

Arbitration Amendment Bill

Government Bill

As reported from the Justice and Electoral Committee

Commentary

Recommendation

The Justice and Electoral Committee has examined the Arbitration Amendment Bill and recommends that it be passed with the amendments shown.

Introduction

This bill amends the Arbitration Act 1996. The bill makes a small number of relatively technical amendments designed to strengthen arbitration as a means of private dispute resolution in New Zealand. The amendments focus on increasing party autonomy whilst reducing judicial involvement in the arbitral process, providing greater consistency with the laws and processes of other jurisdictions, and increasing the powers of the arbitral tribunal.

This commentary focuses on the main amendments we recommend to the bill and outlines the main issues we considered. It does not cover minor or technical amendments.

Control of arbitral tribunal in relation to witness subpoenas

We recommend that clause 8(1) be deleted from the bill. This clause amends article 27(1) of Schedule 1 of the Act so that when a party seeks the court's assistance to take evidence, that party will no longer be required to first seek the approval of the arbitral tribunal. We are recommending removing this clause because we consider it

important that parties be required to seek approval of the arbitral tribunal. We consider that this would enhance the tribunal's control over the arbitration process, and maintain current practice.

Interim measures

We recommend that clause 8 be amended to include recent changes adopted by the United Nations Commission of International Trade Law (UNCITRAL) to article 17 of the Model Law on Universal Commercial Arbitration, upon which Schedule 1 of the Act is based.

An arbitral tribunal may impose an interim measure on a party pending determination of a dispute. Schedule 1 of the Act allows the arbitral tribunal to order a party to take any interim measure of protection that the arbitral tribunal may consider necessary. Recent changes to the Model Law set out detailed provisions for the making of interim measures, including the appropriate test for the arbitral tribunal to use regarding the need for interim measures, and provision for the making of preliminary orders. We consider that including amendments to reflect the recent update to the Model Law would increase certainty for arbitral parties by providing more detail as to how and when interim measures will be applied. This amendment would also ensure that the Act remains consistent with the Model Law, and with arbitral legislation in other jurisdictions.

In addition, we recommend amending the bill to empower an arbitral tribunal to require an applicant for an interim measure to provide security for costs. At present, in international arbitrations, the arbitral tribunal does not have the ability to order security for costs. This ability is, however, available in domestic arbitrations, and the Court also has the power to order security for costs when considering an arbitral award on appeal.

Default procedure for appointment of arbitrators

We recommend that clause 9(2) be deleted from the bill. This clause, as introduced, would remove a default procedure for the appointment of an arbitrator where parties are unable to agree, and instead provide that parties could agree on a process to resolve any difficulties in appointing an arbitrator, and that a party could request the High Court to appoint an arbitrator if the other party failed to comply with the agreed process.

However, we understand that parties are currently free to avoid the default procedure by expressly providing for an agreed procedure in

their arbitration agreement. We therefore consider that little would be achieved by the proposed removal of the default procedure. We also consider that the proposed introduction of recourse to the High Court could result in parties facing lengthy and costly High Court proceedings, and is contrary to the intention of the bill to reduce judicial involvement.

Employment arbitration

One submission suggested that, at present employment arbitration would have to be conducted under the provisions of English Common Law. This is so because section 155 of the Employment Relations Act 2000 does not prevent arbitration in the employment sphere; it simply provides that if it does occur, the Arbitration Act 1996 shall have no application. In practice, this issue is largely academic because there is near-universal recourse to the employment dispute resolution procedures provided for by the Employment Relations Act. We discussed the possibility of extending the Arbitration Act to cover employment arbitration. This would require amendments to the Employment Relations Act that would arguably be outside the scope of this bill.

We believe that this proposal merits further consideration and encourage the Government to investigate the possibility of enabling the Arbitration Act to apply to employment arbitration in the future. At the same time, we recognise that the Employment Relations Act is aimed at moving away from treating employment relationships as purely contractual, instead treating them as relationships underpinned by obligations of good faith: facilitating employment arbitration via the Arbitration Act might arguably detract from this relationship focus. We also acknowledge that extending the Arbitration Act to employment arbitration might be seen to impinge upon the authority of the Employment Relations Authority, which was set up as a specialist body with a focus on resolving employment relationship problems rather than taking a strict focus on determining legal rights and responsibilities, and which has exclusive jurisdiction in this area.

