

THE INTERNATIONAL ARBITRATION ACT

(No. 37 of 2008)

Travaux Préparatoires¹

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¹ The International Arbitration Bill was enacted on 25 November 2008, and will come into force on 1 January 2009. The present *Travaux Préparatoires* were made available to the public on 11 December 2008.

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Introduction

1. In his speech for the Second Reading of the International Arbitration Act (no. 38 of 2008) (hereinafter “the Act”), the Honourable Prime Minister invited the State Law Office “*to compile the travaux préparatoires of the Bill for future users of the Legislation*”. This document (hereinafter “the Notes”) addresses the Honourable Prime Minister’s request.

2. **Part A** of the Notes covers a number of decisions of principles which have been taken with respect to the International Arbitration Act (no. 38 of 2008) (hereinafter “the Act”), with the Government’s objective of creating a favourable environment for the development of international arbitration in mind. In particular:
 - (a) The Act establishes two distinct and entirely separate regimes for domestic arbitration and for international arbitration. It covers only the latter.

 - (b) The Act is based on the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on the 21st day of June 1985, as amended by UNCITRAL in 2006 (“the Amended Model Law”). As expressed by the UNCITRAL secretariat in 1985, the Model Law “is acceptable to States of all regions and the different legal or economic systems of the world”.

 - (c) The provisions of the Amended Model Law have been incorporated within the Act itself (rather than in a separate schedule). In order to assist international users, a Schedule (The Third Schedule to the Act) has been prepared setting out where given Articles of the Model Law have been incorporated in the Act. The Amended Model Law has been modified by reference (in particular) to the current works of UNCITRAL on its arbitration Rules, and to the English, Singapore and New Zealand Arbitration Acts.

 - (d) A number of specific features have been incorporated in the Act:
 - (i) The Act provides that all Court applications under the Act are to be made to a panel of three judges of the Supreme Court, with a direct and automatic right of appeal to the Privy Council. This will provide international users with the reassurance that Court applications relating to their arbitrations will be heard and disposed of swiftly, and by eminently qualified jurists.

- (ii) The Act adopts a unique solution, in that all appointing functions (and a number of further administrative functions) under the Act are given to the Permanent Court of Arbitration (the “PCA”). The PCA is a neutral international organisation based in The Hague, and has been the authority of reference under the UNCITRAL Rules for the past thirty years. As such it is uniquely well-placed to fulfil appointing and administrative functions under the Act in an independent and efficient way. Further, in order to ensure that the PCA is able to react swiftly in all Mauritian arbitrations, Government has negotiated, and will conclude, a Host Country Agreement with the PCA pursuant to which the PCA will appoint a permanent representative to Mauritius, funded by Government, whose tasks will consist *inter alia* of assisting the Secretary-General of the PCA in the discharge of all his functions under the Act, and of promoting Mauritius as an arbitral jurisdiction within the region and beyond.
 - (iii) Specific provision has been made in the Act for the arbitration of disputes under the constitution of offshore companies incorporated in Mauritius in order to provide a link between Mauritius’ thriving offshore sector and the new intended international arbitration sector.
 - (iv) The Act expressly clarifies that foreign lawyers are entitled to represent parties and to act as arbitrators in international commercial arbitrations in Mauritius.
 - (v) Finally, and in line with the Amended Model Law, the Act does not link international arbitration in Mauritius with any given arbitral institution, or with any institutional rules. The aim of the proposed Act is to make Mauritius a favourable jurisdiction for all international commercial arbitrations, whether such arbitrations arise under *ad hoc* arbitration agreements, or under institutional rules such as those of the International Chamber of Commerce or the London Court of International Arbitration.
3. **Part B** of the Notes explains the Structure of the Act.
 4. **Part C** of the Notes sets out explanatory comments on each Section and Schedule of the Act.
 5. **Part D** of the Notes explains the on-going process of review which is intended for the Act, including the possibility for future users, academics, and other interested parties to provide the State Law Office with comments and suggestions on the legislation.

A. Decisions of Principle

6. A number of decisions of principles have been taken with respect to the Act, with the specific objectives of Government (as set out in the Explanatory Memorandum of the Act) in mind. These are detailed below.

7. The first decision of principle was whether to draft a new comprehensive Act dealing both with domestic arbitration and with international arbitration, or an Act dealing only with international arbitration. After giving considerable thought to the matter, it has been decided to keep the two forms of arbitration clearly separate, and the Act deals only with international arbitration. This is essentially for the following reasons:
 - (a) The aim of the Act is to create and promote a new area of services for Mauritius. There is already a thriving area of domestic arbitration in Mauritius. That area is currently governed by rules which are well-known and applied by practitioners and businessmen alike, particularly in the construction industry. There are on the other hand no – or very few – international arbitrations currently being conducted in Mauritius. The two forms of arbitration are very different in nature, and give rise to different problems and solutions.
 - (b) In particular, international arbitration has its specific needs. In particular, foreign parties will only choose to come to arbitrate in Mauritius if they can be guaranteed that their contractual wish to arbitrate – and not to litigate – their disputes will be respected, and that the Mauritian Courts will not intervene in the arbitral process, save to support that process and to ensure that the essential safeguards expressly provided for in the Act are respected. This principle of non-intervention, save in extremely limited circumstances, is now one of the cardinal principles of international arbitration around the globe. Domestic arbitration on the other hand may call for wider intervention by State Courts, for instance to control possible errors of law by a domestic tribunal, and different policy considerations apply.
 - (c) The interests of the Republic of Mauritius itself in any given international arbitration will normally be much remoter than they can potentially be in a domestic arbitration.
 - (d) Experience in other countries suggests that if the same rules are applied to both domestic and international arbitration then a tension is created between the more interventionist approach that may be necessary in the domestic context and the non-interventionist approach required in the international context.

8. Secondly, a decision had to be taken as to which model the new law should follow. There were two realistic candidates:
 - (a) The UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on the 21st day of June 1985; and
 - (b) The English Arbitration Act 1996.

9. This issue has been canvassed at length at international level, including with various representatives of countries and institutions at UNCITRAL level. Based on these discussions, it was decided that the UNCITRAL Model Law, as amended by UNCITRAL in 2006 (hereinafter “the Amended Model Law”), should be used as the model for the Act. While choosing the English Act would certainly have had some advantages (in particular in providing practitioners and Courts with a substantial body of English case-law on the provisions of the proposed new Act), the Model Law does remain the most accepted and consensual text internationally. As expressed by the UNCITRAL secretariat in 1985, the Model Law “is acceptable to States of all regions and the different legal or economic systems of the world”⁵. This broad statement is still true today.

