribunal that makes - the disclosure, provides to the other party and the arbitral tribunal or, as the case may be, the parties, written details of the disclosure (including an explanation of the reason for the disclosure);
or

(e) if the disclosure is in accordance with an order made by -

(i) an arbitral tribunal under section 14D; or

(ii) the High Court under section 14E.

14D. Arbitral tribunal may allow disclosure of confidential information in certain circumstances -

(1) This section applies if -

(a) a question arises in any arbitral proceedings as to whether confidential information should be disclosed other than as authorised under section 14C (a) to (d); and

(b) at least one of the parties agrees to refer that question to the arbitral tribunal concerned.

(2) The arbitral tribunal, after giving each of the parties an opportunity to be heard, may make or refuse to make an order allowing all or any of the parties to disclose confidential information.

14E. Proceedings to be heard in camera - Proceedings under this Act shall, on the application of any party to the proceedings, be heard in camera.

14F. Restrictions on reporting of proceedings heard in camera - (1) This section shall apply to proceedings under this Act in any Court heard in camera.

(2) A court hearing any proceedings to which this section applies shall, on the application of any party to the proceedings, give directions as to whether any, and if so, what information relating to the proceedings may be published.

(3) A court shall not give a direction under subsection (2) permitting information to be published, unless -

(a) all parties to the proceedings agree that such information may be published; or

(b) the court is satisfied that the information, if published in accordance with such directions as it may give, would not reveal any matter including the identity of any party to the proceedings, that any party to the proceedings reasonably wishes to remain confidential; or

(c) the court is satisfied that the public interest in the publication of information relating to the proceedings outweighs the interest of any of the parties to the proceedings in having

the whole or any part of the proceedings conducted in camera, without disclosure of the information relating to or arising out of the proceedings.

(4) Notwithstanding subsection (3), where a court gives grounds for its decision in a judgment in respect of proceedings to which this section applies and considers that judgment to be of major legal interest, the court shall direct that reports of the judgment may be published in law reports and professional publications: Provided that if any party to the proceedings reasonably wishes to conceal any matter including the fact of being a party, the court shall -

(a) give directions as to the action that shall be taken to conceal that matter in those reports; and

(b) if it considers that a report published in accordance with the directions given under paragraph (a) would be likely to reveal that matter, direct that no report shall be published until after the end of such period, not exceeding 10 years, as the court in its discretion considers appropriate.

(5) In this section and in section 14E -

"Court" means the High Court of the Cook Islands and its appellate courts, but does not include an arbitral tribunal;

"proceedings" includes all matters brought before the Court under this Act (for example, an application to enforce an arbitral award).

15. Certificates concerning parties to conventions - A certificate purporting to be signed by the Secretary of Foreign Affairs or a Deputy Secretary of Foreign Affairs, that at the time specified in the certificate, any country had signed and ratified or had denounced, or had taken any other treaty action under the, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) in respect of the territory specified in the certificate, is presumptive evidence of the facts stated.

16. Rules - Rules may be made for the purposes of this Act under the provisions of the Judicature Act.

17. Amendments to other Acts - The Acts specified in Schedule 4 are amended in the manner indicated in that Schedule.

18. Enactments ceasing to have effect - The enactments specified in Schedule 5 shall cease to have effect as part of the law of the Cook Islands.

19. Transitional provisions - (1) Subject to subsections (2) and (3) -

(a) this Act applies to every arbitration agreement, whether made before or after the commencement of this Act, and to every arbitration under such an agreement; and

(b) a reference in an arbitration agreement to the Arbitration Act 1908, or to a provision of that Act, shall be construed as a reference to this Act, or to any corresponding provision of this Act.

(2) Where the arbitral proceedings were commenced before the commencement of this Act, the law governing the arbitration agreement and the arbitration shall be the law which would have applied if this Act had not been passed.

(3) Where an arbitration agreement, which is made before the commencement of this Act, provides for the appointment of 2 arbitrators, and arbitral proceedings are commenced after the commencement of this Act -

(a) unless a contrary intention is expressed in the arbitration agreement, the 2 arbitrators shall, immediately after they are appointed, appoint an umpire; and

(b) the law governing the arbitration agreement and the arbitration is the law that would have applied if this Act had not been passed.

(4) For the purposes of this section, arbitral proceedings are to be taken as having commenced on the date of the receipt by the respondent of a request for the dispute to be referred to arbitration, or, where the parties have agreed that any other date is to be taken as the date of commencement of the arbitral proceedings, then on that date.

(5) This Act applies to every arbitral award, whether made before or after the commencement of this Act.