An alternative approach might be to prevent recourse to arbitration altogether in the employment law area.

Appendix

Committee process

The Arbitration Amendment Bill was referred to the Justice and Electoral Committee on 10 October 2006. The closing date for submissions was 27 November 2006. We received and considered six submissions from interested groups and individuals. We heard three submissions. We received advice from the Ministry of Justice.

Committee membership

Lynne Pillay (Chairperson)

Christopher Finlayson (Deputy Chairperson)

Chris Auchinvole (from 6 December 2006)

Charles Chauvel (from 21 February 2007)

Russell Fairbrother (until 21 February 2007)

Hone Harawira (from 13 December 2006) (non-voting member)

Ann Hartley

Nandor Tanczos

Nicky Wagner

Dr Richard Worth (until 6 December 2006)

Key to symbols used in reprinted bill

As reported from a select committee

Struck out (unanimous)

Subject to this Act,

Text struck out unanimously

New (unanimous)

Subject to this Act,

Text inserted unanimously

(Subject to this Act,)

Words struck out unanimously

Subject to this Act,

Words inserted unanimously

Hon Clayton Cosgrove

Arbitration Amendment Bill

Government Bill

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Related amendment to Disputes Tribunals Act 1988

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The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Arbitration Amendment Act (~~2006~~ 2007).

2 Commencement

This Act comes into force on the day after the date on which it receives the Royal assent.

5

3 Principal Act amended

This Act amends the Arbitration Act 1996.

Part 1

Amendments to principal Act

4	Interpretation	10
(1)	Section 2(1) is amended by inserting the following definitions in their appropriate alphabetical order:	
	“ confidential information , in relation to arbitral proceedings,—	
	“(a) means information that relates to the arbitral proceedings or to an award made in those proceedings; and	15
	“(b) includes—	
	“(i) the statement of claim, statement of defence, and all other pleadings, submissions, statements, or other information supplied to the arbitral tribunal by a party:	20
	“(ii) any evidence (whether documentary or otherwise) supplied to the arbitral tribunal:	
	“(iii) any notes made by the arbitral tribunal of oral evidence or submissions given before the arbitral tribunal:	25
	“(iv) any transcript of oral evidence or submissions given before the arbitral tribunal:	
	“(v) any rulings of the arbitral tribunal:	
	“(vi) any award of the arbitral tribunal	30

- “**disclose**, in relation to confidential information, includes publishing or communicating or otherwise supplying the confidential information”.
- (2) Section 2(2) is repealed.
- 5 Consumer arbitration agreements** 5
- (1) Section 11(1) is amended by repealing paragraph (c) and substituting the following paragraph:
- “(c) the consumer, by separate written agreement entered into by the consumer and the other party to the contract after a dispute has arisen out of, or in relation to, that contract, certifies that, having read and understood the arbitration agreement, the consumer agrees to be bound by it; and”.
- (2) Section 11(2) is amended by inserting the following paragraph before paragraph (a):
- “(aa) that person is an individual; and”.
- (3) Section 11 is amended by repealing subsection (6) and substituting the following subsection:
- “(6) Nothing in this section applies to—
- “(a) a lease; or
- “(b) a contract of insurance to which section 8 of the Insurance Law Reform Act 1977 applies.”
- 6 New sections 14 to 14I substituted**
- Section 14 is repealed and the following sections are substituted:
- “14 Application of sections 14A to 14I**
- Except as the parties may otherwise agree in writing (whether in the arbitration agreement or otherwise), **sections 14A to 14I** apply to every arbitration for which the place of arbitration is, or would be, New Zealand.
- “14A Arbitral proceedings must be private**
- An arbitral tribunal must conduct the arbitral proceedings in private.

“14B Arbitration agreements deemed to prohibit disclosure of confidential information

“(1) Every arbitration agreement to which this section applies is deemed to provide that the parties and the arbitral tribunal must not disclose confidential information. 5

“(2) **Subsection (1)** is subject to **section 14C**.