10. Thirdly, a decision had to be taken as to the format in which the Model Law would be implemented in Mauritius. As noted by the UNCITRAL secretariat itself, it was always intended that States would be given a degree of flexibility in that respect⁶. Those States that have implemented the Model Law have in fact demonstrated such flexibility, and the implementing legislation of each such State is now itself a potential precedent on which Mauritius can draw.

11. The New Zealand Arbitration Act 1996 (as amended in 2007) was considered as a useful working precedent for the Act, essentially for two reasons. The structure of the New Zealand Act is such that all implementing and other provisions are contained in the Act, with the Model Law enacted as a schedule. This means that the Articles of the Model Law (in the case of Mauritius, the Amended Model Law) are readily identifiable, having (in particular) retained their original numbering. This format also allows for so-called “opt-ins” whereby parties to international arbitrations may choose to adopt certain specific provisions contained in a separate Schedule, such as (for instance) the possibility of an appeal on a point of law.

⁵ See the “Explanatory Note by the UNCITRAL secretariat on the Model Law on International Commercial Arbitration”, para. 2.

⁶ See the “Explanatory Note by the UNCITRAL secretariat on the Model Law on International Commercial Arbitration”, para. 3.

12. Ultimately however, a decision has been taken to incorporate the provisions of the Amended Model Law within the Act itself (rather than in a separate schedule), as this format is simpler, and allows users of the Act to refer to one single document to ascertain the legal regime applicable to particular aspects of their arbitration (without the need to shift between the body of the Act and the Schedules for that purpose). In order to assist international users, a Schedule (The Third Schedule to the Act) has been prepared setting out where the various Articles of the Model Law have been incorporated in the Act.
13. As for the text of the Model Law to be used as the basis for the Schedule, as noted above it is appropriate that the amended version of the Model Law, which has been fully debated at international level, should be used as the starting point. This version of the Model Law is as amended by the Commission at its thirty-ninth session, in 2006. Some of the amendments made at that session were and remain controversial. For that reason, the new proposed Articles 17.B. and 17.C. of the Amended Model Law (which provide for the use of *ex parte* measures by international tribunals) have not been included in the Act.
14. A decision has also been taken to follow the precedent of the New Zealand Act, and to make the provisions of the Amended Model Law applicable to all “international arbitrations” (as defined in Article 1(3) of the Amended Model Law), rather than to “international commercial arbitrations” as in the Amended Model Law (see Article 1(1) of the Amended Model Law). This does not represent a major shift from the Amended Model Law, and will ensure that certain areas (such as, for instance, disputes between shareholders under Articles of Association of a company, or investment arbitrations between a State and an investor) are unequivocally covered by the new Act. The Amended Model Law itself makes it clear that “the term ‘commercial’ should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not”, and provides a non-exclusive list of commercial activities. It was thought simpler to avoid this limitation on the scope of the Act altogether, as this will hopefully avoid narrow or semantic arguments between future litigants as to whether particular forms of arbitration (such as the examples given above) are truly “commercial” or not.
15. Further, the Act takes into account the current work of UNCITRAL on the amendments of the UNCITRAL Arbitration Rules and incorporates such corresponding modifications as were thought to represent current best practice into the text of the Amended Model Law.
16. Finally, in a few instances, specific provisions of the English Act have been incorporated into the Act, either to clarify or to modify certain provisions of the Amended Model Law (such as the power of the Supreme Court to grant interim

measures under Section 23 of the Act / Article 17J of the Amended Model Law), or as potential opt-ins for users of international commercial arbitration in Mauritius (see the First Schedule of the Act).

17. Fourthly, thought has been given as to how to make Mauritius particularly attractive to users of international commercial arbitration. This has led to the incorporation of a number of specific features in the Act:

(a) First and foremost, the success of Mauritius as a jurisdiction of choice for international arbitration will be largely dependent on the uniform and consistent application by the Mauritian Courts of modern international arbitration law, and (in particular) on their strong adhesion to the principles of non-interventionism which is at the heart thereof. To this end:

(i) The Act strictly adopts the Amended Model Law's very limited *voie de recours* against arbitral awards: see section 39, which reproduces Article 34 of the Amended Model Law;

(ii) The Act provides that all Court applications under the Act are to be made to a panel of three judges of the Supreme Court, with a direct and automatic right of appeal to the Privy Council. This will provide international users with the reassurance that Court applications relating to their arbitrations will be heard and disposed of swiftly, and by eminently qualified jurists.

(b) On the same plane, it is essential that users of international arbitration in Mauritius are able to turn to an efficient and state-of-the-art appointing authority whenever they require assistance with the arbitral process (for instance to nominate an arbitrator where a party refuses to do so). The Act adopts a uniquely modern solution in that respect, in that all appointing functions (and a number of further administrative functions) under the Act are given to the Permanent Court of Arbitration (the "PCA"). The PCA is a neutral international organisation based in The Hague, and has been assisting parties under the UNCITRAL Rules for the past thirty years. As such it is uniquely well-placed to fulfil appointing and administrative functions under the Act in an independent and efficient way. Further:

(i) In order to ensure that the PCA is able to react swiftly in all Mauritian arbitrations Government has negotiated, and will conclude, a Host Country Agreement with the PCA pursuant to which the PCA will appoint a permanent representative to Mauritius, funded by Government, whose tasks will consist *inter alia* of assisting the Secretary-General of the PCA in the discharge of all his functions under the Act, and of promoting Mauritius as an arbitral jurisdiction within the region and beyond.

- (ii) In order to avoid delays in the arbitral process, and the use of dilatory tactics by recalcitrant parties, the Act expressly provides that all the decisions of the PCA under the Act are to be final and subject to no appeal or review; any complaints by a party arising from such decisions can only be directed at awards rendered by the arbitral tribunal in the proceedings (see Section 19(5) of the Act).
 - (c) Specific provision has been made in the Act for the arbitration of disputes under the constitution of offshore companies incorporated in Mauritius: see Section 3(6) and the Second Schedule of the Act. This is a unique feature of the Act, and it is hoped that this link between the thriving offshore sector of Mauritius and the new intended arbitration sector will provide a significant boost for international arbitration in Mauritius.
 - (d) The Act expressly clarifies that foreign lawyers are entitled to represent parties and to act as arbitrators in international commercial arbitrations in Mauritius. While it may be thought that this goes without saying⁷, experience in other jurisdictions suggests that (i) this straightforward rule has not always been applied following implementation of international arbitration laws in certain jurisdictions and (ii) those jurisdictions which have not applied the rule have seen their budding international arbitration practice stagnate until such time as they have begun applying the rule. It is expected that – in line with what has happened in other jurisdictions – the development of international arbitration will bring a significant amount of new work and expertise to Mauritian practitioners as foreign clients or lawyers will use Mauritian lawyers either as co-Counsel on all issues of Mauritian law, or as sole representative before tribunals in Mauritius.
18. Finally, and in line with the Amended Model Law, the Act does not link international arbitration in Mauritius with any given arbitral institution, or with any institutional rules. The aim of the proposed Act is to make Mauritius a favourable jurisdiction for all international commercial arbitrations, whether such arbitrations arise under *ad hoc* arbitration agreements, or under institutional rules such as (without limitation) those of the International Chamber of Commerce or of the London Court of International Arbitration.