20. Act passed in substitution for Arbitration Act 1908 - For the avoidance of doubt, it is hereby declared that, for the purposes of section 21 of the Acts Interpretation Act 1924, this Act is passed in substitution in the Cook Islands, for the Arbitration Act 1908 of New Zealand.

21. Appointment of Judges as arbitrators - (1) Subject to subsection (2), a Judge of the High Court may, if in all the circumstances he or she thinks fit, accept appointment as a sole arbitrator by virtue of an arbitration agreement.

(2) A Judge of the High Court shall not accept appointment as a sole arbitrator unless the Chief Justice has informed that Judge that he or she can be made available for such appointment.

(3) The fees, if any, payable for the services of a Judge of the High Court as arbitrator shall be taken in the High Court.

This Act is administered by the Ministry of Justice

SCHEDULE 1

RULES APPLYING TO ARBITRATION GENERALLY

Chapter 1 - General Provisions

1. Scope of application

(1) This Schedule applies as provided in sections 6, 7, 8, and 9.

(2) 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 any commercial or other 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.

(3) For the purposes of paragraph (2) -

(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 that party's habitual residence.

2. Definitions and rules of interpretation

For the purposes of this Schedule -

(a) "Arbitration", "arbitration agreement", "arbitral tribunal", and "award" have the meanings assigned to those terms by section 2;

(b) "Court" means a body or organ of the judicial system of a State;

(c) "Interim measure" has the meaning ascribed to it by article 17(2) of this Schedule;

(d) Where a provision of this Schedule, except article 41, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorise a third party, include an institution, to make that determination:

(e) Where a provision of this Schedule 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 Schedule, other than in articles 38(a) and 45(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:

(g) Article headings are for reference purposes only and are not to be used for purposes of interpretation.

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 the addressee's 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;

(c) the communication is deemed to have been received -

(i) if to be sent and received within the Cook Islands, five days following the day on which it was posted; and

(ii) if to be sent and received internationally, ten days following the day on which it was posted.

(2) The provisions of this article do not apply to communications in court proceedings.

4. Waiver of right to object

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

5. Extent of court-intervention

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

6. Court or other authority for certain functions of arbitration assistance and supervision

Any court having jurisdiction may perform any function conferred on a court by these articles, except where the article provides that the function shall be performed by a specified court or courts.

Chapter 2 Arbitration agreement

7. Form of arbitration agreement

(1) An arbitration agreement may be made orally or in writing. Subject to section 11, an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) A reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement, provided that the reference is such as to make that clause part of the contract.

8. Arbitration agreement and substantive claim before court

(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting that party's first statement on the substance of the dispute, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative, or incapable of being performed, or that there is not in fact any dispute between the parties with regard to the matters agreed to be referred.

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

9. Arbitration agreement and interim measures by court

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

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

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

(3) Where a party applies to a court for an interim injunction or other interim order and an arbitral tribunal has already ruled on any matter relevant to the application, the court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.

Chapter 3 Composition of arbitral tribunal

10. Number of arbitrators

(1) The parties are free to determine the number of arbitrators.

(2) Failing such determination, -

(a) In the case of international arbitration, the number of arbitrators shall be 3:

(b) In every other case, the number of arbitrators shall be one.

11. Appointment of arbitrators

(1) No person shall be precluded by reason of that person's nationality from acting as an arbitrator, unless otherwise agreed by the parties.

(2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5).

(3) Failing such agreement, -

(a) In an arbitration with 3 arbitrators and 2 parties, each party shall appoint one arbitrator, and the 2 arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within 30 days of receipt of a request to do so from the other party, or if the 2 arbitrators fail to agree on the third arbitrator within 30 days of their appointment, the appointment shall be made, upon request of a party, by the High Court:

(b) In an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, that arbitrator shall be appointed, upon request of a party, by the High Court.

(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 2 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 High Court to take the necessary measure, unless agreement on the appointment procedure provides other means for securing the appointment.

(5) A decision on a matter entrusted by paragraphs (3), (4), or (6) to the High shall be subject to no appeal. The court, 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 third arbitrator, shall, in the case of an international arbitration, take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

(6) In an arbitration, where -

(a) The parties have agreed to an arbitration with 2 or 4 or more arbitrators; or

(b) There are 3 arbitrators and more than 2 parties, -

and no procedure for the appointment of arbitrators has been agreed upon, the High Court may, upon request of a party, appoint the requisite number of arbitrators, having due regard to the matters referred to in paragraph (5).

12. Grounds for challenge

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

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

13. Challenge procedure

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

(2) Failing such agreement, a party who intends to challenge an arbitrator shall, within 15 days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) is not successful, the challenging party may request, within 30 days after having received notice of the decision rejecting the challenge, the High Court 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.

