



*Tonga*

**INTERNATIONAL ARBITRATION ACT  
2020**

**Act 21 of 2020**





## INTERNATIONAL ARBITRATION ACT 2020

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# INTERNATIONAL ARBITRATION ACT 2020

Act 21 of 2020

## AN ACT TO MAKE PROVISION FOR ARBITRATION, THE RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS AND RELATED MATTERS

I assent,  
TUPOU VI,  
25<sup>th</sup> February 2021.

**BE IT ENACTED** by the King and Legislative Assembly of Tonga in the  
Legislature of the Kingdom as follows:

### PART I - PRELIMINARY

#### 1 Short Title and Commencement

- (1) This Act may be cited as the International Arbitration Act 2020.
- (2) This Act shall come into force on the date of gazettal.

#### 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 arbitration agreement defined under section 8;

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

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

“**court**” means the Supreme Court of Tonga;

“**data message**” means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy;

“**electronic communication**” means any communication that the parties make by means of data messages;

“**Minister**” means the Minister responsible for commerce;

“**New York Convention**” means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958);

“**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;

“**place of business**” means –

- (a) if a party has more than one place of business, the place of business which has the closest relationship to the arbitration agreement; or
  - (b) if a party does not have a place of business, the party’s habitual residence;
- (2) Where a provision of this Act, except section 46, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorise a different party, including an institution, to make that determination.
  - (3) Where a provision of this Act 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.
  - (5) Where a provision of this Act, other than in sections 41 (a) and 52 (2) (a), refers to a claim, it also applies to a counterclaim, and where it refers to a defence, it also applies to a defence to such counterclaim.

### 3 Act binds the Crown

This Act binds the Crown.



## PART 2 – GENERAL PROVISIONS

### 4 Scope of application

- (1) This Act shall apply to international commercial arbitration.
- (2) The provisions of this Act, except sections 9, 11, 29, 30, 31, 59, 60 and 61 shall apply only if the place of arbitration is Tonga.
- (3) An arbitration is international if –
  - (a) the parties to an arbitration agreement have, at the time of the execution of that agreement, their place of business is located in different countries; or
  - (b) one of the following places is situated outside the country in which the parties have their place of business –
    - (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement; or
    - (ii) any place where a substantial part of the obligations of the commercial 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.
- (4) This Act shall not affect any other law of Tonga by virtue of which certain disputes shall not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Act.

### 5 Purposes of the Act

The purposes of this Act are –

- (a) to facilitate the fair resolution of disputes by arbitration without unnecessary delay or expense;
- (b) to provide for the recognition and enforcement of arbitral awards; and
- (c) to give effect to Tonga's obligations under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in 1958.

### 6 Receipt of written communications

- (1) Unless otherwise agreed by the parties, any written communication is deemed to have been received if it is delivered to –
  - (a) the addressee personally;
  - (b) his place of business;

- (c) habitual residence; or
  - (d) mailing address.
- (2) If delivery cannot be effected according to sub-section (1) after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to –
- (a) the addressee’s last known place of business;
  - (b) habitual residence;
  - (c) mailing address by registered letter; or
  - (d) any other means which provides a record of the attempt to deliver it.
- (3) A written communication is deemed to have been received on the day it is so delivered.

## **7 Waiver of right to object**

A party who knows that any provision of this Act 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 his objection to such non-compliance without undue delay or, if a time limit is provided therefore, within such period of time, shall be deemed to have waived his right to object.

# **PART 3 – ARBITRATION AGREEMENT**

## **8 Arbitration agreement**

- (1) An arbitration agreement is –
- (a) 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;
  - (b) may be in the form of an arbitration clause in a contract or in the form of a separate agreement; and
  - (c) shall be in writing.
- (2) An arbitration agreement is in writing if –
- (a) its content is recorded in any form; and
  - (b) 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 requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference.

- (4) 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 clause part of the contract.