⁷ It is already applied in Mauritius in the few international arbitrations with a Mauritian seat which the drafters are aware of. This suggestion is also in line with the amendments currently being made by Government to the Law Practitioners' Act.

B. Structure of the Act

19. As explained above, the body of the Act incorporates both the legislative framework provisions required to enact the Amended Model Law into Mauritius, and the substantive provisions of the Amended Model Law. It is structured as follows:

- (a) Part I of the Act sets out preliminary matters, including the usual provision as to short title, a provision setting out defined terms and the main operative provision defining the scope of application of the Act. In this respect:
 - (i) Thought has been given as to whether the provisions of the Act should be separated in two groups depending on whether parties are free to derogate from those provisions by agreement (so-called “non-mandatory provisions”) or not (so-called “mandatory provisions”). Such a division has been used in the English Arbitration Act 1996, where it has proved useful both to parties negotiating arbitration agreements, and to courts and tribunals applying the provisions of the English Act. On balance however, and following consultations with the UNCITRAL Secretariat, such a formal division has not been included. Rather, the Act has been drafted in line with the Amended Model Law, so as to identify where parties are free to make their own arrangements with respect to any matter.
 - (ii) In addition to the provisions contained in the body of the Act, parties have been given the choice of “opting into” one or more of the provisions set out in the First Schedule of the Act. This “opt in” formula has been used for provisions (in effect determinations of preliminary points of Mauritius law, appeals on points of Mauritius law, consolidation, and joinder) which certain parties may consider as useful for their arbitrations, but which are too controversial for inclusion into the “normal regime” for international arbitrations in Mauritius without the express prior agreement of the relevant parties. It is for the parties to select which if any of the provisions of the First Schedule they wish to opt into.
 - (iii) There is one exception where the provisions of the First Schedule apply mandatorily (disputes under the constitution of or relating to GBL companies). This is considered further in Section C (“Comments on Specific Sections”) below.

- (b) Part II of the Act contains the provisions relating to the initiation of arbitral proceedings and general provisions relating to the arbitration agreement, the seat of the arbitration, and consumer protection.
- (c) Part III of the Act contains the provisions relating to the Arbitral Tribunal including appointments of, and challenges to, arbitrators, and the jurisdiction of the tribunal.
- (d) Part IV of the Act contains the provisions relating to interim measures.
- (e) Part V of the Act contains the provisions relating to the conduct of arbitral proceedings.
- (f) Part VI of the Act contains the provisions relating to the Award, including applications for setting aside of awards and recognition and enforcement.
- (g) Part VII of the Act contains Miscellaneous Provisions relating *inter alia* to the constitution of the Supreme Court for matters covered by the Act, and appeals to the Privy Council.
- (h) The First Schedule of the Act sets out the specific provisions which parties are free to “opt into”, as explained above.
- (i) The Second Schedule of the Act sets out a Model Arbitration Section for GBL Companies, the aim of which is to facilitate the adoption by GBL companies of arbitration agreements in their constitutions.
- (j) The Third Schedule of the Act contains a table showing the corresponding provisions of the Act and of the Amended Model Law.

C. Comments on Specific Sections

Part I - Preliminary

Section 1 “Short title”

20. This is self-explanatory.

Section 2 “Interpretation”

21. Section 2(1) is a definition section, which enacts *inter alia* Article 2(a)-(c) of the Amended Model Law.
22. Section 2(2)(a) enacts Article 3 of the Amended Model Law, and provides useful rules for the deemed receipt of requests and communications under the Act which international users will be familiar with. Section 2(2)(b) is new and has been inserted for the avoidance of doubt. Its wording derives from wording currently being discussed as part of UNCITRAL’s updating of the UNCITRAL Rules of Arbitration⁸. Article 3(2) of the Amended Model Law has not been enacted in terms, but the introductory words of Section 2(2) (“...any request or other written communication *in an arbitration governed by this Act ...*”) make it clear that the rules set out in the Section are to apply to the arbitral proceedings themselves, and not to communications in Court proceedings conducted pursuant to the Act, where normal Court rules on communication of documents will apply.
23. Sections 2(3), 2(4) and 2(5) enact Articles 2(d), (e) and (f) of the Amended Model Law respectively.

Section 3 “Application of Act”

24. Sections 3(1)(a) and (b) provide that the date of commencement of the Act shall be the cut-off point, in that the Act will apply to all arbitrations commenced after that date (irrespective of the date when the relevant arbitration agreement was concluded) and not to arbitrations commenced before that date.

⁸ See UN Document A/CN.9/WG.II/WP.147 para. 18.

25. Section 3(1)(c) enacts Articles 1(1) and 1(2) of the Model Law, and defines the scope of application of the Act:
- (a) The Act is to apply in whole to all “international arbitrations” as defined in Section 3(2) and 3(3) (see below).
 - (b) In addition, Sections 5 (“substantive claim before Courts”), 6 (“compatibility of interim measures”), 22 (“recognition and enforcement of interim measures) and 23(“powers of Supreme Court to issue interim measures”) apply to all arbitrations which satisfy the criteria in Section 3(2)(b) (i.e. which are international in character), even where their juridical seat is outside Mauritius.
26. Section 3(1)(d) of the Act is derived from Section 9(2) of the New Zealand Act, which has been adopted as a useful clarifying provision. It clarifies that references in any enactment to the resolution of certain disputes or categories of disputes by “the Courts” or any particular Court does not, without more, indicate that such disputes or categories of disputes are not capable of determination by arbitration.
27. The reference to “enactment” in Section 3(1)(e) of the Act is to Mauritius enactments. This Section has been inserted for the avoidance of doubt, and excludes from the operation of the Act all existing (and future) forms of statutory arbitrations in Mauritius such as rent review arbitrations before the Fair Rent Tribunal, employment arbitrations before the Permanent Arbitration Tribunal or tax and duties arbitrations before the Assessment Review Committee. The Act is only meant to apply to international arbitration, and must have no impact on these established and tested forms of domestic arbitration.
28. Sections 3(2) and 3(3) define the concept of “international arbitration” which is central to the Act. An arbitration is international if it fulfils two *cumulative* criteria:
- (a) First, the arbitration must have its juridical seat within Mauritius: see Section 3(2)(a)⁹. The concept of juridical seat is addressed in Section 10.
 - (b) Secondly, the arbitration must also be international in character. The criteria for assessing this are set out in Section 3(2)(b) (i), (ii) and (iii). These are *alternative* criteria (i.e. the fulfilment of any one of the criterion is sufficient) which reproduce the criteria in Article 1(3) of the Model