(4) Nothing in this Article shall authorise the use of the challenge procedure in respect of alleged impartiality or lack of independence arising out of or in relation to the actual conduct of the arbitration. Such matters may be raised only in an application under Article 34 to set aside the subsequent award.

14. Failure or impossibility to act

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

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

any ground referred to in this article or article 12(2).

15. Appointment of substitute arbitrator

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

(2) Unless otherwise agreed by the parties, -

(a) Where the sole or the presiding arbitrator is replaced, any hearings previously held shall be repeated; and

(b) Where an arbitrator, other than a sole or a presiding arbitrator is replaced, any hearings previously held may be repeated at the discretion of the arbitral tribunal.

(3) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this article is not invalid solely because there has been a change in the composition of the arbitral tribunal.

Chapter 4 Jurisdiction of arbitral tribunal

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* (necessarily) the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that that party has appointed, or participated in 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) either as a preliminary question or in an award on the merits. If the arbitral tribunal rules on such a plea as a preliminary question, any party may request, within 30 days after having received notice of that ruling, the High Court 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 4A Interim Measures and Preliminary Orders

Interim Measures

17. Interpretation

In this Chapter, unless the context otherwise requires -

"applicant" means any of the following, as the case may be:

- (a) a party who requests an interim measure:
- (b) a party who applies for a preliminary order:
- (c) a party who seeks or obtains recognition or enforcement of an interim measure.

"Interim measure" means a temporary measure (whether or not in the form of an award) by which a party is required, at any time before an award is made in relation to a dispute, to do all or any of the following:

- (a) maintain or restore the status quo pending the 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 proceedings:
- (c) provide any means of preserving assets out of which a subsequent award may be satisfied:
- (d) preserve evidence that may be relevant to the dispute:
- (e) give security for costs.

"preliminary order" means an order directing a party not to frustrate the purpose of an interim measure

"respondent" means any of the following, as the case may be:

- (a) a party against whom an interim measure is requested or directed:
- (b) a party against whom a preliminary order is applied for or directed:
- (c) a party against whom recognition or enforcement of an interim measure is sought or has been obtained.

Interim Measures

17A. Power of arbitral tribunal to grant interim measure

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant an interim measure.

17B. Conditions for granting interim measure

(1) If an interim measure of a kind described in subparagraph (a), (b) or (c) of the definition of that term in article 17 is requested, the applicant must satisfy the arbitral tribunal that -

(a) harm no adequately reparable by an award of damages is likely to result if the measure is not granted; and

(b) the harm substantially outweighs the harm that is likely to result to the respondent if the measure is granted; and

(c) there is a reasonable possibility that the applicant will succeed on the merits of the claim.

(2) If an interim measure of a kind described in subparagraph (d) of the definition of that term in article 17 is requested, the applicant must satisfy the arbitral tribunal of the matters specified in paragraph (1)(a) to (c), but only to the extent that the arbitral tribunal considers appropriate.

(3) If an interim measure of a kind described in subparagraph (e) of the definition of that term in article 17 is requested, the applicant must satisfy the arbitral tribunal that the applicant will be able to pay the costs of the respondent if the applicant is unsuccessful on the merits of the claim.

(4) A determination by the arbitral tribunal on the matter specified in paragraph (1)(c) does not affect its discretion to make any subsequent determination.

17C. Power of arbitral tribunal to issue preliminary order

Unless otherwise agreed by the parties, a party may, without notice to any other party, apply for a preliminary order when making, a request for an interim measure to be granted under article 18.

17D. Conditions for issuing preliminary order

(1) The arbitral tribunal may issue a preliminary order if it considers that prior to disclosure of the request for the interim measure to the respondent risks frustrating the purpose of the measure.

(2) An applicant for a preliminary order must satisfy the arbitral tribunal of the matters specified in article 17B. That article applies to a preliminary order subject to -

(a) the modification that the harm to be assessed under article 17B(1)(a) is the harm likely to result from the order being issued or not; and

(b) all other necessary modifications.

17E. Procedure for preliminary order

(1) Immediately after the arbitral tribunal makes a determination in respect of an application for a preliminary order, it must -

(a) give notice to all the parties of -

(i) the request for the interim measure; and

(ii) the application for the preliminary order; and

(iii) the preliminary order issued by the arbitral tribunal (if any); and

(iv) all other communications (whether oral or written) between a party and the arbitral tribunal in relation to the matters specified in subparagraph (a)(i) to (iii); and

(b) give an opportunity to each respondent to present the respondent's case at the earliest practicable time.

(2) The arbitral tribunal must decide promptly on any objection to the preliminary order.

17F. Duration of preliminary order

(1) A preliminary order expires 20 days after the date on which it was issued by the arbitral tribunal.