“14C Limits on prohibition on disclosure of confidential information in section 14B

A party or an arbitral tribunal may disclose confidential information— 10

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

“(b) if both of the following matters apply:

“(i) the disclosure is necessary— 15

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

“(B) for the establishment or protection of a party’s legal rights in relation to a third party; or 20

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

“(ii) the disclosure is no more than what is reasonably required to serve any of the purposes referred to in **subparagraph (i)(A) to (C)**; or 25

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

“(d) if both of the following matters apply:

“(i) the disclosure is authorised or required by law (except this Act) or required by a competent regulatory body (including New Zealand Exchange Limited); and 30

“(ii) the party who, or the arbitral tribunal that, makes the disclosure provides to the other party and the arbitral tribunal or, as the case may be, the parties, written details of the disclosure (including an explanation of the reasons for the disclosure); or 35

“(e) if the disclosure is in accordance with an order made by— 40

- “(i) an arbitral tribunal under **section 14D**; or
- “(ii) the High Court under **section 14E**.

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

- “(1) This section applies if— 5
 - “(a) a question arises in any arbitral proceedings as to whether confidential information should be disclosed other than as authorised under **section 14C(a) to (d)**); and
 - “(b) at least 1 of the parties agrees to refer that question to the arbitral tribunal concerned. 10
- “(2) The arbitral tribunal, after giving each of the parties an opportunity to be heard, may make or refuse to make an order allowing all or any of the parties to disclose confidential information.

“14E High Court may allow or prohibit disclosure of confidential information if arbitral proceedings have been terminated or party lodges appeal concerning confidentiality 15

- “(1) The High Court may make an order allowing a party to disclose any confidential information— 20
 - “(a) on the application of that party, which application may be made only if the mandate of the arbitral tribunal has been terminated in accordance with article 32 of Schedule 1; or
 - “(b) on an appeal by that party, after an order under **section 14D(2)** allowing that party to disclose the confidential information has been refused by an arbitral tribunal. 25
- “(2) The High Court may make an order under **subsection (1)** only if—
 - “(a) it is satisfied, in the circumstances of the particular case, that the public interest in preserving the confidentiality of arbitral proceedings is outweighed by other considerations that render it desirable in the public interest for the confidential information to be disclosed; and 30
 - “(b) the disclosure is no more than what is reasonably required to serve the other considerations referred to in **paragraph (a)**. 35
- “(3) The High Court may make an order prohibiting a party (**party A**) from disclosing confidential information on an appeal by

- another party (**party B**) who unsuccessfully opposed an application by party A for an order under **section 14D(2)** allowing party A to disclose confidential information.
- “(4) The High Court may make an order under this section only if it has given each of the parties an opportunity to be heard. 5
- “(5) The High Court may make an order under this section—
 “(a) unconditionally; or
 “(b) subject to any conditions it thinks fit.
- “(6) To avoid doubt, the High Court may, in imposing any conditions under **subsection (5)(b)**, include a condition that the order ceases to have effect at a specified stage of the appeal proceedings. 10
- “(7) The decision of the High Court under this section is final.
- “**14F Court proceedings under Act must be conducted in public except in certain circumstances** 15
- “(1) A Court must conduct proceedings under this Act in public unless the Court makes an order that the whole or any part of the proceedings must be conducted in private.
- “(2) A Court may make an order under **subsection (1)**—
 “(a) on the application of any party to the proceedings; and 20
 “(b) only if the Court is satisfied that the public interest in having the proceedings conducted in public is outweighed by the interests of any party to the proceedings in having the whole or any part of the proceedings conducted in private. 25
- “(3) If an application is made for an order under **subsection (1)**, the fact that the application had been made, and the contents of the application, must not be made public until the application is determined.
- “(4) In this section and (**section 14I**) **sections 14G to 14I**,— 30
 “**Court**—
 “(a) means any court that has jurisdiction in regard to the matter in question; and
 “(b) includes the High Court and the Court of Appeal; but
 “(c) does not include an arbitral tribunal 35
 “**proceedings** includes all matters brought before the Court under this Act (for example, an application to enforce an arbitral award).