## **9 Arbitration agreement and substantive claim before court**

- (1) A court before which an action is brought in a matter which is the subject of an arbitration agreement 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.
- (2) Where an action referred to in sub-section (1) 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.
- (3) If the court refuses to refer the parties to arbitration, any provision of the arbitration agreement that an award is a condition precedent to the bringing of legal proceedings in respect of any matter shall have no effect in relation to those proceedings.
- (4) If the court refers the parties to arbitration under sub-section (1), it shall make an order staying the legal proceedings in that action.

## **10 Death, bankruptcy or winding up of party to arbitration agreement**

- (1) Unless otherwise agreed by the parties, an arbitration agreement 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) Sub-section (1) does not affect the operation of any law under which the death of a person extinguishes a cause of action.

## **11 Arbitration agreement and interim measures by court**

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.

## PART 4 – COMPOSITION OF ARBITRAL TRIBUNAL

### 12 Number of arbitrators

The parties are free to determine the number of arbitrators and failing such determination, the number of arbitrators shall be three.

### 13 Appointment of arbitrators

- (1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.
- (2) The parties are free to agree on rules of procedure in appointing the arbitrator or arbitrators, subject to the provisions of sub-sections (4) and (5).
- (3) When failing to agree under sub-section (2) –
  - (a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator;
  - (b) if a party fails to appoint the arbitrator under sub-paragraph (a) 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 court or other authority; and
  - (c) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority.
- (4) Where, under an appointment rules of 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, including an institution, fails to perform any function entrusted to it under such procedure,  
any party may request the court or other authority to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.
- (5) The court or other authority, 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 sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

- (6) A decision on a matter in sub-section (4) or (5) of this section to the court or other authority specified in this section shall be subject to no appeal.

#### **14 Grounds for challenge**

- (1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence.
- (2) An arbitrator, from the time of his 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 him.
- (3) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties.
- (4) A party may challenge an arbitrator appointed by him, or in whose appointment that party has participated, only for reasons of which he becomes aware after the appointment has been made.

#### **15 Challenge procedure**

- (1) The parties are free to agree on a procedure for challenging an arbitrator, subject to sub-section (3).
- (2) Failing an agreement under sub-section (1), 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 section 14 (3) and (4), send a written statement of the reasons for the challenge to the arbitral tribunal.
- (3) Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.
- (4) If a challenge under any procedure agreed upon by the parties or under the procedure of sub-sections (2) and (3) is not successful, the challenging party may request, within 30 days after having received notice of the decision rejecting the challenge, the 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.

#### **16 Failure or impossibility to act**

- (1) If an arbitrator becomes unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination.

- (2) If the matter is not resolved under sub-section (1), any party may request the court to decide on the termination of the mandate, which decision shall be subject to no appeal.
- (3) If, under this section or section 15 (3), an arbitrator withdraws from his 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 14.

## **17 Appointment of substitute arbitrator**

Where the mandate of an arbitrator terminates under section 15 or 16 –

- (a) because of his withdrawal from office for any other reason;
- (b) because of the revocation of his mandate by agreement of the parties; or
- (c) in any other case of termination of his mandate;

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

## **18 Immunity of arbitrator**

- (1) 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.
- (2) Sub-section (1) applies to an employee or agent of an arbitrator as it applies to the arbitrator himself.
- (3) This section does not affect any liability incurred by an arbitrator by reason of his resigning.

# **PART 5 – JURISDICTION OF ARBITRAL TRIBUNAL**

## **19 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 sub-section (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 that the contract is null and void shall not entail the invalidity of the arbitration clause.
- (4) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence.

- (5) A party is not precluded from raising a plea under sub-section (4) by the fact that he has appointed, or participated in the appointment of, an arbitrator.
- (6) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged is raised during the arbitral proceedings.
- (7) The arbitral tribunal may admit a later plea if it considers the delay justified.
- (8) The arbitral tribunal may rule on a plea either as a preliminary question or in an award on the merits.
- (9) If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within 30 days after having received notice of that ruling, the court to decide the matter which decision shall be subject to no appeal.