(2) However, the arbitral tribunal may grant an interim measure adopting or modifying the preliminary order, after each respondent has been given -

(a) notice under article 22(1); and

(b) an opportunity to present the respondent's case.

17G. Effect of preliminary order

(1) A preliminary order is binding on the parties but is not enforceable by a court.

(2) A preliminary order does not constitute an award.

Supplementary provisions for interim measures and preliminary orders

17H. Modification, suspension, and cancellation

If the arbitral tribunal grants or issues an interim measure or a preliminary order, it may modify, suspend, or cancel the measure or order -

(a) on the application of a party; or

(b) on its own initiative, but only in exceptional circumstances and after giving prior notice to the parties.

17I. Provision of security

(1) The arbitral tribunal may require the applicant for an interim measure to provide appropriate security in connection with the measure.

(2) The arbitral tribunal may require a party to promptly disclose to the arbitral tribunal a material

change in the circumstances upon which an interim measure was requested or granted.

17J. Disclosure of material circumstances

(1) The arbitral tribunal may require a party to promptly disclose to the arbitral tribunal a material change in the circumstances upon which an interim measure was requested or granted.

(2) The applicant for a preliminary order must disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal's determination as to whether to issue or extend the order.

(3) The obligation in paragraph (2) continues until each respondent has had an opportunity to present the respondent's case, after which paragraph (1) applies.

17K. Costs and damages

(1) An applicant for an interim measure or a preliminary order is liable for any costs and damages caused to any party by the measure or order if the arbitral tribunal later determines that, in the circumstances, the measure or order should not have been granted or issued.

(2) The arbitral tribunal may award those costs and damages at any time during the arbitral proceedings.

Recognition and enforcement of interim measures

17L. Recognition and enforcement

(1) An interim measure granted by an arbitral tribunal must be recognised as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent Court, irrespective of the county in which it was granted.

(2) Paragraph (1) is subject to article 30.

(3) The applicant for recognition or enforcement of an interim measure under article 48 must promptly inform the Court of any modification, suspension, or cancellation of that interim measure.

(4) The Court may, if it considers it proper, order the applicant to provide appropriate security if -

(a) the arbitral tribunal has not already made a decision with respect to the provision of security; or

(b) the decision with respect to the provision of security is necessary to protect the rights of third parties.

17M. Grounds for refusing recognition or enforcement

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

(a) at the request of the respondent if the Court is satisfied that -

(i) the refusal is warranted 49(1)(a)(i), (ii), or (iv); or

(ii) the arbitral tribunal's decision with respect to the provision of security in connection with the interim measure granted by it has not been complied with; or

(iii) the interim measure has been suspended or cancelled by the arbitral tribunal or, if so empowered, by the Court of the country in which the arbitration took 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 on 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 and without modifying its substance; or

(ii) any of the grounds set out in article 49(1)(b) apply to the recognition and enforcement of the interim measure.

(2) A determination made by the Court on any ground in paragraph (1) is effective only for the purposes of the application to recognise and enforce the interim measure.

(3) The Court must not, in making that determination, undertake a review of the substance of the interim measure.

Chapter 6 Conduct of arbitral proceedings

18. General duty of the Tribunal - Equal treatment of parties

The tribunal shall -

(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and

(b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

19. Determination of rules of procedure

(1) Subject to the provisions of this Schedule, 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 shall decide all procedural and evidential matters and may, subject to the provisions of this Schedule, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to decide whether to apply the strict rules of evidence and the power to determine the admissibility, relevance, materiality, and weight of any evidence.

(3) Every witness giving evidence, and every counsel or expert or other person appearing before an arbitral tribunal, shall have the same privileges and immunities as witnesses and counsel in proceedings before a court.

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), 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.

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.

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, 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.

23. Statements of claim and defence

(1) Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting the claim, the points at issue and the relief or remedy sought, and the respondent shall state the defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements. The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

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

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.

(4) At any hearing or any meeting of the arbitral tribunal of which notice is required to be given under paragraph (2), or in any proceedings conducted on the basis of documents or other materials, the parties may appear or act in person or may be represented by any other person of their choice.

25. Default of a party

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

(a) The claimant fails to communicate the statement of claim in accordance with article 36(1), the arbitral tribunal shall terminate the proceedings;

(b) The respondent fails to communicate the statement of defence in accordance with article 36(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;

(d) The claimant fails to prosecute the claim, the arbitral tribunal may make an award dismissing the claim or give directions, with or without conditions, for the speedy determination of the claim.

26. Expert appointed by arbitral tribunal

(1) Unless otherwise agreed by the parties, the arbitral tribunal -

(a) May appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal:

(b) May require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods, or other property for the expert's inspection.