⁹ It is anticipated that arbitration agreements will refer to arbitrations taking place “in Mauritius” as a whole, rather than to specific locations within Mauritius. If and insofar as reference is made to specific locations within Mauritius (such as Port Louis), this is of course intended to be covered by Section 3(2)(a).

Law. The last words of Section 3(2)(b)(iii) (“or that this Act is to apply to their arbitration”) are an additional criteria intended to give parties the freedom to opt into the whole scheme of the Act (which they can do by simply providing that the Act is to apply to their arbitration). Section 3(2)(b)(iv) has been added expressly to cover arbitrations arising under the constitution of, or relating to, GBL companies under Section 3(6), for the avoidance of any possible doubt. Section 3(3) provides additional guidance for the application of the criteria in Section 3(2)(b).

29. Section 3(4) makes provision for the possibility for parties to “opt into” the supplementary provisions set out in the First Schedule. These provisions are explained in more detail in the comments on the First Schedule below.
30. Section 3(5) is an important provision designed to deal with the threshold issues of the application of the Act as a whole and/or of any specific provision of the First Schedule to a given arbitration.
 - (a) It provides that, as a general principle, these threshold issues are to be resolved by the arbitral tribunal, and not by the Court or the PCA (see Section 3(5)(a)), and that the Court or the PCA should accordingly decline to hear or decide these threshold issues, and refer them to the arbitral tribunal for decision (see Section 3(5)(b)(i)).
 - (b) Where the arbitral tribunal has not yet been constituted however, the Court or the PCA may make a *provisional* determination of these threshold issues (see Section 3(5)(b)(ii)). Where, for instance, the seat of the arbitration has not been chosen in the parties’ arbitration agreement, and difficulties arise with respect to the constitution of the arbitral tribunal, the PCA – if asked for assistance in that respect – will have to take a provisional view as to whether the seat of the arbitration is Mauritius so as to determine whether it is able to provide that assistance. If it provides that assistance, and an arbitral tribunal is constituted, the issue will then be determined by the arbitral tribunal.
31. Section 3(6) makes provision for the possibility for shareholders in a GBL company to agree to arbitrate disputes arising under the constitution of, or relating to, the company. The word “concerning” in the introductory words of the Section is not meant to be limiting in any way, and should be understood to cover *inter alia* all disputes arising out of relating to the constitution of the company.
 - (a) As explained above, it is hoped that this Section will have an important application in practice. Mauritius is of course an important offshore jurisdiction, with the number of companies holding Global Business Licences now running into the thousands. Under the current law, any dispute arising under the constitution of such a company must be litigated before the Mauritian Courts, being the Courts of incorporation of the

company. Many of these disputes will in fact be “shareholder” issues relating to the control of a company (such as for instance the impact of a rights issue on the balance of power within the company) and will have little or no direct impact on third party rights. The shareholders in question will themselves usually have little or no link with Mauritius.

- (b) In the circumstances, there can be little objection for such shareholders to choose to resolve (for instance) “pure shareholder disputes” (with no impact on third parties) through international arbitration provided however that the Mauritian Courts retain ultimate control over disputes arising under the constitution of, or relating to, a company which is incorporated in Mauritius. It has accordingly been decided to limit the parties’ freedom to opt for international arbitration in the two following ways (see Section 3(6)(b)):
 - (i) First, the juridical seat of the arbitration must be Mauritius;
 - (ii) Secondly, the provisions of the First Schedule of the Act (including the provisions on consolidation and joinder) will apply mandatorily to any such arbitration. This will ensure that the Mauritian Courts will potentially be able to deal with situations where other shareholders and/or affected third parties seek to be joined to such an arbitration.
- (c) The extent to which any given dispute arising under the Articles of Association (or constitution) of a company may validly be referred to arbitration has deliberately not been addressed in Section 3(6). The boundaries of arbitrability under this Section of the Act (as under the Act generally) will fall to be defined by arbitral tribunals and by our Courts over the years. In this respect, it is noted that arbitrability will be the next topic for discussion within UNCITRAL following its current work on the amendment of the UNCITRAL Rules. Should that work lead to suggested amendments to the Model Law or to other suggestions in the coming years, the Act may be amended at that time.
- (d) Section 3(6) also says nothing about the legitimacy or otherwise of the insertion of a Mauritian arbitration clause into the constitution or Articles of Association of a *foreign* company. The possibility of such a situation arising must be remote, but if it does, it will fall to be resolved by our Courts in the ordinary way. Section 3(6) should not be taken as impliedly forbidding (or indeed as authorising) this practice.

32. The introductory words of Section 3(6) (“*Without prejudice to the right of a GBL company to agree to the arbitration of any dispute between itself and any third party under this Act,*”) were added by way of amendment to the Bill in Parliament, at Committee Stage¹⁰. As explained by the Honourable Prime Minister during the Second Reading of the Bill, its purpose is to clarify, for the

¹⁰ It is the only amendment made to the Bill originally presented to Parliament.

- avoidance of any possible doubt that the right granted to shareholders of GBL companies by Section 3(6) “is not meant to debar or discourage GBL companies in any way from agreeing to the arbitration in Mauritius of any dispute between themselves and third parties in the normal way”.
33. Section 3(7) enacts Article 4 of the Amended Model Law, with a modification intended to make it clear that waiver can occur not only where the waiving party has actual knowledge of the irregularity, but also where it ought to have known of that irregularity applying a “reasonable diligence” test. This converts the waiver test from a subjective one to a more manageable objective one. This is also the approach taken in the English Act: see section 73 thereof.
 34. Section 3(8) is of great importance. It enacts Article 5 of the Amended Model Law and enshrines the principle of non-interventionism referred to in Part A of these Notes (i.e. that the Courts are not to intervene in the international arbitrations governed by the Act except where the Act provides that they are to do so).
 35. Section 3(9) enacts and develops Article 2A of the Amended Model Law, and will ensure that Mauritius law of international arbitration keeps in line with international developments, and benefits from the experience of the great number of jurisdictions which have already enacted the Model Law.
 36. Section 3(10) is of great importance, and is intended to disconnect the law of international arbitration in Mauritius (which is to be developed by reference to international standards as set out in Section 3(9)) from domestic Mauritius law (and in particular from domestic Mauritius arbitration law).
 37. Section 3(11) provides that the Act will bind the State.