## **20 Powers relating to conduct of arbitral proceedings**

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) order the provision of further particulars in a statement of claim or statement of defence;
- (b) order the giving of security for costs;
- (c) fix and amend time limits within which various steps in the arbitral proceedings must be completed;
- (d) order the discovery and production of documents or materials within the possession or power of a party;
- (e) order the answering of interrogatories; and
- (f) 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.

## **PART 6 – INTERIM MEASURES AND PRELIMINARY ORDERS**

### **21 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) For the purposes of this Part, “interim measures” means any temporary measure.
- (3) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to –

- (a) maintain or restore the status quo pending 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 process itself;
- (c) provide a means of preserving assets out of which a subsequent award may be satisfied; or
- (d) preserve evidence that may be relevant and material to the resolution of the disputes.

## **22 Conditions for granting interim measures**

- (1) The party requesting an interim measure under section 21 (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 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 sub-section (1) (b) shall not affect the discretion of the arbitral tribunal in making any subsequent determination.
- (3) Where there is a request for an interim measure under section 21(2)(d), the requirements in sub-section (1) (a) and (b) shall apply only to the extent the arbitral tribunal considers appropriate.

## **23 Applications for preliminary orders 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 provided 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 22 apply to any preliminary order, provided that the harm to be assessed under section 22 (1) (a), is the harm likely to result from the order being granted or not.



## 24 Specific regime for preliminary orders

- (1) After the arbitral tribunal has made a determination in respect of an application for a preliminary order, the arbitral tribunal shall immediately give notice to all parties of –
  - (a) the request for the interim measure;
  - (b) the application for the preliminary order;
  - (c) the preliminary order, if any; and
  - (d) all other communications, including by indicating the content of any oral communication, between any party and the arbitral tribunal in relation thereto.
- (2) At the same time, 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) 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 adopting or modifying the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.
- (6) A preliminary order shall be binding on the parties but shall not be subject to enforcement by a court.
- (7) A preliminary order does not constitute an award.

## 25 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.

## 26 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.

**27 Disclosure**

- (1) The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of 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) Sub-section (1) shall apply after a party has met the requirements under sub-section (2).

**28 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.

**29 Recognition and enforcement of an interim measure**

- (1) An interim measure issued by an arbitral tribunal, irrespective of the country in which it was issued, shall be recognised as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the court, subject to section 30.
- (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) The court where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.

**30 Grounds for refusing recognition or enforcement of an interim measure**

- (1) Recognition or enforcement of an interim measure may be refused only –
  - (a) at the request of the party against whom it is invoked if the court is satisfied that –
    - (i) such refusal is warranted on the grounds set forth in section 60(1)(a)(i) - (iv); or

- (ii) 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
    - (iii) the interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the country in which the arbitration takes 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 upon 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 measure and without modifying its substance; or
    - (ii) any of the grounds set forth in section 60 (1) (b) (i) or (ii), apply to the recognition and enforcement of the interim measure.
- (2) Any determination made by the court on any ground in sub-section (1) shall be effective only for the purposes of the application to recognise and enforce the interim measure.
- (3) The court shall not undertake a review of the substance of the interim measure when making a determination under sub-section (2).

### **31 Court ordered interim measures**

The court shall apply its own rules when granting an interim measure, in relation to arbitration proceedings regardless of whether the place of arbitration is Tonga.

## **PART 7 – CONDUCT OF ARBITRAL PROCEEDINGS**

### **32 Consolidation of proceedings and concurrent hearings**

- (1) The parties are free to agree —
  - (a) that the arbitral proceedings shall be consolidated with other arbitral proceedings; or
  - (b) that concurrent hearings shall be held on such terms as may be agreed.
- (2) Unless the parties agree to confer such power on the tribunal, the tribunal has no power to order consolidation of proceedings or concurrent hearings.

### **33 Equal treatment of parties**

The parties shall be treated equally and shall be given an opportunity to present his case.

**34 Representation in arbitral proceedings**

Unless otherwise agreed by the parties, a party may appear in person before an arbitral tribunal and may be represented by —

- (a) himself; or
- (b) any other person of that party's choice.