(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of a written or oral report, participate in a hearing where the parties have the opportunity to put questions and to present expert witnesses in order to testify on the points at issue.

27. Court assistance in taking evidence

(1) The arbitral tribunal or a party with the approval of the arbitral tribunal may request from the court assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.

(2) For the purposes of paragraph (1), -

(a) The High Court may make an order of subpoena may issue a witness summons to compel the attendance of a witness before an arbitral tribunal to give evidence or produce documents:

(b) The High Court may order any witness to submit to examination on oath or affirmation before the arbitral tribunal, or before an officer of the court, or any other person for the use of the arbitral tribunal:

(c) The High Court shall have, for the purpose of the arbitral proceedings, the same power as it has for the purpose of proceedings before that court to make an order for -

(i) The discovery of documents and interrogatories:

(ii) The issue of a commission or request for the taking of evidence out of the jurisdiction:

(iii) The detention, preservation, or inspection of any property or thing which is in issue in the arbitral proceedings and au

Chapter 7 Making of award and termination of proceedings

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* (according to considerations of general justice and fairness) only if the parties have expressly authorised it to do so.

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

29. Decision-making by panel of arbitrators

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

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 44 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.

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 43.

(3) The award shall state its date and the place of arbitration as determined in accordance with article 33(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) shall be delivered to each party.

(5) Unless the arbitration agreement otherwise provides, or the award otherwise directs, a sum directed to be paid by an award shall carry interest as from the date of the award and at the same rate as a judgment debt.

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).

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

(a) The claimant withdraws the claim, unless the respondent objects thereto and the arbitral tribunal recognises a legitimate interest on the respondent's part in obtaining a final settlement of the dispute:

(b) The parties agree on the termination of the proceedings:

(c) The arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of articles 46 and 47(4).

(4) Unless otherwise agreed by the parties, the death of a party does not terminate the arbitral proceedings or the authority of the arbitral tribunal.

(5) Paragraph (4) does not affect any rule of law or enactment under which the death of a person extinguishes a cause of action.

33. Correction and interpretation award; additional award

(1) Within 30 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 30 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) on its own initiative within 30 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 30 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 60 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 paragraphs (1) or (3).

(5) The provisions of article 44 shall apply to a correction or interpretation of the award or to an additional award.

Chapter 8 Recourse against award

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).

(2) An arbitral award may be set aside by the High Court only if -

(a) The party making the application furnishes proof that -

(i) A party to the arbitration agreement 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 on that question, under the laws of the Cook Islands; or

(ii) The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case; or

(iii) The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside, or

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

(b) The High Court finds that -

(i) The subject-matter of the dispute is not capable of settlement by arbitration under the laws of the Cook Islands; or

(ii) The award is in conflict with the public policy of the Cook Islands.

(3) An application for setting aside may not be made after 3 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 46, from the date on which that request had been disposed of by the arbitral tribunal. This paragraph does not apply to an application for setting aside on the ground that the award was induced or affected by fraud or corruption.

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

(5) Where an application is made to set aside an award, the High Court may order that any money made payable by the award shall be brought into Court or otherwise secured pending the determination of the application.

(6) For the avoidance of doubt, and without limiting the generality of paragraph (2)(b)(ii), it is hereby declared that an award is in conflict with the public policy of the Cook Islands 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 -

- (i) During the arbitral proceedings; or
- (ii) In connection with the making of the award.

Chapter 9

Recognition and enforcement of awards

35. Recognition and enforcement

- (1) An arbitral award, irrespective of the country in which it was made -
 - (a) must be recognised as binding and,
 - (b) upon application in writing to the High Court, must be enforced by entry as a judgment in terms of the award, or by action, subject to the provisions of this article and of article 49.
- (2) The party relying on an award or applying for its enforcement must supply -
 - (a) the duly authenticated original award or a duly certified copy of the award; and
 - (b) if the arbitration agreement is recorded in writing, the original arbitration agreement or a duly certified copy of the agreement; and
 - (c) if the award or agreement is not made in the English language, a duly certified translation into the English language of either or both documents.

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 court where recognition or enforcement is sought proof that -
 - (i) A party to the arbitration agreement 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 on that question, under the law of the country where the award was made; or
 - (ii) The party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case; or
 - (iii) The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced; or

(iv) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(v) The award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) If the court finds that -

(i) The subject-matter of the dispute is not capable of settlement by arbitration under the law of the Cook Islands; or

(ii) The recognition or enforcement of the award would be contrary to the public policy of the Cook Islands.

(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), the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

(3) For the avoidance of doubt, and without limiting the generality of paragraph (1)(b)(ii), it is hereby declared that an award is contrary to the public policy of the Cook Islands 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 -

(i) During the arbitral proceedings, or

(ii) In connection with the making of the award.