Part II – Initiation of Proceedings

Section 4 “Arbitration Agreement”

38. Option I of the new Article 7 of the Amended Model Law adopted by UNCITRAL in 2006 has been chosen (with the terms “arbitration agreement”, “electronic communications” and “data messages” being defined in Section 2(1) of the Act). This maintains a minimum form requirement, and UNCITRAL’s

relevant *travaux* will be of use when interpreting the provision. Section 4(1)(a) enacts Article 7(1) with a slight modification (the addition of the words “or other legal instrument”) in order to make sure that arbitrations arising under bilateral or multilateral investment treaties are covered by the Act.

Section 5 “Substantive claim before Courts”

39. Section 5 of the Act enacts Article 8 of the Model Law and gives effect *inter alia* to Mauritius’ obligations under Article II.3 of the New York Convention.
40. Article 8 has been modified in order to give real efficacy to the so-called “negative effect” of the principle of *kompetenz kompetenz*¹¹. This has been achieved through the following mechanism:
 - (a) Where any action or matter is brought before any Mauritius Court, a party may contend, at any time prior to the submission of his first statement on the substance of the dispute, that the action is the subject of an arbitration agreement;
 - (b) The action will then automatically be transferred to the Supreme Court;
 - (c) The Supreme Court (constituted as specified in Section 42 of the Act) shall then refer the parties to arbitration unless the party who refuses to have the matter referred to arbitration shows on a prima facie basis that “there is a very strong probability that the arbitration agreement is null and void, inoperative or incapable of being performed” (“the nullity issue”).
 - (d) Only if a party is able to meet that very high threshold on a prima facie basis will the Supreme Court itself proceed to a full determination of the nullity issue.
41. This mechanism is meant to ensure that the parties will be referred to arbitration save in the most exceptional circumstances.
42. In its initial assessment of whether there exists a “very strong probability” that the arbitration agreement is null and void, inoperative or incapable of being performed, the Supreme Court should not engage into a full trial (or even a mini-trial) of the relevant issues, but should assess them on a “prima facie” basis. The burden of proving that the parties did not validly agree to arbitration lies on the party seeking to impugn the arbitration agreement. Where doubt remains after a

¹¹ Experience in a number of jurisdictions (including England) has shown that, despite provisions similar to Article 8 (such as section 9 of the English Act) giving effect to Article II.3 of the New York Convention, State courts have sometimes declined to stay proceedings, preferring to decide complex points of jurisdiction themselves usually on “case management” grounds.

prima facie assessment, that doubt must be resolved in favour of referral to arbitration without a full trial (or mini-trial) of the unresolved issues.

43. It will then fall to the arbitrators to resolve these issues pursuant to Section 20 of the Act (which enacts the principle of *kompetenz kompetenz* contained in Article 16 of the Amended Model Law), subject to the parties' right to return to Court if they so choose after the tribunal's determination, pursuant to Sections 20(7) or 39 of the Act.

Section 6 "Compatibility of interim measures"

44. Section 6(1) enacts Article 9 of the Amended Model Law, and clarifies in particular that a party may request interim measures of protection from any Court (whether in Mauritius or abroad) without thereby waiving its right to arbitrate. The Section departs from Article 9 of the Amended Model Law in that it makes it clear that the role of the Courts (whether in Mauritius or abroad) is to *support* (and not frustrate) the arbitral process, and accordingly circumscribes the operation of Article 9 to interim measures "in support of arbitration".
45. Section 6(2) clarifies that, insofar as the request for interim measures is made in Mauritius, it must be made in accordance with Section 23 of the Act.

Section 7 "Death, bankruptcy or winding up of party"

46. Section 7(1) clarifies that – in the absence of contrary agreement – an arbitration agreement is not discharged by the death, bankruptcy or winding up of a party, and (in particular) that it binds the successors of that party. Section 7(2) clarifies that Section 7(1) does not affect the operation of *substantive* rules operating upon the death, bankruptcy or winding up of a party.

Section 8 "Consumer arbitration agreement"

47. Consumer protection is now a well-established feature of arbitration laws (see for instance sections 89 and 90 of the English Arbitration Act, or section 11 of the New Zealand Arbitration Act, as amended by section 5 of the New Zealand Arbitration Amendment Act 2007).
48. Section 8(1) provides that a consumer (as defined in Section 8(2)) can only be forced to arbitrate if he or she confirms that he agrees to be bound by the

arbitration agreement by separate written agreement entered into *after* the dispute has arisen.

49. This is a mandatory provision from which the parties are not free to derogate, and which applies to every contract containing an arbitration agreement entered into in Mauritius even where the contract is expressed to be governed by a foreign law: see Section 8(3). It will be for our Courts to define when an arbitration agreement has been entered into “in Mauritius” by reference to such conflicts of law principles as are appropriate.

Section 9 “Commencement of proceedings”

50. Section 9 enacts Article 21 of the Amended Model Law and is self-explanatory.

Section 10 “Juridical seat”

51. Section 10 enacts Article 20 of the Amended Model Law.
52. The words “place of arbitration” used in the Amended Model Law have not been used in the Act, and have been replaced throughout with the words “juridical seat of the arbitration”, in order to avoid any ambiguity in distinguishing between the important legal concept referred to in Article 20(1) of the Amended Model Law (and used in particular in Section 3(2)(a) of the Act) and the geographical location where hearings etc may take place referred to in Article 20(2) of the Amended Model Law (the Act replaces the word “place” used in Article 20(2) of the Amended Model Law with the words “geographical location”). The need to clarify UNCITRAL documents in that respect has been expressed in the course of the UNCITRAL Working Group’s updating of the UNCITRAL Rules of Arbitration¹².
53. These terminological changes have been made in Section 10. A deeming provision (which provides that all awards are deemed to have been signed at the juridical seat of the arbitration) has also been added in Section 36(5) to avoid any potential problems with awards signed at locations other than the juridical seat of the arbitration. This is in line with the current consensus within the UNCITRAL

¹² See for instance UN Documents A/CN.9/WG.II/WP.145/Add.1 para. 9; A/CN.9/WG.II/WP.147/Add.1 para. 10-11.

