




No. of 2023.

Arbitration (Domestic) Bill 2023.

ARRANGEMENT OF CLAUSES.

PART I. - PRELIMINARY.

1. Compliance with constitutional requirements.
2. Objectives.
3. Interpretation -
 - “arbitration”
 - “arbitral tribunal”
 - “arbitration agreement”
 - “arbitral award”
 - “*Constitution*”
 - “Court”
 - “electronic communication”
 - “interim measure”
 - “mediator”
 - “Minister”
 - “party”
 - “the State”
 - “UNCITRAL Arbitration Rules”
 - “this Act”.

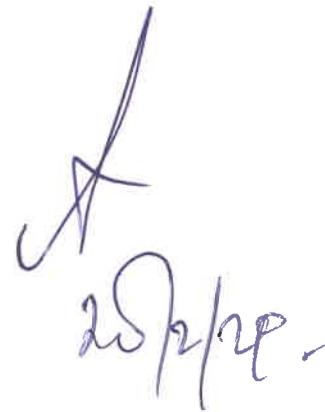


20/01/2024.

4. Act to bind the State.
5. Application of this Act.

PART II. - GENERAL PROVISIONS.

6. Arbitration and dispute settlement under other Acts.
7. Court referrals to (court annexed) arbitration.
8. Arbitrability of disputes.
9. National Court functions, assistance and appeals.
10. Extent of court intervention.
11. Statutory time bars and conditions precedent.
12. Receipt of written communications.
13. Waiver of right to object.
14. Form of arbitration agreement.
15. Arbitration agreement and court proceedings.
16. Death, bankruptcy or winding up of party to an arbitration agreement.



20/2/24.

PART III. - ARBITRAL TRIBUNAL.

Division 1. - Composition of Arbitral Tribunals.

17. Number of arbitrators.
18. Appointment of arbitrators.
19. Minister to appoint body to resolve arbitral tribunal composition issues.
20. Grounds for challenge.
21. Challenge procedure.
22. Failure or impossibility to act.
23. Appointment of substitute arbitrator.
24. Liability and immunity.

Division 2. - Jurisdiction of Arbitral Tribunals.

25. Competence of arbitral tribunal to rule on its own jurisdiction.
26. Objections to competence of arbitral tribunal.
27. Appeal on ruling on competence of arbitral tribunal.

Division 3. - Interim Measures and Preliminary Orders.

28. Power of arbitral tribunal to order interim measures.
29. Conditions for granting interim measures.
30. Applications and conditions for granting preliminary orders.
31. Specific regime for preliminary orders.
32. Modification, suspension and termination.
33. Provision of security.
34. Disclosure.
35. Costs and damages.
36. Recognition and enforcement.
37. Grounds for refusing recognition or enforcement of interim measure.
38. Court ordered interim measures.

Division 4. - Conduct of Arbitral Proceedings.

39. Equal treatment of parties.
40. Representation in arbitral proceedings.
41. Determination of rules of procedure.
42. Commencement of arbitral proceedings.
43. Language.
44. Statements of claim and defence.
45. Hearings and written proceedings.
46. Default of a party.
47. Expert appointed by arbitral tribunal.
48. Court assistance in taking evidence.
49. Confidentiality and privacy.

Division 5. - Making of Arbitral Award and Termination of Proceedings.

50. Rules applicable to substance of dispute.
51. Decision making by panel of arbitrators.
52. Settlement.
53. Interest.
54. Form and contents of arbitral award.
55. Costs and expenses of an arbitration.

56. Termination of proceedings.
57. Correction and interpretation of arbitral award and additional awards.

Division 6. - Recourse against Arbitral Award.

58. Application for setting aside as exclusive recourse against arbitral awards.

Division 7. - Recognition and Enforcement of Arbitral Awards.

59. Recognition and enforcement of an arbitral award.
60. Evidence of arbitral awards and arbitration agreements.
61. Grounds for refusing recognition or enforcement.
62. Public policy.

PART IV. - MISCELLANEOUS.

63. Regulations.
64. Rules of court.
65. Repeal.
66. Transitional provisions.



A Bill
for
AN ACT
entitled

Arbitration (Domestic) Bill 2023,

Being an Act -

- (a) to recognise and give effect to the agreement of contracting parties in domestic commercial agreements and other domestic agreements or any other domestic matter amenable for resolution by arbitration;
- (b) to repeal and replace the *Arbitration Act* (Chapter 46) with respect to domestic arbitration;
- (c) to promote use of modern forms of arbitration as a means of alternate dispute resolution, and for related purposes,

MADE by the National Parliament to come into operation in accordance with a notice in the National Gazette by the Head of State, acting with, and in accordance with, the advice of the Minister.

PART I. - PRELIMINARY.

1. COMPLIANCE WITH CONSTITUTIONAL REQUIREMENTS.

(1) This Act, to the extent that it regulates or restricts a right or freedom referred to in Subdivision III.3.C of the *Constitution (qualified rights)*, namely -

- (a) freedom from arbitrary search and entry under Section 44;
- (b) freedom of conscience, thought and religion under Section 45;
- (c) freedom of expression under Section 46;
- (d) the right to privacy under Section 49;
- (e) the right to freedom of information under Section 51; and
- (f) protection from unjust deprivation of property under Section 53,

of the *Constitution*, is a law that is made pursuant to Section 38 of the *Constitution*, taking account of the National Goals and Directive Principles and the Basic Social Obligations, for the purpose of -

- (g) giving effect to the national interest in public order and public welfare; and
- (h) protecting the exercise of rights and freedoms of other persons, and for public purposes,

to the extent that the law is reasonably justifiable in a democratic society having a proper respect for the rights and dignity of mankind.