SCHEDULE 2

Additional optional rules applying to arbitration

1. Default appointment of arbitrators

(1) For the purposes of article 11 of Schedule 1, the parties shall be taken as having agreed on the procedure for appointing the arbitrator or arbitrators set out in subclauses (2) to (5), unless the parties agree otherwise.

(2) In an arbitration with 3 arbitrators and 2 parties, each party shall appoint one arbitrator, and the 2 arbitrators thus appointed shall appoint the third arbitrator.

(3) In an arbitration with -

(a) A sole arbitrator; or

(b) Two or 4 or more arbitrators; or

(c) Three arbitrators and more than 2 parties -

the parties shall agree on the person or persons to be appointed as arbitrator.

(4) Where, under subclause (2) or subclause (3), or any other appointment procedure agreed upon by the parties -

(a) A party fails to act as required under such procedure; or

(b) The parties, or the 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, by written communication delivered to every such party, arbitrator or third party, specify the details of that person's default and propose if that default is not remedied within the period specified in the communication (being not less than 7 days after the date on which the communication is received by all of the persons to whom it is delivered), a person named in the communication shall be appointed to such vacant office arbitrator as is specified in the communication, or the arbitral tribunal shall consist only of the person or persons who have already been appointed to the of arbitrator.

(5) If default specified in the communication is not remedied within the period specified in the communication -

(a) The proposal made in the communication shall take effect as part of the arbitration agreement on the day after the expiration of that period; and

(b) The arbitration agreement shall be read with all necessary modifications accordingly.

2. Consolidation of arbitral proceedings

(1) Where arbitral proceedings all have the same arbitral tribunal -

(a) The arbitral tribunal may, on the application of at least one party in each of the arbitral proceedings, order -

(i) Those proceedings to be consolidated on such terms as the arbitral tribunal thinks just; or

(ii) Those proceedings to be heard at the same time, or one immediately after the other; or

(iii) Any of those proceedings to be stayed until after the determination of any other of them.

(b) if an application has been made to the arbitral tribunal under paragraph (a) and the

arbitral tribunal refuses or fails to make an order under that paragraph, the High Court may, on application by a party in any of the proceedings, make any such order as could have been made by the arbitral tribunal.

(2) Where arbitral proceedings do not all have the same arbitral tribunal -

(a) The arbitral tribunal for any one of the arbitral proceedings may, on the application of a party in the proceedings, provisionally order -

(i) The proceedings to be consolidated with other arbitral proceedings on such terms as the arbitral tribunal thinks just; or

(ii) The proceedings to be heard at the same time as other arbitral proceedings, or one immediately after the other; or

(iii) Any of those proceedings to be stayed until after the determination of any other of them:

(b) An order ceases to be provisional when consistent provisional orders have been made for all of the arbitral proceedings concerned:

(c) The arbitral tribunals may communicate with each other for the purpose of conferring on the desirability of making orders under this subclause and of deciding on the terms of any such order:

(d) If a provisional order is made at least one of the arbitral proceedings concerned, but the arbitral tribunal for another of the proceedings refuses or fails to make such an order (having received an application from a party to make such an order), the High Court may, on application by a party in any of the proceedings, make an order or orders that could have been made under this subclause:

(e) If inconsistent provisional orders are made for the arbitral proceedings, the High Court may, on application by a party in any of the proceedings, alter the orders to make them consistent.

(3) When arbitral proceedings are to be consolidated under subclause (2), the arbitral tribunal for the consolidated proceedings shall be that agreed on for the purpose by all the parties to the individual proceedings, but, failing such an agreement, the High Court may appoint an arbitral tribunal for the consolidated proceedings.

(4) An order or a provisional order may not be made under this clause unless it appears -

(a) That some common question of law or fact arises in all of the arbitral proceedings; or

(b) That the rights to relief claimed in all of the proceedings are in respect of, or arise out of, the same transaction or series of transactions; or

(c) That for some other reason it is desirable to make the order or provisional order.

(5) Any proceedings before an arbitral tribunal for the purposes of this clause shall be treated as

part of the arbitral proceedings concerned.

(6) Arbitral proceedings may be commenced or continued, although an application to consolidate them is pending under subclause (1) or (2) and although a provisional order has been made in relation to them under subclause (2).

(7) Subclauses (1) and (2) apply in relation to arbitral proceedings whether or not all or any of the parties are common to some or all of the proceedings.

(8) There shall be no appeal from any decision of the High Court under this clause.

(9) Nothing in this clause prevents the parties to 2 or more arbitral proceedings from agreeing to consolidate those proceedings and taking such steps as are necessary to effect that consolidation.