Working Group as to a proposed update to Article 16 of the UNCITRAL Arbitration Rules¹³.

54. Section 10(1) cross-refers to Section 3(5)(b)(ii), in order to make it clear that, where the arbitral tribunal has not yet been constituted, the Court or the PCA is free to make a provisional determination of the juridical seat of the arbitration: see paragraph 25(b) above.

Part III – The Arbitral Tribunal

Section 11 “Number of arbitrators”

55. Section 11 enacts Article 10 of the Model Law, modified by the addition of a default rule against tribunals with an even number of arbitrators, which is to apply unless the parties have made it absolutely clear, and expressly agreed, that this is what they want. For obvious reasons a simple provision to the effect that the number of arbitrators is to be an even number (without more) should not qualify as an “express agreement” for that purpose.

Section 12 “Appointment of arbitrators”

56. Section 12 enacts Article 11 of the Amended Model law, modified in particular to cater for multi-party arbitration and to deal with the so-called *Dutco* problem¹⁴ (see Section 12(3)(d)), and to provide for a stop-gap appointment procedure where the parties’ agreed procedure(s) have failed (see Section 12(5)). These issues have been addressed in the on-going UNCITRAL discussions on the amendment of the UNCITRAL Rules of Arbitration and the wording inserted in this Section derives from the following sources:
- (a) Sections 12(3)(c), 12(3)(d) and 12(5) are inspired by the current version of the new draft of the Rules (which is still subject to discussion)¹⁵;
 - (b) Section 12(6) is derived from section 18 of the English Act.

¹³ See UN Document A/CN.9/WG.II/WP.147/Add.1 pages 5-6.

¹⁴ See the French Cour de Cassation’s decision in *Siemens and BKMI v. Dutco*, Cass. 7.1.92, Rev. Arb. (1992) p. 470, n. Bellet.

¹⁵ See articles 6-8 (and in particular 7bis) of that draft in UN Document A/CN.9/WG.II/WP.147 pages 12-16.

57. Article 11(3)(b) of the Amended Model Law has been enacted in a slightly modified form (see Section 12(3)(b)) in order to set a 30 day time-limit for the parties' agreement on a sole arbitrator.
58. As explained in Part A above, all default appointing functions under Section 12 are given to the PCA.

Section 13 "Grounds for challenge of arbitrator"

59. Section 13 of the Act enacts Article 12 of the Amended Model Law, with no changes of substance.

Section 14 "Procedure for challenge of arbitrator"

60. Section 14 of the Act enacts Article 13 of the Amended Model Law, with no changes of substance.
61. The authority in charge of ultimately determining challenges is the PCA: see Section 14(3).

Section 15 "Failure or inability to act"

62. Section 15 of the Act enacts Article 14 of the Amended Model Law, with no changes of substance.
63. The authority in charge of ultimately determining whether an arbitrator has become de jure or de facto unable to perform his functions or has for other reasons failed to act without undue delay is the PCA: see Section 15(2).

Section 16 "Replacement of arbitrator"

64. Section 16(1) enacts Article 15 of the Amended Model Law with no changes of substance.
65. Sections 16(2) to 16(4) are new and deal with the issue of truncated tribunals. These issues have been addressed in the on-going UNCITRAL discussions on the

amendment of the UNCITRAL Rules of Arbitration and the wording used in the Act derives from the current version of the new draft of the Rules (which is still subject to discussion)¹⁶, and from Article 12 of the LCIA Rules.

66. Those provisions are not mandatory and may be derogated from by the parties by agreement. In the absence of contrary agreement, the decision whether the arbitration may proceed on a “truncated” basis has been left to the PCA, and not to the remaining arbitrators. Parties may wish to confer that power on the remaining arbitrators by – for instance – opting for arbitration rules which so provide (such as Article 12 of the LCIA Rules).

Section 17 (“Hearing following replacement of arbitrator”)

67. This Section is new and does not appear in the Amended Model Law. In the absence of contrary agreement, it gives the arbitral tribunal complete discretion as to whether to repeat any stage of the proceedings following the replacement of an arbitrator.

Section 18 “Fees and expenses of arbitrators”

68. This is a mandatory provision. While the obligation for parties to remunerate arbitrators is no doubt implicit within the regime of the Amended Model Law, it has been decided that this obvious obligation should be spelt out, as it has been in the English Act (see section 28 of the English Arbitration Act 1996).
69. In addition, Section 18(2) deals with the increasingly troublesome issue (which is currently being debated within UNCITRAL in the context of the revision of the UNCITRAL Arbitration Rules) of arbitrators operating under ad hoc arbitration agreements or under institutional rules which do not provide for a right of scrutiny of their fees by an independent third party. A tendency has been noted for certain arbitrators to abuse such situations to claim excessive remuneration. In such situations, either party is given the right to apply to the PCA for adjustment and fixing of the arbitrators’ fees.

Section 19 “Protection from liability and finality of decisions”

70. The immunity of arbitrators and arbitral institutions as set out in Sections 19(1), (2) and (4) of the Act is now well established in a number of institutional rules

¹⁶ See the new article 13.2 thereof in UN Document A/CN.9/WG.II/WP.147 page 19.

and national legislations, and it has accordingly been included in the Act as a provision supplementing those of the Amended Model Law.

71. This is a mandatory provision which incorporates sections 29 and 74 of the English Arbitration Act 1996, and English jurisprudence under those sections of the English Act may accordingly be of assistance in the future interpretation of Section 19.
72. In addition, Sections 19(3) and (4) of the Act make provision for immunity for the PCA, its Secretary-General, and its employees and agents acting in the discharge or purported discharge of their function. That statutory immunity implements into Mauritius law (in particular) the treaty obligations to be contracted by Mauritius under its Host Country Agreement with the PCA.
73. Finally, Section 19(5) is a very important provision, and provides that all appointing and administrative functions exercised by the Secretary-General of the Permanent Court of Arbitration under the Act shall be final and subject to no appeal or review, subject only to recourse to the Supreme Court against any award rendered in the arbitral proceedings under Section 39 of the Act. In other words, a party who feels aggrieved by a decision of the PCA cannot challenge **the decision of the PCA itself** before the Courts or otherwise, but can – at a later stage – challenge any **award rendered by the arbitral tribunal** under Section 39 (provided that the decision of the PCA has affected the arbitral proceedings in a way which gives rise to a right of recourse under Section 39). For instance, where the PCA has appointed an arbitrator whom a party contends does not possess the qualifications required, that party may not challenge the decision of the PCA appointing the arbitrator¹⁷, but may later challenge an award on the ground that “the composition of the arbitral tribunal ... was not in accordance with the agreement of the parties” within the meaning of Section 39(2)(iv) of the Act.