(2) Unless by agreement of the parties to a contract provide for notice of intention to make a claim against the State, Section 5 of the *Claims by and Against The State Act 1996* shall apply to all arbitrations where the State is a party.

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Arbitration (Domestic)

2. OBJECTIVES.

- (1) The objectives and purposes of this Act are -
- (a) to encourage the use of arbitration as an agreed method of resolving disputes; and
 - (b) to redefine and clarify the limits of judicial review of the arbitral process and of arbitral awards; and
 - (c) to facilitate the recognition and enforcement of arbitration agreements and arbitral awards; and
 - (d) to expedite resolution of disputes and reduce backlogs of cases in the courts; and
 - (e) minimize the cost of litigation.
- (2) In exercising its powers under this Act, the Court must have regard -
- (a) to the overriding objectives of this Act as set out in Subsection (1); and
 - (b) to the fact that, where applicable -
 - (i) parties have agreed to have their dispute resolved by arbitration; or
 - (ii) the Court is of the view that arbitration is an appropriate mode of resolving a dispute; and
 - (iii) arbitral awards are intended to provide certainty and finality.

3. INTERPRETATION.

In this Act, unless the context otherwise requires -

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

“arbitral tribunal” means a sole arbitrator, a panel of arbitrators or an emergency arbitrator appointed pursuant to an arbitration agreement, the rules of arbitration agreed to or adopted by the parties or this Act;

“arbitration agreement” means an agreement -

- (a) 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; and
- (b) which may be in the form of an arbitration clause in a contract or in the form of a separate agreement;

“arbitral award” means an award, which is a decision of the arbitral tribunal on the substance of the dispute and includes any interim, interlocutory or partial award, but excludes a preliminary order made under Section 30;

“**Constitution**” means the Constitution of the Independent State of Papua New Guinea;

“Court” means the National Court of Justice of Papua New Guinea and includes any judge of the National Court;

“electronic communication” means any communication that the parties make by means of information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI) or electronic mail;

“interim measure” means any temporary measure, whether in the form of an arbitral award or in another form, by which, at any time prior to the issuance of the arbitral award finally deciding the dispute, the arbitral tribunal orders a party to do something or refrain from doing something, as set out in Section 28;

“Minister” means the Minister responsible for justice matters;

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

“the State” means the Independent State of Papua New Guinea;

Arbitration (Domestic)

“UNCITRAL Arbitration Rules” means the procedural rules adopted by the United Nations Commission on International Trade Law in 1976 including any amendments to the rules;
“this Act” includes the Regulation.

4. ACT TO BIND THE STATE.

This Act binds the State.

5. APPLICATION OF THIS ACT.

(1) This Act shall apply to domestic arbitration commenced on or after the entry into force of this Act under an arbitration agreement whenever made.

(2) An arbitration is domestic where it does not fall under the *Arbitration (International) Act 2023*.

PART II. - GENERAL PROVISIONS.

6. ARBITRATION AND DISPUTE SETTLEMENT UNDER OTHER ACTS.

(1) This Act does not affect in any way the application of any existing legislation providing for domestic arbitration.

(2) Where any other Act stipulates a mechanism for dispute resolution apart from arbitration, the dispute settlement mechanism provided for under that Act shall prevail.

7. COURT REFERRALS TO (COURT ANNEXED) ARBITRATION.

(1) Subject to Subsection (2), the Court may, of its own motion or with the consent of the parties, refer a matter for resolution by arbitration that is not already the subject of an arbitration agreement.

(2) The Court may not refer a matter for resolution by arbitration under Subsection (1) if it presents any of the following:

- (a) a question of constitutional law interpretation and application; or
- (b) there are legal issues that have not previously been determined by a court in Papua New Guinea; or
- (c) arbitration is not in the interest of National security; or
- (d) there is no reasonable cause of action; or
- (e) a case warranting immediate declaratory relief where the facts are not contested; or
- (f) a case involving a history of violence; or
- (g) a case where a court sanction or order is statutorily required; or
- (h) one or more of the parties are in a state of mind that renders them incapable of negotiating for themselves or others; or
- (i) a public sanction as in a criminal case or other case is required for public health, safety and good order.

(2) Where the Court refers a matter to arbitration under Section 7(1), the parties are deemed to have agreed to arbitrate the dispute referred by the Court under the UNCITRAL Arbitration Rules in force at the date of referral or such other arbitration rules as the parties may agree or as may be determined by the Court.

8. ARBITRABILITY OF DISPUTES.

(1) Any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless it is contrary to public policy to do so.

Arbitration (Domestic)

(2) The fact that any written law confers jurisdiction in respect of any matter on any court but does not refer to the determination of that matter by arbitration shall not, of itself, indicate that a dispute about that matter is not capable of determination by arbitration.

(3) Any dispute brought before the Court and that is referred to arbitration in accordance with Section 7 may be determined by arbitration.