<p>“14G Applicant must state nature of, and reasons for <u>seeking, order (sought under section 14F) to conduct Court proceedings in private</u></p> <p>An applicant for an order under section 14F must state in the application—</p> <p>“(a) whether the applicant is seeking an order for the whole or part of the proceedings to be conducted in private; and</p> <p>“(b) the applicant’s reasons for seeking the order.</p>	<p>5</p>
<p>“14H Matters that Court must consider in determining application for order (<u>under section 14F</u>) to conduct Court proceedings in private</p> <p>In determining an application for an order under section 14F, the Court must consider all of the following matters:</p> <p>“(a) the open justice principle; and</p> <p>“(b) the privacy and confidentiality of arbitral proceedings; and</p> <p>“(c) any other public interest considerations; and</p> <p>“(d) the terms of any arbitration agreement between the parties to the proceedings; and</p> <p>“(e) the reasons stated by the applicant under section 14G(b).</p>	<p>10</p> <p>15</p> <p>20</p>
<p>“14I Effect of order (<u>under section 14F</u>) to conduct Court proceedings in private</p> <p>“(1) If an order is made under section 14F,—</p> <p>“(a) no person may search, inspect, or copy any file or any documents on a file in any office of the Court relating to the proceedings for which the order was made; and</p> <p>“(b) the Court must not include in the Court’s decision on the proceedings any particulars that could identify the parties to those proceedings.</p> <p>“(2) An order remains in force for the period specified in the order or until it is sooner revoked by the Court on the further application of any party to the proceedings.”</p>	<p>25</p> <p>30</p>
<p>7 Transitional provisions</p> <p>(1) Section 19(3) is amended by omitting “after the commencement of this Act” and substituting “during the period beginning on the date of commencement of this Act and ending</p>	<p>35</p>

with the close of the day before the date of commencement of the Arbitration Amendment Act (~~2006~~2007”.

(2) Section 19 is amended by inserting the following subsections after subsection (3):

“(3A) **Subsection (3B)** applies to an arbitration agreement that— 5

“(a) is made before the commencement of this Act; and

“(b) provides for the appointment of—

“(i) an arbitrator by each of the 2 parties; or

Struck out (unanimous)

“(ii) an arbitrator by each of the 2 parties and for those arbitrators to appoint an umpire; and 10

New (unanimous)

“(ii) 2 arbitrators by the parties and for those arbitrators to appoint an umpire; and

“(c) does not relate to arbitral proceedings that have been commenced during the period referred to in subsection (3). 15

“(3B) Every arbitration agreement to which this subsection applies must be read as if the arbitration agreement provides for the appointment, by the arbitrators appointed by *(each party) the parties*, of a third arbitrator under this Act, and the provisions of this Act, subject to any modifications that may be necessary, apply accordingly to that arbitration agreement.” 20

8 Schedule 1 amended

New (unanimous)

(1AA) Article 2 of Schedule 1 is amended by inserting the following paragraph after paragraph (b):

“(ba) **interim measure** has the meaning given to it by **article 17:**” 25

(1AB) Article 9(1) of Schedule 1 is amended by omitting “of protection”.

New (unanimous)

(1AC) Schedule 1 is amended by repealing article 9(2) and substituting the following paragraph:	
“(2) For the purposes of paragraph (1), the High Court or a District Court has the same powers as an arbitral tribunal to grant an interim measure under article 17A for the purposes of proceedings before that Court, and that article and article 17B apply accordingly subject to all necessary modifications.”	5
(1AD) Schedule 1 is amended by repealing article 17 and substituting the following Chapter:	
“Chapter 4A—Interim measures and preliminary orders	10
<i>“Preliminary</i>	
“17 Interpretation	
In this Chapter, unless the context otherwise requires,—	
“ applicant means any of the following, as the case may be:	
“(a) a party who requests an interim measure:	15
“(b) a party who applies for a preliminary order:	
“(c) a party who seeks or obtains recognition or enforcement of an interim measure	
“ Court , in articles 17L and 17M , has the meaning given to it by article 35(3)	20
“ interim measure means a temporary measure (whether or not in the form of an award) by which a party is required, at any time before an award is made in relation to a dispute, to do all or any of the following:	
“(a) maintain or restore the status quo pending the determination of the dispute:	25
“(b) take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral proceedings:	
“(c) provide a means of preserving assets out of which a subsequent award may be satisfied:	30
“(d) preserve evidence that may be relevant and material to the resolution of the dispute:	
“(e) give security for costs	
“ preliminary order means an order directing a party not to frustrate the purpose of an interim measure	35

New (unanimous)

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

“(a) a party against whom an interim measure is requested or directed:

“(b) a party against whom a preliminary order is applied for or directed: 5

“(c) a party against whom recognition or enforcement of an interim measure is sought or has been obtained.