3. Powers relating to conduct of arbitral proceedings

(1) For the purposes of article 32 of Schedule 1, and unless the parties agree otherwise, the parties shall be taken as having agreed that the powers conferred upon the arbitral tribunal include the power to -

(a) Adopt inquisitorial processes;

(b) Draw on its own knowledge and expertise;

(c) Order the provision of further particulars in a statement of claim or statement of defence;

(d) Order the giving of security for costs;

(e) Fix and amend time limits within which various steps in the arbitral proceedings must be completed;

(f) Order the **disclosure** and production of documents or materials within the possession or power of a party;

(g) Decide whether any and if so what questions should be put to and answered by the respective parties and when and in what form this should be done.

(h) Order that any evidence be given orally or by affidavit or otherwise;

(i) Order that any evidence be given on oath or affirmation;

(j) Order any party to do all such other things during the arbitral proceedings as may reasonably be needed to enable an award to be made properly and efficiently;

(k) Make an interim, interlocutory or partial award.

(2) Notwithstanding anything in article 5 of Schedule 1, the arbitral tribunal, or a party with the approval of the arbitral tribunal, may request from the court assistance in the exercise of any power conferred on the arbitral tribunal under subclause (1).

(3) If a request is made under subclause (2), the High Court shall have, for the purposes of the arbitral proceedings, the same power to make an order for the doing of any thing which the arbitral tribunal is empowered to order under subclause (1) as it would have in civil proceedings before that court.

4. Determination of preliminary point of law by court

(1) Notwithstanding anything in article 5 of Schedule 1, on an application to the High Court by any party -

(a) With the consent of the arbitral tribunal: or

(b) With the consent of every other party -

the High Court shall have jurisdiction to determine any question of law arising in the course of the arbitration.

(2) The High Court shall not entertain an application under subclause (1)(a) with respect to any question of law unless it is satisfied that the determination of the question of law concerned -

(a) Might produce substantial savings in costs to the parties; and

(b) Might, having regard to all the circumstances, substantially affect the rights of one or more of the parties.

5. Appeals on questions of law

(1) Notwithstanding anything in articles 5 or 47 of Schedule 1, any party may appeal to the High Court on any question of law arising out of an award -

(a) If the parties have so agreed before the making of that award; or

(b) With the consent of every other party given after the making of the award.

(2) On the determination of an appeal under this clause, the High Court may, by order -

(a) Confirm, vary, or set aside the award; or

(b) Remit the award, together with the High Court's opinion on the question of law which was the subject of the appeal, to the arbitral tribunal for reconsideration or, where a new arbitral tribunal has been appointed, to that arbitral tribunal for consideration, -

and, where the award is remitted under paragraph (b), the arbitral tribunal shall, unless the order otherwise directs, make the award not later than 3 months after the date of the order.

(3) With the leave of the High Court, any party may appeal to the Court of Appeal from any determination of the High Court under this clause. The High Court may grant leave on such conditions as it thinks fit.

(4) If the High Court refuses to grant leave to appeal under subclause (3), the Court of Appeal may grant special leave to appeal.

(5) Where the award of an arbitral tribunal is varied on an appeal under this clause, the award as varied shall have effect (except for the purposes of this clause) as if it were the award of the arbitral tribunal; and the party relying on the award or applying for its enforcement under article 48(2) of Schedule 1 shall supply the duly authenticated original order of the High Court varying the award or a duly certified copy.

(6) Article 34(3) (time limit for appeal) and (4) (reference back to arbitral tribunal) of Schedule I apply to an appeal under this clause as they do to an application for the setting aside of an award under that article.

(7) For the purposes of article 36 of Schedule 1, -

(a) An appeal under this clause shall be treated as an application for the setting aside of an award; and

(b) An award which has been remitted by the High Court under subclause (2)(b) to the original or a new arbitral tribunal shall be treated as an award which has been suspended.

(8) For the purposes of this clause, "question of law" -

(a) includes an error of law that involves an incorrect interpretation of the applicable law (whether or not the error appears on the record of the decision; but

(b) does not include any question as to whether -

(i) the award or any part of the award was supported by any evidence or any sufficient or substantial evidence; and

(ii) the arbitral tribunal drew the correct factual inferences from the relevant primary facts.

6. Costs and expenses of an arbitration

(1) Unless the parties agree otherwise, -

(a) The costs and expenses of an arbitration, being the legal and other expenses of the parties, the fees and expenses of the arbitral tribunal, and any other expenses related to the arbitration shall be as fixed and allocated by the arbitral tribunal in its award under article 44 of Schedule 1, or any additional award under article 46(3) of Schedule 1; or

(b) In the absence of an award or additional award fixing and allocating the costs and expenses of the arbitration, each party shall be responsible for the legal and other expenses of that party and for an equal share of the fees and expenses of the arbitral tribunal and any other expenses relating to the arbitration. There shall be no obligation upon the arbitral tribunal to make an award or an additional award fixing and allocating the costs and expenses of the arbitration unless there has been a submission of the subject of costs or any aspect of it to the determination of the arbitral tribunal whether by the making of an

express claim for the costs and expenses of the arbitration by either party to the arbitration or otherwise.