**35 Determination of rules of procedure**

- (1) Subject to this Act, 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 may, subject to this Act, conduct the arbitration in such manner as it considers appropriate.
- (3) The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

**36 Place of arbitration**

- (1) The parties are free to agree on the place of arbitration.
- (2) 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.
- (3) Notwithstanding the provisions of sub-section (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.

**37 Commencement of arbitral proceedings**

- (1) 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 but before the expiration of five years from the date on which the cause of action accrued.
- (2) In computing the said period, the period of any previous arbitral proceedings arising from the same arbitration agreement and concerning the same dispute or disputes under that agreement, in respect of which an award has been set aside under this Act, shall be disregarded.

**38 Language**

The parties shall be free to agree on the language or languages to be used in the arbitral proceedings.

**39 Statements of claim and defence**

- (1) The claimant shall submit his statement of claim within the agreed period of time or as determined by the arbitral tribunal.
- (2) The statement of claim shall state -
  - (a) the facts supporting his claim;
  - (b) the points at issue; and
  - (c) the relief sought.
- (3) The respondent shall state his defence in respect of the particulars within the agreed period of time or as determined by the arbitral tribunal, unless the parties have otherwise agreed to the required elements of such statements.
- (4) The parties may submit additional documents they consider to be relevant.
- (5) Unless otherwise agreed by the parties, either party may amend or supplement his 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.

**40 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.
- (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 to the other party.
- (5) Subject to section 42, any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

**41 Default of a party**

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

- (a) the claimant fails to communicate his statement of claim in accordance with section 39(1)-(4), the arbitral tribunal shall terminate the proceedings;

- (b) the respondent fails to communicate his statement of defence in accordance with section 39(1)-(4), 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 the award on the evidence before it.

#### **42 Expert appointed by the 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 his 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 his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

#### **43 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.
- (2) The court may execute the request according to its rules on taking evidence.
- (3) For the purposes of sub-sections (1) and (2), the court may –
  - (a) make an order of subpoena to compel the attendance of a witness before an arbitral tribunal to give evidence or produce documents; or
  - (b) 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.

#### **44 Determination of preliminary point of law**

- (1) Unless otherwise agreed by the parties, the court may on the application of a party to arbitral proceedings, upon notice to the other parties, determine any question of law arising in the course of the proceedings which the court is satisfied substantially affects the rights of one or more of the parties.
- (2) An application under this section shall not be considered unless—

- (a) it is made with the agreement of all the other parties to the proceedings; or
- (b) it is made with the permission of the arbitral tribunal and the court is satisfied—
  - (i) that the determination of the question is likely to produce substantial savings in costs; and
  - (ii) that the application was made without delay.
- (3) The application shall identify the question of law to be determined and, unless made with the agreement of all the other parties to the proceedings, shall state the grounds on which it is said that the question should be decided by the court.
- (4) Unless otherwise agreed by the parties, the arbitral tribunal may continue the arbitral proceedings and make an award while an application to the court under this section is pending.
- (5) Unless the court gives leave, no appeal lies from a decision of the court whether the conditions specified in sub-section (2) are met.
- (6) The decision of the court on the question of law shall be treated as a judgment of the court for the purposes of an appeal but no appeal lies without the leave of the court which shall not be given unless the court considers that the question is one of general importance, or is one which for some other special reason should be considered by the Court of Appeal.

## 45 Confidentiality

- (1) Unless otherwise agreed by the parties, all documents and matters relating to the arbitration shall be confidential and no party may publish, disclose or communicate any information relating to –
  - (a) the arbitration proceedings; or
  - (b) any awards in the arbitration.
- (2) Nothing in sub-section (1) prevents the publication, disclosure or communication of information referred to in that sub-section by a party if the publication, disclosure or communication is made –
  - (a) to protect or pursue a legal right or interest of the party;
  - (b) to enforce or challenge the award referred to in that sub-section, in legal proceedings before a court or other judicial authority in or outside Tonga;
  - (c) to any government body, regulatory body, court or tribunal and the party is obliged by law to make the publication, disclosure or communication;
  - (d) pursuant to an order made by the arbitral tribunal, allowing a party to do so and such an order may only be made at the request of a party, and after giving each of the parties an opportunity to be heard; or
  - (e) to a professional or any other adviser of any of the parties.