Section 20 “Competence as to jurisdiction”

74. Section 20 enacts Article 16 of the Amended Model Law, which enshrine in particular the cardinal principles:
 - (a) Of “competence competence”, according to which arbitral tribunals have jurisdiction to determine their own jurisdiction (see Section 20(1)), subject to the Courts’ ultimate control (see Section 20(7) and 39(2)(a)(iii));
 - (b) Of “separability” according to which the arbitration agreement is a separate agreement from the substantive contract (see Section 20(2)).

¹⁷ Even though the PCA may thereby have acted in contravention of the parties’ arbitration agreement and of Section 12(7) of the Act.

75. Section 20 amends Article 16 of the Amended Model Law in one material respect. Section 20(7) modifies Article 16(3) to provide that the losing party’s right to refer issues of jurisdiction to the Courts under Section 20 arises not only where the tribunal has ruled that it has jurisdiction, but also where it has ruled that it does not have jurisdiction. On a conceptual level, it is difficult to see why an arbitral tribunal should not be allowed finally to determine that it has jurisdiction (thereby “pulling itself by its own bootstraps” if that decision is wrong and if it does not in fact have jurisdiction) but should be allowed finally to determine that it does not have jurisdiction (thereby negating the parties’ agreement to arbitrate if that decision is wrong). New Zealand has rectified this anomaly in the Model Law, and the Act adopts the same modification. The English Act also allows challenges on jurisdiction in both situations: see section 67 thereof.
76. The Act does not modify the Amended Model Law to make it clear that any hearing before the Supervisory Court on issues of jurisdiction should take place by way of a full rehearing, as it was felt that this is now well-established, and must in any event follow as a matter of logic (since the tribunal cannot itself finally resolve any matter going to its own jurisdiction and thereby pull itself by its own bootstraps: see above).

Part IV – Interim Measures

Section 21 “Interim measures by tribunal”

77. Section 21 of the Act enacts Articles 17 and 17A to 17G of the Amended Model Law. The text adopted by the Commission in 2006 has been adopted, save that the controversial Section 2 on ex parte “Preliminary Orders” (Articles 17B and 17C) has been omitted.
78. Section 21(1) enacts Article 17 of the Amended Model Law, and clarifies expressly that a tribunal may order a party to provide security for costs. It is anticipated that the normal rules on security for costs (and not the rules for the granting of interim measures set out in Section 21(2)) will usually apply, and this has been clarified in Section 21(3).
79. Sections 21(2), 21(3) and 21(4) enact Article 17A of the Amended Model Law, with two minor modifications:

- (a) Express provision is again made in relation to security for costs (see above);
 - (b) The second sentence of Article 17A(1)(b) [tribunal’s preliminary assessment of the merits not to affect subsequent determination of the merits] has been amended to make it clear that the tribunal’s preliminary assessment of the merits does not affect its independence or impartiality or its power to make any subsequent determination of the merits: see Section 21(4).
80. Section 21(5) enacts Article 17D.
81. Section 21(6) enacts Article 17E(1) (Article 17E(2) is concerned with preliminary orders and has therefore been omitted: see above).
82. Section 21(7) enacts Article 17F(1) (Article 17F(2) is concerned with preliminary orders and has therefore been omitted: see above).
83. Section 21(8) enacts Article 17G. Although this is not specifically addressed in the Act, it goes without saying that tribunals are free to impose any condition they deem fit when granting an interim measure (and are not restricted to the power to order the payment of costs and damages as expressly provided in Article 17G). For instance (but without limitation to the foregoing), a tribunal may require that the party requesting an interim measure give an express undertaking in damages and/or “fortify” that undertaking through the provision of an appropriate bank guarantee or other security as a condition of granting the measure.

Section 22 “Recognition and enforcement of interim measures”

84. Section 22 of the Act enacts Articles 17H and 17I of the Amended Model Law.
85. Sections 22(1) to 22(3) enact Article 17H with no substantive modification.
86. Section 22(4) enacts Article 17I(1) with no substantive modification (with all cross-references with respect to the grounds on which recognition and enforcement may be refused being made to Section 39 of the Act [which enacts Article 34 of the Amended Model Law] since Article 36 of the Amended Model Law is not being enacted: see below). Where the wording of any of the relevant provisions of Section 39 refers to the setting aside of an award, as opposed to the

refusal of recognition and enforcement of an award, that provision is to be applied *mutatis mutandis* as if it referred to recognition and enforcement.

Section 23 “Powers of Supreme Court to issue interim measures”

87. Section 23(1) enacts Article 17J of the Amended Model Law (which provides for Court-ordered interim measures), with the Court’s power to grant interim measures being exercised by the Supreme Court as constituted under Section 42.
88. Article 17J of the Amended Model Law contains very little guidance as to the way in which the Courts are to exercise the power to grant interim measures, and in particular on how that power inter-relates with the arbitral tribunal’s own power to grant interim measures (it simply provides that “The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration”). If this is not addressed, there is a risk that parties may try and abuse of this provision to disrupt arbitrations. Accordingly, it has been decided to adopt restrictions on the power of the Courts, so as to ensure that the Courts will not interfere with the arbitral process, and will only intervene to support – and not disrupt – arbitrations, at times when (i) there is real urgency and (ii) the arbitral tribunal is unable to act effectively.
89. This has been done through the incorporation of text derived from Section 44 of the English Act into Sections 23(3) to 23(6) of the Act¹⁸. Those provide in particular that, unless the parties agree otherwise:
- (a) Where the case is not one of urgency, the Supreme Court can only grant an interim measure on the application of a party made with the permission of the arbitral tribunal or with the agreement in writing of the other parties to the arbitration: see Sections 23(3) and 23(4)(b);
 - (b) In addition, the Supreme Court shall only act if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively: see Section 23(5);
 - (c) The Supreme Court may tailor any interim order made by it in such a manner as to pass control over the interim measure back to the arbitral tribunal when (for instance) the tribunal becomes able to act effectively: see Section 23(6).

¹⁸ The words “for the purpose of preserving evidence or assets” which are to be found in Section 44(3) of the English Act have not been used in Section 23(3) of the Act given the difficulties of interpretation which have arisen in this respect before the English Courts.