(2) Unless the parties agree otherwise, the parties shall be taken as having agreed that, -

(a) If a party makes an offer to another party to settle the dispute or part of the dispute and the offer is not accepted and the award of the arbitral tribunal is no more favourable to the other party than was the offer, the arbitral tribunal, in fixing and allocating the costs and expenses of the arbitration, may take the fact of the offer into account in awarding costs and expenses in respect of the period from the making of the offer to the making of the award; and

(b) The fact that an offer to settle has been made shall not be communicated to the arbitral tribunal until it has made a final determination of all aspects of the dispute other than the fixing and allocation of costs and expenses.

(3) Where an award or additional award made by an arbitral tribunal fixes or allocates the costs and expenses of the arbitration, or both, the High Court may, on the application of a party, if satisfied that the amount or the allocation of those costs and expenses is unreasonable in all the circumstances, make an order varying their amount or allocation, or both. The arbitral tribunal is entitled to appear and be heard on any application under this subclause.

(4) Where -

(a) An arbitral tribunal refuses to deliver its award before the payment of its fees and expenses; and

(b) An application has been made under subclause (3), -

the High Court may order the arbitral tribunal to release the award on such conditions as the Court sees fit.

(5) An application may not be made under clause (3) after 3 months have elapsed from the date on which the party making the application received any award or additional award fixing and allocating the costs and expenses of the arbitration.

(6) There shall be no appeal from any decision of the High Court under this clause.

7. Extension of time for commencing arbitration proceedings

(1) Where an arbitration agreement provides that no arbitral proceedings are to be commenced unless steps have been taken to commence the proceedings within the time specified in the agreement, the High Court may, notwithstanding that the specified time has expired, extend the time for such period as it thinks fit, if, in its opinion, undue hardship would otherwise be caused to the parties.

(2) An extension may be subject to any such conditions as the justice of the case may require.

SCHEDULE 3 **Treaty relating to arbitration**

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

[Adopted at New York by the United Nations Conference on International Commercial
Arbitration on 10 June 1958]

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.
2. The term arbitral awards shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.
3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

1. Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
2. The term agreement in writing shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

Each Contracting State shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

- (a) The duly authenticated original award or a duly certified copy thereof;
- (b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

- (a) The parties to the agreement referred to in article II were, under the law applicable to them, 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
- (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
- (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced, or
- (d) The composition of the arbitral authority 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
- (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

- (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
- (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

Article VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

Article IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article XI

In the case of a federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Article XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

Article XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

Article XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

- (a) Signatures and ratifications in accordance with article VIII;
- (b) Accessions in accordance with article IX;
- (c) Declarations and notifications under articles I, X and XI;
- (d) The date upon which this Convention enters into force in accordance with article XII;
- (e) Denunciations and notifications in accordance with article XIII.

Article XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

SCHEDULE 4
Enactments amended

Enactment	Amendment
Evidence Act 1968	By omitting from the definition of the term "person acting judicially" in section 2 the words "or by consent of parties".
	By repealing the definitions of the terms "proceedings" and "Court" in section 2.
	By inserting in paragraph (b) of section 26, after word "legal", the words "or arbitral".
Limitation Act 1950	By repealing the definitions of the terms "arbitration", "award", and "submission" in section 2. By repealing section 29, and substituting the following section: "29. Application of Act and other limitation

	<p>enactments to arbitrations -</p> <p>"(1) This Act and any other enactment relating to the limitation of actions shall apply to arbitrations as they apply to actions.</p> <p>"(2) For the purposes of this Act and of any such enactment, an arbitration shall be treated as being commenced in the same manner as provided in Article 21 of the First Schedule to the Arbitration Act 1996.</p> <p>"(3) Where the High Court orders that an award be set aside, the Court may further order that the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by this Act or any such enactment for the commencement of proceedings (including arbitration) with respect to the dispute referred.</p> <p>"(4) This section applies to an arbitration under an Act as well as to an arbitration under an arbitration agreement."</p>
--	---

SCHEDULE 5

Enactments of the Parliament of New Zealand ceasing to apply as part of the law of the Cook Islands

1908 No 8 - The Arbitration Act 1908
1933, No 4 - The Arbitration Clauses (Protocol) and the Arbitration (Foreign Awards) Act 1933

—————