9. NATIONAL COURT FUNCTIONS, ASSISTANCE AND APPEALS.

(1) The functions referred to in Sections 11(2), 15, 21(5), 21(7)(d), 22(2), 27(2), 36, 37, 38, 48, 58, 59 60 and 61 shall be performed by the Court.

(2) Unless the context otherwise requires, the Court shall also exercise all the powers vested in a court by other provisions in this Act.

10. EXTENT OF COURT INTERVENTION.

Unless otherwise expressly provided for in this Act, neither the Court nor any other court shall intervene on matters governed by this Act.

11. STATUTORY TIME BARS AND CONDITIONS PRECEDENT.

(1) All arbitrations shall be commenced within the time bars for commencing legal proceedings under the *Frauds and Limitations Act 1988* or any other applicable laws.

(2) The Court may order that, for the purpose of computing the time bars under the *Frauds and Limitations Act 1988* in respect of a dispute which was the subject matter of -

(a) an arbitral award which the Court orders to be set aside or declares to be of no effect;

or

(b) the affected part of an arbitral award which the Court orders to be set aside in part, or declares to be in part of no effect,

the period between the commencement of the arbitration and the date of the order referred to in Paragraph (a) or (b) be excluded.

(3) For the purposes of computing any time bars under the *Frauds and Limitations Act 1988*, any provision in an arbitration agreement that an arbitral award is a condition precedent to the bringing of legal proceedings in respect of a matter to which the arbitration agreement applies shall be disregarded.

12. RECEIPT OF WRITTEN COMMUNICATIONS.

(1) Unless otherwise agreed to by the parties, any written communication is deemed to have been received if it is:

(a) delivered to the addressee personally; or

(b) delivered to the addressee (with a record of receipt) at:

(i) the addressee's place of business; or

(ii) to the addressee's habitual residence; or

(iii) to the addressee's postal mailing address; or

(iv) to the addressee's electronic mailing address.

(2) A written communication delivered in accordance with Subsection (1)(a) or (b) is deemed to have been received on the day it is so delivered.

(3) If none of the options set out in Subsection (1)(a) or (b) can be found after making a reasonable enquiry, a written communication is deemed to have been received if it is delivered (with a record of receipt) to the addressee's last-known place of business, habitual residence or mailing address by registered letter or any other means.



Arbitration (Domestic)

- (4) This Section does not apply to service of any court documents in any court proceedings.

13. WAIVER OF RIGHT TO OBJECT.

A party who knows that any provision of this Law from which the parties may derogate or that any requirement under the arbitration agreement has not been complied with, and yet proceeds with the arbitration, shall be deemed to have waived his right to object.

14. FORM OF ARBITRATION AGREEMENT.

- (1) An arbitration agreement shall be in writing.

- (2) An arbitration agreement is in writing where -

- (a) its content is recorded in any form, irrespective of whether the arbitration agreement or contract has been concluded orally, by conduct, or by other means; or
- (b) it is concluded by an electronic communication and the information contained in the electronic communication is accessible so as to be useable for subsequent reference; or
- (c) it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

- (3) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that arbitration clause part of the contract.

15. ARBITRATION AGREEMENT AND COURT PROCEEDINGS.

- (1) Where a party brings an action before the Court in a matter which is the subject of an arbitration agreement, the Court may, of its own motion refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

- (2) Where a party brings an action before the Court in a matter which is the subject of an arbitration agreement, the Court shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

- (3) The Court may order a stay of proceedings or dismiss the proceedings, if the Court refers the parties to arbitration under Subsection (1) or (2).

- (4) Where an action referred to in Subsection (1) or (2) has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the Court.

16. DEATH, BANKRUPTCY OR WINDING UP OF PARTY TO AN ARBITRATION AGREEMENT.

- (1) An arbitration shall not be discharged by the death, bankruptcy or winding up of a party, and may be enforced by or against the representatives of that party.

- (2) Subsection (1) does not affect the operation of any written law by which a substantive right or obligation is extinguished by death, bankruptcy or winding up.

Arbitration (Domestic)

PART III. - ARBITRAL TRIBUNAL.

Division 1. - Composition of Arbitral Tribunals.

17. NUMBER OF ARBITRATORS.

- (1) The parties are free to determine the number of arbitrators.
- (2) Where the parties fail to determine the number of arbitrators, the number of arbitrators shall be one.

18. 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) Parties are free to agree on a procedure of appointing the arbitrator or arbitrators.
- (3) Where the agreement under Subsection (2) fails -
 - (a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators shall appoint the third arbitrator. If a party fails to appoint an arbitrator within 30 days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within 30 days of their appointment, the appointment shall be made, upon request of a party, by the authority specified in Section 19; and
 - (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 authority specified in Section 19.
- (4) Where under an appointment procedure agreed upon by the parties -
 - (a) a party fails to act as required under such procedure; or
 - (b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure; or
 - (c) a third party, (which for the avoidance of doubt, could include an arbitral institution), fails to perform any function entrusted to it under such procedure,any party may request the authority specified in Section 19 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.
- (5) The authority specified in Section 19, 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.
- (6) In appointing a sole or third arbitrator, the authority specified in Section 19 shall take into account, in addition to the considerations mentioned above, the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties, where the parties are of different nationalities.
- (7) A decision on a matter vested by Subsections (3) or (4) to the authority specified in section 19 shall be subject to no appeal or review.