## **PART 8 – MAKING OF AWARD AND TERMINATION OF PROCEEDINGS**

### **46 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.
- (2) Any designation of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of laws rules.
- (3) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.
- (4) The arbitral tribunal shall decide on what is fair and right 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 take into account the usages of the trade applicable to the transaction.
- (6) The arbitral tribunal may award any remedy or relief that could have been ordered by the court if the dispute had been the subject of civil proceedings in that court.

### **47 Decision-making by panel of arbitrators**

- (1) If there is 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 on rules of procedure may be decided by a presiding arbitrator, if so authorised by the parties or all members of the arbitral tribunal.

### **48 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 section 51 and shall state that it is an award.
- (3) An award made under this section has the same status and effect as any other award on the merits of the case.



**49 Interest up to making of award**

- (1) Where an arbitral tribunal determines to make an award for the payment of money, whether on a claim for a liquidated or an unliquidated amount, the tribunal may, subject to sub-section (2), include in the sum for which the award is made, interest at such reasonable rate as the tribunal determines on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.
- (2) Sub-section (1) does not –
  - (a) authorise the awarding of interest upon interest;
  - (b) apply in relation to any amount upon which interest is payable as of right whether by virtue of an agreement or otherwise; or
  - (c) affect the damages recoverable for the dishonour of a bill of exchange.

**50 Interest on debt under award**

- (1) This section applies if –
  - (a) an arbitral tribunal makes an award for the payment of an amount of money; and
  - (b) under the award, the amount is to be paid by a due date.
- (2) The arbitral tribunal may direct that interest, including compound interest, is payable if the amount is not paid on or before the due date.
- (3) The arbitral tribunal may set a reasonable rate of interest.
- (4) The interest is payable –
  - (a) from the day immediately following the due date; and
  - (b) on so much of the amount as remains unpaid.
- (5) The direction is taken to form part of the award.

**51 Form and contents of award**

- (1) The award shall be made in writing, signed by the arbitrator or arbitrators and delivered to each party.
- (2) If there is 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.
- (3) The 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 award is an award on agreed terms under section 48; and

- (b) its date and the place of arbitration.
- (4) This section shall apply to a correction or an interpretation of an award under section 53 or to an additional award under section 54.

## 52 Termination of proceedings

- (1) The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal in accordance with sub-section (2).
- (2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when –
  - (a) the claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute;
  - (b) the parties agree on the termination of the proceedings; or
  - (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 sections 53, 54 and 58 (4).

## 53 Correction and interpretation of award

- (1) A party may request the arbitral tribunal within 30 days of receipt of an award, unless otherwise agreed by the parties, to –
  - (a) correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature; or
  - (b) give an interpretation of a specific point or part of the award.
- (2) A party making a request under sub-section (1) must notify the other party of the request.
- (3) 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.
- (4) An interpretation given under sub-section 3 shall form part of the award.
- (5) The arbitral tribunal may correct any error of the type referred to in sub-section (1)(a) on its own initiative within 30 days of the date of the award.
- (6) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction or an interpretation.

**54 Additional award**

- (1) A party may request the arbitral tribunal within 30 days of receipt of an award, unless otherwise agreed by the parties, to make an additional award as to claims presented in the arbitral proceedings but omitted from the award.
- (2) If the arbitral tribunal considers the request under sub-section (1) to be justified, it shall make the additional award within 60 days.
- (3) The arbitral tribunal may extend, if necessary, the period of time within which it shall make an additional award under sub-section (2).

**55 Costs of the arbitration**

- (1) For the purposes of sections 56 and 57, “**costs of the arbitration**” means —
  - (a) the arbitrators’ fees and expenses;
  - (b) the fees and expenses of any arbitral institution concerned; and
  - (c) the legal or other costs of the parties.
- (2) Any such reference includes the costs of or incidental to any proceedings to determine the amount of the recoverable costs of the arbitration.