*“Interim measures***“17A Power of arbitral tribunal to grant interim measure**

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant an interim measure. 10

“17B Conditions for granting interim measure

“(1) If an interim measure of a kind described in **subparagraph (a), (b), or (c)** of the definition of that term in **article 17** is requested, the applicant must satisfy the arbitral tribunal that— 15

“(a) harm not adequately reparable by an award of damages is likely to result if the measure is not granted; and

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

“(c) there is a reasonable possibility that the applicant will succeed on the merits of the claim. 20

“(2) If an interim measure of a kind described in **subparagraph (d)** of the definition of that term in **article 17** is requested, the applicant must satisfy the arbitral tribunal of the matters specified in **paragraph (1)(a) to (c)**, but only to the extent that the arbitral tribunal considers appropriate. 25

“(3) If an interim measure of a kind described in **subparagraph (e)** of the definition of that term in **article 17** is requested, the applicant must satisfy the arbitral tribunal that the applicant will be able to pay the costs of the respondent if the applicant is unsuccessful on the merits of the claim. 30

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

New (unanimous)

“Preliminary orders

“17C Power of arbitral tribunal to issue preliminary order

Unless otherwise agreed by the parties, a party may, without notice to any other party, apply for a preliminary order when making a request for an interim measure to be granted under **article 17A**.

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“17D Conditions for issuing preliminary order

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

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

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

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“(b) all other necessary modifications.

“17E Procedure for preliminary order

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

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“(a) give notice to all the parties of—

“(i) the request for the interim measure; and

“(ii) the application for the preliminary order; and

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

25

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

30

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

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

New (unanimous)

“17F Duration of preliminary order

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

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

“(a) notice under **article 17E(1)**; and

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

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“17G Effect of preliminary order

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

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

“Supplementary provisions for interim measures and preliminary orders

“17H Modification, suspension, and cancellation

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

“(a) on the application of a party; or

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

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“17I Provision of security

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

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“(2) The arbitral tribunal must require the applicant for a preliminary order to provide appropriate security in connection with the order unless it considers it inappropriate or unnecessary to do so.

“17J Disclosure of material circumstances

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

New (unanimous)

- “(2) The applicant for a preliminary order must disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal’s determination as to whether to issue or extend the order.
- “(3) The obligation in **paragraph (2)** continues until each respondent has had an opportunity to present the respondent’s case, after which **paragraph (1)** applies. 5
- “17K Costs and damages**
- “(1) An applicant for an interim measure or a preliminary order is liable for any costs and damages caused to any party by the measure or order if the arbitral tribunal later determines that, in the circumstances, the measure or order should not have been granted or issued. 10
- “(2) The arbitral tribunal may award those costs and damages at any time during the arbitral proceedings. 15
- “Recognition and enforcement of interim measures*
- “17L Recognition and enforcement**
- “(1) An interim measure granted by an arbitral tribunal must be recognised as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent Court, irrespective of the country in which it was granted. 20
- “(2) **Paragraph (1)** is subject to **article 17M**.
- “(3) The applicant for recognition or enforcement of an interim measure under **article 35** must promptly inform the Court of any modification, suspension, or cancellation of that interim measure. 25
- “(4) The Court may, if it considers it proper, order the applicant to provide appropriate security if—
- “(a) the arbitral tribunal has not already made a decision with respect to the provision of security; or 30
- “(b) the decision with respect to the provision of security is necessary to protect the rights of third parties.