19. MINISTER TO APPOINT BODY TO RESOLVE ARBITRAL TRIBUNAL COMPOSITION ISSUES.

- (1) The Minister may, by notice in the Gazette, appoint a suitably qualified body to resolve the matters specified in Section 18(3) and (4).

Arbitration (Domestic)

(2) The Minister may, by notice in the Gazette, revoke any appointment made under Subsection (1).

(3) Until the Minister otherwise determines in accordance with Subsections (1) and (2), the matters specified in Sections 18(3) and (4) shall be resolved by the Chair of the Alternative Dispute Resolution Committee of the Court.

20. 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.

(2) Where any circumstances referred to in Subsection (1) arise from the time of appointment and throughout the arbitral proceedings, an arbitrator shall, without delay, disclose any such circumstances to the parties unless they have already been informed of them by the arbitrator.

(3) A party may challenge an arbitrator only if circumstances exist that give rise to justifiable doubts as to that arbitrator's impartiality or independence or if the arbitrator does not possess qualifications agreed to by the parties.

(4) 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.

21. CHALLENGE PROCEDURE.

(1) Subject to Subsection (5), the parties are free to agree on a procedure for challenging an arbitrator.

(2) Where the agreement under Subsection (1) fails, a party who intends to challenge an arbitrator shall send a written statement of the reasons for the challenge to the arbitral tribunal within 15 days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in Section 20(3).

(3) An arbitrator who is challenged under Subsection (2) is entitled to withdraw from office as an arbitrator.

(4) Unless the challenged arbitrator withdraws from office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(5) If a challenge under any procedure agreed upon by the parties or under the procedure in Subsection (2) is not successful, the challenging party may, within 30 days of receiving notice of the decision rejecting the challenge, request the Court to decide on the challenge.

(6) While a request under Subsection (5) is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an arbitral award.

- (7) The mandate of a challenged arbitrator terminates in one of the following circumstances:
- (a) the arbitrator withdraws from office as an arbitrator; or
 - (b) the parties agree to the challenge; or
 - (c) the challenge is upheld according to the parties' agreed procedure or by the arbitral tribunal, and no request is made for the Court to decide the challenge; or
 - (d) the Court, upon request to decide on the challenge, upholds the challenge.

Arbitration (Domestic)

22. FAILURE OR IMPOSSIBILITY TO ACT.

(1) If an arbitrator is, 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.

(2) If a controversy remains concerning any of the grounds in subsection (1) any party may request the Court to decide on the termination of the mandate.

(3) If, under this Section or Section 21(3) 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 Section or Section 20(3).

23. APPOINTMENT OF SUBSTITUTE ARBITRATOR.

A substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced –

- (a) where the mandate of an arbitrator terminates under Sections 21 or 22; or
- (b) because of withdrawal from office for any other reason; or
- (c) because of the revocation of that arbitrator's mandate by agreement of the parties, or in any other case of termination of that mandate.

24. LIABILITY AND IMMUNITY.

(1) An arbitrator is not liable for anything done or omitted to be done by the arbitrator and no proceeding shall be brought against an arbitrator unless the act or omission is shown to have been in bad faith.

(2) The appointing authority, an arbitral or other institution or person designated or requested by the parties to appoint or nominate an arbitrator, shall not be liable for anything done or omitted in the discharge or purported discharge of that function unless the act or omission is shown to have been in bad faith.

(3) The appointing authority, an arbitral or other institution or person who appoints or nominates an arbitrator shall not be liable, by reason only of having appointed or nominated the arbitrator-

- (a) for anything done or omitted by the arbitrator; or
- (b) for anything done or omitted by the arbitrator's employees or agents in the discharge or purported discharge of the arbitrator's functions as arbitrator.

(4) This Section shall apply to an employee or agent of the appointing authority or of an arbitral or other institution or person as it applies to the appointing authority, institution or person concerned.

Division 2. - Jurisdiction of Arbitral Tribunals.

25. COMPETENCE OF ARBITRAL TRIBUNAL TO RULE ON ITS OWN 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.

(2) For the purpose of Subsection (1), an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.

(3) A decision by the arbitral tribunal, a court or any other authority that the contract is null and void shall not of itself invalidate an arbitration clause.

Arbitration (Domestic)

(4) A termination of a contract containing an arbitration agreement is not of itself a bar to the jurisdiction of the arbitral tribunal.

(5) The power of the arbitral tribunal to rule on its own jurisdiction under Subsection (1) includes the power to decide on any of the following issues:

- (a) whether the tribunal is properly constituted; and
- (b) what matters have been submitted to arbitration in accordance with the arbitration agreement.

26. OBJECTIONS TO COMPETENCE OF ARBITRAL TRIBUNAL.

(1) Subject to Subsections (2), (3) and (4), a party shall not raise a plea that the arbitral tribunal does not have jurisdiction after the submission of the statement of defence.

(2) A party is not precluded from raising a plea of lack of jurisdiction by reason of the fact that such party has appointed or participated in the appointment of an arbitrator.

(3) 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.

(4) The arbitral tribunal may, in either case in Subsection (2) or (3), admit a later plea if it considers the delay is justified.

27. APPEAL ON RULING ON COMPETENCE OF ARBITRAL TRIBUNAL.

(1) The arbitral tribunal may rule on a plea referred to in Section 26 either as a preliminary question or in an arbitral award on the merits.