**56 Agreement to pay costs in any event**

An agreement which has the effect that a party is to pay the whole or part of the costs of the arbitration in any event is only valid if made after the dispute in question has arisen.

**57 Award of costs**

- (1) The arbitral tribunal may make an award allocating the costs of the arbitration as between the parties, subject to any agreement of the parties.
- (2) Unless the parties otherwise agree, the tribunal shall award costs on the general principle that costs should follow the event except where it appears to the tribunal that in the circumstances this is not appropriate in relation to the whole or part of the costs.

**PART 9 – RECOURSE AGAINST AWARD****58 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 sub-sections (2) and (3).

- (2) An arbitral award may be set aside by the court only if –
- (a) the party making the application furnishes proof that –
    - (i) a party to the arbitration agreement referred to in section 8 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 thereon, under the laws of Tonga;
    - (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 his case;
    - (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 Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act; or
  - (b) the court finds that—
    - (i) the subject matter of the dispute is not capable of settlement by arbitration under the laws of Tonga; or
    - (ii) the award is contrary to public policy in Tonga.
- (3) An application for setting aside may not be made after three 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 sections 53 and 54, from the date on which that request had been disposed of by the arbitral tribunal.
- (4) The 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.

## PART 10 – RECOGNITION AND ENFORCEMENT OF AWARDS

### 59 Recognition and enforcement of an award

- (1) An arbitral award, irrespective of the country in which it was made, shall be recognised as binding and, upon application in writing to the court, shall be enforced subject to this section and section 60.
- (2) Any application for recognition and enforcement of an arbitral award shall be made no later than six years from the date of the award.
- (3) The party relying on an award or applying for its enforcement shall supply the original award or a copy thereof.
- (4) If the award is not made in the English language, the court may request the party to supply a translation thereof.

### 60 Grounds for refusing recognition or enforcement of an award

- (1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused by the court 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) it 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 thereon, under the law of the country where the award was made;
    - (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 his case;
    - (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;
    - (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 laws of Tonga; or
    - (ii) the recognition or enforcement of the award would be contrary to public policy in Tonga.
- (2) If an application for setting aside or suspension of an award has been made to a court referred to in sub-section (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.

## **61 Evidence of awards and arbitration agreements**

- (1) In any proceedings in which a party seeks the enforcement of an award by virtue of this Part, he shall produce to the court –
- (a) the duly authenticated original award or a duly certified copy; and
  - (b) the original arbitration agreement under which the award purports to have been made or a duly certified copy.
- (2) For the purpose of sub-section (1), an award shall be deemed to have been duly authenticated, and a copy of an award or agreement shall be deemed to have been duly certified, if –
- (a) it purports to have been authenticated or certified, as the case may be, by the arbitrator or, where the arbitrator is a tribunal, by an officer of that tribunal, and it has not been shown to the court that it was not in fact so authenticated or certified; or
  - (b) it has been otherwise authenticated or certified to the satisfaction of the court.
- (3) If a document or part of a document produced under sub-section (1) is written in a language other than English, there shall be produced with the document a translation, in the English language, of the document or that part, as the case may be, certified to be a correct translation.
- (4) For the purposes of sub-section (3), a translation shall be certified by a diplomatic or consular agent to Tonga of the country in which the award was made or otherwise to the satisfaction of the court.
- (5) A document produced to a court in accordance with this section is, upon mere production, receivable by the court as prima facie evidence of the matters to which it relates.

## **PART 11 – MISCELLANEOUS**

### **62 Regulations**

The Minister may with the consent of Cabinet make regulations for the proper and efficient administration of this Act.

Passed by the Legislative Assembly on **10<sup>th</sup>** day of **December** 2020.

**SCHEDULE****Convention on the Recognition and Enforcement of Foreign Arbitral Awards  
(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 recognize 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 recognize 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 recognized 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 instruments 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.

The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.