New (unanimous)

- “17M Grounds for refusing recognition or enforcement**
- “(1) Recognition or enforcement of an interim measure may be refused only—
- “(a) at the request of the respondent if the Court is satisfied that—
- “(i) the refusal is warranted on the grounds set out in article 36(1)(a)(i), (ii), or (iv); or
- “(ii) the arbitral tribunal’s decision with respect to the provision of security in connection with the interim measure granted by it has not been complied with; or
- “(iii) the interim measure has been suspended or cancelled by the arbitral tribunal or, if so empowered, by the Court of the country in which the arbitration took place or under the law of which that interim measure was granted; or
- “(b) if the Court finds that—
- “(i) the interim measure is incompatible with the powers conferred on the Court, unless the Court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or
- “(ii) any of the grounds set out in article 36(1)(b) apply to the recognition and enforcement of the interim measure.
- “(2) A determination made by the Court on any ground in **paragraph (1)** is effective only for the purposes of the application to recognise and enforce the interim measure.
- “(3) The Court must not, in making that determination, undertake a review of the substance of the interim measure.”

Struck out (unanimous)

- (1) Article 27(1) of Schedule 1 is amended by omitting “with the approval of the arbitral tribunal”.

- (2) Schedule 1 is amended by repealing article 35 and substituting the following article:
- “35 Recognition and enforcement**
- “(1) An arbitral award, irrespective of the country in which it was made,— 5
- “(a) must be recognised as binding; and
- “(b) on application in writing to a Court, must be enforced by entry as a judgment in terms of the award, or by action, subject to the provisions of this article and of article 36. 10
- “(2) The party relying on an award or applying for its enforcement must supply—
- “(a) the duly authenticated original award or a duly certified copy of the award; and
- “(b) if the arbitration agreement is recorded in writing, the original arbitration agreement or a duly certified copy of the agreement; and 15
- “(c) if the award or agreement is not made in the English language, a duly certified translation into the English language of either or both documents. 20
- “(3) For the purposes of this article, **Court** means—
- “(a) the High Court; or
- “(b) a District Court in any case where the amount of any money made payable by the award does not exceed the amount to which the jurisdiction of the District Court is limited in civil cases.” 25

9 Schedule 2 amended

Struck out (unanimous)

- (1) Clause 1(1) of Schedule 2 is amended by omitting “sub-clauses (2) to (5)” and substituting “**subclauses (2) to (6)**”.
- (2) Clause 1 of Schedule 2 is amended by repealing subclauses (4) and (5) and substituting the following subclauses: 30
- “(4) The parties are free to agree, under the arbitration agreement, on a process for resolving any difficulties in securing the appointment of the arbitrator or arbitrators including, without limitation, difficulties that arise if, under subclause (2) or (3), 35

Struck out (unanimous)

- or under any other appointment procedure agreed on by the parties,—
- “(a) a party fails to act as required under that procedure; or
 - “(b) the parties, or the arbitrators, are unable to reach an agreement expected of them under that procedure; or 5
 - “(c) a third party, including an institution, fails to perform any function entrusted to it under that procedure.
- “(5) The process referred to in **subclause (4)** may include a procedure that allows a party to serve on another party a notice that requires the other party to remedy a default in relation to the appointment of the arbitrator or arbitrators. 10
- “(6) A party may request the High Court, in accordance with article 11(3) of Schedule 1, to appoint the arbitrator or arbitrators if the other party fails to comply with the process referred to in **subclause (4)**.” 15
- (3) Clause 5 of Schedule 2 is amended by adding the following subclause:
- “(10) For the purposes of this clause, **question of law**—
- “(a) includes an error of law that involves an incorrect interpretation of the applicable law (whether or not the error appears on the record of the decision); but 20
 - “(b) does not include any question as to whether—
 - “(i) the award or any part of the award was supported by any evidence or any sufficient or substantial evidence; and 25
 - “(ii) the arbitral tribunal drew the correct factual inferences from the relevant primary facts.”

Part 2**Related amendment to Disputes Tribunals Act 1988**

- 10 Amendment to Disputes Tribunals Act 1988** 30
This Part amends the Disputes Tribunals Act 1988.

11 Section 16 amended

Section 16 is amended by adding the following subsection:

- “(4) Despite subsection (2), a Tribunal does not have jurisdiction in respect of a claim if section 11(1) of the Arbitration Act 1996 applies.” 5

Legislative history

8 September 2006

Introduction (Bill 72–1)

10 October 2006

First reading and referral to Justice and Electoral Committee