(2) If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request the Court, within 30 days after having received notice of that ruling to decide the matter and while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

Division 3. - Interim Measures and Preliminary Orders.

28. POWER OF ARBITRAL TRIBUNAL TO ORDER INTERIM MEASURES.

(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.

(2) The arbitral tribunal may grant an interim measure to order a party to -

- (a) maintain or restore the status quo; or
- (b) take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself; or
- (c) provide a means of preserving assets out of which a subsequent arbitral award may be satisfied; or
- (d) preserve evidence that may be relevant and material to the resolution of the disputes.

(3) If an arbitral tribunal has granted an interim measure, it may, on the application of any party, make an arbitral award to the same effect as the interim measure.

29. CONDITIONS FOR GRANTING INTERIM MEASURES.

(1) The party requesting an interim measure under Sections 28(2)(a), (b) and (c) shall satisfy the arbitral tribunal that -

- (a) harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely

Arbitration (Domestic)

- to result to the party against whom the measure is directed if the measure is granted;
and
- (b) there is a reasonable possibility that the requesting party will succeed on the merits of the claim.

(2) A determination under Subsection (1) shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

(3) With regard to a request for an interim measure under Section 28(2)(d), the requirements in Subsections (1)(a) and (b) shall apply only to the extent the arbitral tribunal considers appropriate.

30. APPLICATIONS AND CONDITIONS FOR GRANTING PRELIMINARY ORDERS.

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

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

(3) The conditions defined under Section 29 apply to any preliminary order, if that the harm to be assessed under Section 29(1)(a) is the harm likely to result from the order being granted or not.

31. SPECIFIC REGIME FOR PRELIMINARY ORDERS.

- (1) The arbitral tribunal shall give notice to all parties -
- (a) of the request for the interim measure; and
 - (b) on the application for the preliminary order; and
 - (c) regarding the preliminary order, if any; and
 - (d) of all other communications, including by indicating the content of any oral communication between any party and the arbitral tribunal,

immediately after the arbitral tribunal has determined an application for a preliminary order.

(2) At the same time as giving a notice as per Section 31(1), the arbitral tribunal shall give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practicable time.

(3) The arbitral tribunal shall decide promptly on any objection to the preliminary order.

(4) Subject to Subsection (5) a preliminary order shall expire after 20 days from the date on which it was issued by the arbitral tribunal.

(5) The arbitral tribunal may issue an interim measure to adopt or modify the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case has been given.

(6) A preliminary order shall be binding on the parties but shall not be subject to enforcement by the Court as an arbitral award.

Arbitration (Domestic)

32. MODIFICATION, SUSPENSION AND TERMINATION.

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

33. PROVISION OF SECURITY.

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

(2) The arbitral tribunal shall require the party applying for a preliminary order to provide security in connection with the order unless the arbitral tribunal considers it inappropriate or unnecessary to do so.

34. DISCLOSURE.

(1) The arbitral tribunal may require any party to promptly disclose any material change in the circumstances based on which the measure was requested or granted.

(2) The party applying for a preliminary order shall disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal's determination whether to grant or maintain the order, and such obligation shall continue until the party against whom the order has been requested has had an opportunity to present its case.

(3) Subsection (2) shall occur before Subsection (1) applies.

35. COSTS AND DAMAGES.

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

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

36. RECOGNITION AND ENFORCEMENT.

(1) Subject to Section 37 and unless otherwise provided for by the arbitral tribunal, an interim measure issued by an arbitral tribunal, irrespective of the country or territory in which it was issued, shall be recognised as binding and enforced only upon application to the Court.

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

(3) If the Court considers it proper, it may order the requesting party to provide appropriate security -

- (a) if the arbitral tribunal has not already made a determination with respect to security; or
- (b) where such a decision is necessary to protect the rights of third parties.

37. GROUNDS FOR REFUSING RECOGNITION OR ENFORCEMENT OF INTERIM MEASURE.

(1) Subject to Subsections (3) and (4), the Court may refuse to recognise or enforce an interim measure only at the request of the party against whom it is invoked if the Court is satisfied that -

- (a) such refusal is warranted only on the grounds in Section 61(1)(a), (b), (c), (d), (e) or (f); or
- (b) the arbitral tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or
- (c) the interim measure has been terminated or suspended by the arbitral tribunal or,

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Arbitration (Domestic)

where so empowered, by the court of the country or territory in which the arbitration takes place or under the law of which that interim measure was granted.

- (2) Subject to Subsections (3) and (4), the Court may refuse to recognise or enforce an interim measure only if the Court finds that -
- (a) the interim measure is incompatible with the powers conferred upon the Court and is incapable of reformulation by the Court to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure without modifying its substance; or
 - (b) any of the grounds in Section 61(2)(a) or (b), apply to the recognition and enforcement of the interim measure.
- (3) Any determination made by the Court on any ground in Subsections (1) and (2) shall be effective only for the purposes of the application to recognise and enforce the interim measure.
- (4) The Court shall not, in making a determination under Subsections (1) and (2), undertake a review of the substance of the interim measure.

38. COURT ORDERED INTERIM MEASURES.

- (1) Irrespective of whether the seat of arbitration proceedings is in the State, the Court shall have the same powers of issuing an interim measure in relation to arbitration proceedings as it would in any other case in accordance with its own procedures having regard to the specific features of arbitration. The Court has the same power of issuing an interim measure in relation to arbitration proceedings as it has in relation to proceedings in courts.
- (2) The powers of the Court under Subsection (1) may be invoked and exercised on the application of a party to an arbitration agreement.
- (3) After determining an application under Subsection (2), the matter shall be referred for full and final resolution by arbitration.

Division 4. - Conduct of Arbitral Proceedings.

39. EQUAL TREATMENT OF PARTIES.

The parties shall be treated with equality and each party shall be given a full opportunity of presenting their respective cases.

40. REPRESENTATION IN ARBITRAL PROCEEDINGS.

- (1) For the purposes of this Section, "duly qualified legal practitioner" means a legal practitioner who is admitted to practice as a legal practitioner in Papua New Guinea.
- (2) Unless otherwise agreed by the parties, a party may appear in person before an arbitral tribunal and may be -
- (a) self-represented; or
 - (b) represented by a duly qualified legal practitioner of that party's choice.

41. DETERMINATION OF RULES OF PROCEDURE.

- (1) Subject to this Act, the parties are free to agree on the procedure to be followed by their arbitral tribunal in conducting the proceedings.

Arbitration (Domestic)

(2) Where parties do not agree under Subsection (1), the arbitral tribunal may, subject to the provisions of this Act, conduct the arbitration in such manner as it considers fair, reasonable and appropriate.

(3) The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

42. COMMENCEMENT OF ARBITRAL PROCEEDINGS.

(1) Unless otherwise agreed to 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.

(2) All notices for arbitration for and on behalf of the State shall be by and through the Attorney General.

(3) Notices other than by or through the requirement under Subsection (2) shall not be binding on the State.

43. LANGUAGE.

(1) The parties are free to agree on the language or languages to be used in their arbitral proceedings.

(2) Where the parties fail to agree pursuant to Subsection (1), the arbitral tribunal shall determine the language or languages to be used in the proceedings.

(3) An agreement or determination under Subsection (1) shall, unless otherwise specified in the agreement or determination, apply to any written statement by a party, any hearing and any arbitral award, decision or other communication by or with the arbitral tribunal.

(4) 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.

44. STATEMENTS OF CLAIM AND DEFENCE.

(1) Within the time period 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.

(2) 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.

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

45. HEARINGS AND WRITTEN PROCEEDINGS.

(1) Subject to Subsection (2) or 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 based on documents and other materials.

Arbitration (Domestic)

(2) 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.

(3) 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.

(4) All statements, documents or other information supplied to the arbitral tribunal by one party, shall be communicated by that party to the other party.

(5) Any expert report or evidentiary document on which the arbitral tribunal may rely upon in making its decision shall be communicated to the parties.

46. DEFAULT OF A PARTY.

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

(a) the claimant fails to communicate the statement of claim in accordance with Section 44(1), the arbitral tribunal shall terminate the proceedings;

(b) the respondent fails to communicate the statement of defence in accordance with Section 44(1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations; or

(c) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make an arbitral award on the evidence before it.

(2) The arbitral tribunal may dismiss the claim, defence, cross-claim or cross-defence for inordinate or inexcusable delay by the defaulting party.

47. EXPERT APPOINTED BY ARBITRAL TRIBUNAL.

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

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

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

48. COURT ASSISTANCE IN TAKING EVIDENCE.

(1) An arbitral tribunal or a party with the approval of an arbitral tribunal may request from the Court assistance in taking evidence.

(2) The Court may execute a request under Subsection (1) within its competence and according to its rules on taking evidence.

49. CONFIDENTIALITY AND PRIVACY.

(1) Unless otherwise agreed to by the parties and subject to Subsections (2) and (3), all documents and matters relating to any arbitration shall be confidential and no party shall publish, disclose or communicate any information relating to -

(a) an arbitration proceeding; or

(b) any arbitral awards in an arbitration.

Arbitration (Domestic)

- (2) Nothing in Subsection (1) prevents the publication, disclosure or communication of information by a party if the publication, disclosure or communication is -
- (a) necessary to protect or pursue a legal right or interest of the party; or
 - (b) necessary to enforce or challenge an arbitral award in legal proceedings before a court or other judicial authority in or outside the State; or
 - (c) requested by any government body, regulatory body, court or tribunal and the party is obliged by law to make the publication, disclosure or communication; or
 - (d) made to a professional or any other advisor of any of the parties, if such advisor is obliged to hold the information confidential.

(3) Nothing in Subsection (1) prevents the publication, disclosure or communication by a party pursuant to an order made by the arbitral tribunal allowing that party to do so.

(4) All court proceedings under this Act shall be heard otherwise than in open court unless, on the application of a party or on its own motion, the Court directs otherwise.

Division 5. - Making of Arbitral Award and Termination of Proceedings.

50. RULES APPLICABLE TO SUBSTANCE OF DISPUTE.

(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law chosen by the parties as applicable to the substance of the dispute.

(2) Any designation of the law or legal system of a given country, or a territory shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country or a territory and not to its conflict of laws rules.

(3) Where parties fail to designate the law or legal system pursuant to Subsection (2), the arbitral tribunal shall apply the law determined by the conflict of laws rules, which it considers applicable.

(4) The arbitral tribunal shall decide based on considerations of natural justice and fairness only if the parties have expressly authorised it to do so.

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

51. DECISION MAKING BY PANEL OF ARBITRATORS.

(1) Subject to Subsection (2), 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.

(2) Questions of procedure may be decided by a presiding arbitrator, if so authorised by the parties or all members of the arbitral tribunal.

52. SETTLEMENT.

(1) If during arbitral proceedings the parties settle the dispute, the arbitral tribunal shall terminate the proceedings.

(2) If requested by the parties and not objected to by the arbitral tribunal, the arbitral tribunal shall record the settlement in the form of an arbitral award on agreed terms.

(3) An arbitral award on agreed terms shall be made in accordance with Section 54 and shall state that it is an arbitral award.

Arbitration (Domestic)

(4) An arbitral award under Subsection (3) has the same status and effect as any other arbitral award on the merits of the case.

53. INTEREST.

(1) The parties are free to agree on the powers of the arbitral tribunal regarding the award of interest.

(2) Unless otherwise agreed by the parties the following provisions set out in this Section apply.

(3) The tribunal may award simple or compound interest from such dates, at such rates and with such rests as it considers meets the justice of the case -

(a) on the whole or part of any amount awarded by the arbitral tribunal, in respect of any period up to the date of the arbitral award; or

(b) on the whole or part of any amount claimed in the arbitration and outstanding at the commencement of the arbitral proceedings but paid before the award was made, in respect of any period up to the date of payment.

(4) The arbitral tribunal may award simple or compound interest from the date of the award (or any later date) until payment, at such rates and with such rests as it considers meets the justice of the case, on the outstanding amount of any award (including any award of interest under subsection (3) and any award as to costs).

(5) References in this Section to an amount awarded by the arbitral tribunal include an amount payable in consequence of a declaratory award by the arbitral tribunal.

(6) This Section does not affect any other power of the arbitral tribunal to award interest.

54. FORM AND CONTENTS OF ARBITRAL AWARD.

(1) An arbitral award shall be made in writing and shall be signed by the arbitrator or arbitrators.

(2) In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, if the reason for any omitted signature is stated.

(3) An arbitral award shall state -

(a) the reasons upon which it is based unless the parties have agreed that no reasons are to be given or the arbitral award is an arbitral award on agreed terms under Section 52; and

(b) its date and the seat of arbitration and the arbitral award shall be deemed to have been made at that place.

(4) After the arbitral award is made, a copy signed by the arbitrators in accordance with Subsection (1) or (2), shall be delivered to each party.

55. COSTS AND EXPENSES OF AN ARBITRATION.

(1) 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 arbitral award.

(2) In the absence of an arbitral award or additional arbitral award to fix and allocate the costs and expenses of the arbitration, each party shall be responsible for the legal and other expenses

Arbitration (Domestic)

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.

56. TERMINATION OF PROCEEDINGS.

(1) The arbitral proceedings are terminated by a final award or by an order of the arbitral tribunal in accordance with Subsection (2).

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

- (a) the claim is withdrawn by the claimant, unless the respondent objects to the claim and the arbitral tribunal recognises a legitimate interest of the respondent in obtaining a final settlement of the dispute; and
- (b) the parties agree on the termination of the proceedings; and
- (c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) Subject to Sections 57 and 58(5), the mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings.

57. CORRECTION AND INTERPRETATION OF ARBITRAL AWARD AND ADDITIONAL AWARDS.

(1) Within 30 days of receipt of an arbitral award, unless another period has been agreed upon by the parties -

- (a) a party may, with notice to the other party, request the arbitral tribunal to correct in the arbitral award any errors in computation, any clerical or typographical errors or any errors of similar nature; or
- (b) if so agreed by the parties, a party may, with notice to the other party, request the arbitral tribunal to give an interpretation of a specific point or part of the arbitral award.

(2) If the arbitral tribunal considers the request under Subsection (1) to be justified, it shall make the correction or give the interpretation within 30 days of receipt of the request and the interpretation shall form part of the arbitral award.

(3) The arbitral tribunal may correct any error of the type referred to in Subsection (1)(a) on its own initiative within 30 days of the date of the arbitral award.

(4) Unless otherwise agreed by the parties, a party with notice to the other party may, within 30 days of receipt of the arbitral award, request the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award.

(5) If the arbitral tribunal considers a request under Subsection (4) to be justified, it shall make the additional arbitral award within 60 days.

(6) The arbitral tribunal may extend if necessary, the period of time within which it shall make a correction, interpretation or an additional arbitral award under this Section.

(7) Section 54 shall apply to a correction or interpretation of the arbitral award or to an additional arbitral award.

Arbitration (Domestic)

Division 6. - Recourse Against Arbitral Award.

58. APPLICATION FOR SETTING ASIDE AS EXCLUSIVE RECOURSE AGAINST ARBITRAL AWARDS.

(1) Recourse to the Court against an arbitral award may be made only by an application for setting aside in accordance with Subsection (2).

(2) The Court may set aside an arbitral award, in whole or in part, only if the party making the application proves that -

- (a) 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, under the law of the State; or
- (b) a party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
- (c) the arbitral award deals with a matter not contemplated by or not falling within the terms of the submission to arbitration, or contains a decision or decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to the arbitration can be separated from those not submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or
- (d) 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 Act from which the parties cannot derogate or, in the absence of such agreement, was not in accordance with this Act.

(3) The Court may also set aside an arbitral award, in whole or in part if the Court finds that -

- (a) the subject-matter of the dispute is not capable of settlement by arbitration under the law of the State; or
- (b) the arbitral award is in conflict with the public policy of the State.

(4) An application for setting aside shall be made within three months from the date on which the party making that application received the arbitral award or, if a request had been made under Section 57, from the date on which that request was disposed of by the arbitral tribunal.

(5) The Court may, when asked to set aside an arbitral award, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by the Court in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such

other action which in the arbitral tribunal's opinion will eliminate the grounds for setting aside proceedings.

Division 7. - Recognition and Enforcement of Arbitral Awards.

59. RECOGNITION AND ENFORCEMENT OF AN ARBITRAL AWARD.

(1) Subject to this Section and of Section 61, an arbitral award, shall be recognised as binding and, upon application in writing to the Court, shall be enforced.

(2) The party relying on an arbitral award or applying for its enforcement shall provide the original arbitral award or a copy of the original arbitral. If the arbitral award is not made in English, a translated English version must be provided by the applicant party.



Arbitration (Domestic)

60. EVIDENCE OF ARBITRAL AWARDS AND ARBITRATION AGREEMENTS.

(1) In any proceedings in which a party seeks the enforcement of an arbitral award by virtue of this Part, that party shall produce to the Court -

- (a) an authenticated original of the arbitral award or a certified copy; and
- (b) the original arbitration agreement under which the arbitral award purports to have been made or a certified copy.

(2) For the purposes of Subsection (1), an arbitral award shall be deemed to have been authenticated, and a copy of an arbitral award shall be deemed to have been certified, if it has not been demonstrated to the Court that it is fraudulent, and -

- (a) purports to have been authenticated or certified by a sole arbitrator; or
- (b) purports to have been authenticated or certified by the presiding arbitrator, where the tribunal consists of more than one arbitrator; or
- (c) has been otherwise authenticated or certified to the satisfaction of the Court.

(3) If a document or part of a document other than the arbitral award is written in a language other than English, the part concerned shall be produced with a translated version of the document or that part certified to be a correct translation.

(4) For the purposes of Subsection (3), a translation of an arbitral award may be certified by the arbitral tribunal and the parties and in the case of any other document by the translator of the document.

(5) A document produced to the Court in accordance with this Section is, upon production, receivable by the Court as prima facie evidence of the matters to which it relates.

61. GROUNDS FOR REFUSING RECOGNITION OR ENFORCEMENT.

(1) The Court may refuse to recognise or enforce an arbitral award, irrespective of the country in which it was made, if the party against whom it is invoked proves that -

- (a) a party to the arbitration agreement was under some incapacity; or
- (b) the said agreement is not valid under the law to which the parties have subjected it; or
- (c) the said agreement is not valid under the law of the country where the arbitral award was made; or
- (d) the party was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings, or the party was otherwise unable to present his case; or
- (e) the arbitral award -
 - (i) deals with a dispute not contemplated by or does not fall within the terms of the submission to arbitration; or
 - (ii) contains decisions on matters beyond the scope of the submission to arbitration; or
- (f) the composition of the arbitral tribunal or the arbitral procedure was -
 - (i) not in accordance with the agreement of the parties; or
 - (ii) if there was no such agreement, was not in accordance with the law of the country where the arbitration took place; or
- (g) the arbitral 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 arbitral award was made.

Arbitration (Domestic)

- (2) The Court may refuse to recognize or enforce an arbitral award if the Court finds that -
- (a) the subject-matter of the dispute is not capable of settlement by arbitration under the law of the State; or
 - (b) the recognition or enforcement of the arbitral award would be contrary to the public policy of the State.

(3) Subject to Subsection (1)(e), if the award contains, apart from decisions on matters submitted to arbitration, decisions on matters not submitted to arbitration, and the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the arbitral award which contains decisions on matters submitted to arbitration may be recognised and enforced.

(4) If an application for setting aside or suspension of an arbitral award has been made to a court referred to in Subsection (1)(g), the Court may -

- (i) if it considers it proper, adjourn its decision; and
- (ii) on the application of the party claiming recognition or enforcement of the arbitral award,

order the other party to provide appropriate security.

62. PUBLIC POLICY.

Without limiting the generality of Sections 37(2)(b), 58(3)(b) and 61(2)(b), it is declared, for the avoidance of any doubt, that, for the purposes of those sections, an interim measure or arbitral award is in conflict with, or is contrary to, the public policy of the State if -

- (a) it was induced or affected by fraud or corruption; or
- (b) it is repugnant to general principles of humanity.

PART IV. - MISCELLANEOUS.

63. REGULATIONS.

The Head of State may make Regulations not inconsistent with this Act.

64. RULES OF COURT.

Unless the Minister otherwise determines, the Judges of the Court may, from time to time, make Rules of Court to give effect to the purposes of this Act, including the establishment of arbitrator standards, code of ethics and credentialing of arbitrators.

65. REPEAL.

This *Arbitration Act* (Chapter 46) is repealed.

66. TRANSITIONAL PROVISIONS.

(1) Subject to Subsections (2), a reference in an arbitration agreement to the *Arbitration Act 1951* (Chapter 46), or to a provision of that Act, shall be construed as a reference to this Act, or to any corresponding provision of this Act, unless the contrary intention appears.

(2) All domestic arbitration proceedings commenced or arbitral awards made under the repealed Act are deemed to have been commenced and or made under this Act.