90. Sections 23(3) to 23(6) are meant to operate as effective constraints on the Courts’ power to grant interim measures, and exhaustively to set out the Courts’ powers in relation to interim measures in international arbitrations. In this respect, Section 3(8) (which provides that “Subject to this Act, no Court shall intervene in any matter governed by this Act”) and Section 3(10) (non-application of domestic law principles) will operate to prevent the Courts from granting interim measures outside the framework of Sections 23(3) to 23(6) (for instance pursuant to its inherent jurisdiction or to other statutory powers).
91. In this respect, in particular, Mauritius Courts are not free to – and should not – follow the jurisprudence currently adopted in England, where the Courts have used their inherent jurisdiction and/or Section 37 of the English Supreme Court Act 1981 to grant interim measures even where the conditions for the grant of such measures under Section 44 have not been fulfilled¹⁹.

Part V – Conduct of Arbitral Proceedings

Section 24 “Duties and powers of Tribunal”

92. Section 24 of the Act enacts Articles 18, 19 and 22 of the Amended Model Law, modified in three main respects:
- (a) Section 24(1)(a) provides that the tribunal’s duty is to give the parties a “reasonable” – rather than “full” – opportunity of presenting their case. This change is in line with Section 33(1)(a) of the English Act and is meant to allow tribunals to act efficiently as well as fairly, without thereby exposing their awards to unmeritorious challenges under Section 39 of the Act.
 - (b) Section 24(1)(b) expressly sets out the tribunal’s duty to adopt procedures suitable to the circumstances of the case, avoiding unnecessary delay and expenses, and has been drafted by reference to Section 33(1)(b) of the English Act. This is again meant to stress the importance of efficiency, and of the avoidance of unnecessary delay and expense, in arbitral proceedings; it puts the emphasis on proactive and efficient case management by arbitral tribunals.

¹⁹ The English Arbitration Act 1996 is different from the Act in that Section 1(c) of the English Act only provides that “in matters governed by [the relevant Part of the Act] the court **should** [note, not **shall**] not intervene except as provided by [that Part]”.

- (c) Section 24(3) expressly sets out the main procedural powers²⁰ available to an arbitral tribunal. The provision is based on Section 34 (“Procedural and evidential matters”) of the English Act.
93. As is clear from Sections 24(2) and 24(3) of the Act, the parties are free to make their own arrangements on the procedure to be followed by the arbitral tribunal. They are not free to contract out of the essential safeguards set out in Section 24(1) of the Act.

Section 25 “Statements of claim and defence”

94. Section 25 of the Act enacts Article 23 of the Amended Model Law, modified in the following respects:
- (a) The introductory words of Section 25(1) (“*Subject to subsection 24,* ”) are intended to clarify that the procedure agreed by the parties, or chosen by the arbitral tribunal, does not necessarily have to follow the usual format of an exchange of statements of claim and defence. For instance, certain arbitrations may give rise to simple points of contractual interpretation which do not call for the exchange of formal pleadings. Conversely, in larger cases, certain tribunals may prefer to request full scale memorials, rather than statements of claim and defence. Where there are no Statements of Claim or Defence, references to these documents in other provisions of the Act (see for instance Sections 4(2)(c) and 20(3)) are to be understood *mutatis mutandis* in light of the procedure adopted in the proceedings.
 - (b) The introductory words of Section 25(2) (“*Subject to subsection 24,* ”) are meant to ensure consistency with the tribunal’s general power set out in Section 24(3)(c) of the Act.
 - (c) The language of Article 23 has been modified to cater for the possibility of multiple claimants and respondents.

Section 26 “Hearing”

95. Section 26 of the Act enacts Article 24 of the Amended Model Law, modified slightly to provide expressly for the possibility of multiple claimants or respondents, with one further minor modification: Section 26(5) clarifies that the

²⁰ Substantive powers (as opposed to procedural powers) are dealt with in Section 33 of the Act: see below. Section 24(3)(h) (which deals with the tribunal’s power to administer oaths or take affirmations) is derived from Section 38(5) of the English Act.

tribunal must share with the parties any statements, documents or information which are before it, and on which it might rely in making its decision.

Section 27 “Default of a party”

96. Section 27 of the Act enacts Article 25 of the Amended Model Law, modified slightly to provide expressly for the possibility of multiple claimants or respondents.

Section 28 “Appointment of expert”

97. Section 28 of the Act enacts Article 26 of the Amended Model Law, with no substantive modification.

Section 29 “Court assistance in taking evidence”

98. Section 29(1) of the Act enacts Article 27 of the Amended Model Law, with no substantive modification. Section 29(2) specifies (without limitation) two of the powers available to the Court under Section 29(1).

Section 30 “Power of PCA to extend time limits”

99. Section 30 of the Act is not an Amended Model Law provision. It is derived from sections 12, 50 and 79 of the English Arbitration Act 1996, and integrates these three provisions in one comprehensive Section. English jurisprudence under these sections of the English Act may accordingly be of some assistance in the future interpretation of Section 30.
100. There is no doubt that this Section extends to some extent the scope of intervention by supervising authorities in the arbitral process, and questions have been raised *inter alia* by the UNCITRAL Secretariat in that respect. Upon reflection, there can however be little doubt that the Section does serve a very useful practical purpose. The arbitral process can be frustrated by short time limits set by the parties in their agreement long before a dispute has arisen, and without much thought being given to their application in practice. If such time limits are applied with no flexibility, the parties’ wish to arbitrate – and not litigate – their dispute may itself be frustrated. This Section will avoid this result, while laying down clear guidelines which will avoid undue interference by the supervising authority. The risk of undue interference has further been minimised by the attribution of this power to the PCA, a multilateral, neutral and arbitration-

friendly organisation which can best achieve the purpose of this Section, i.e. to assist the arbitral process where deadlines previously agreed by the parties would otherwise frustrate that process, without unduly interfering in private arbitrations²¹.

101. Where the PCA is called upon to act in circumstances where an institution has already refused to extend the relevant time limit under its institutional rules, it is expected that the PCA will take into account – and show the required degree of deference to – that refusal.

Section 31 “Representation”

102. This is also not an Amended Model Law provision. As noted in Part A above, other jurisdictions seeking to develop as international arbitration jurisdictions have made the mistake in the past of seeking to forbid representation by foreign lawyers. Those jurisdictions did not significantly develop until such time as the rule was abolished. On the other hand, experience shows that any significant development of the field of international arbitration will lead to increased work for the domestic Bar.
103. The Section has in any event merely been inserted for the sake of clarity (and to send the right message to foreign users) given the consistent past practice in arbitrations in Mauritius, and the recent amendments to the Law Practitioners Act.

Note on “Confidentiality”

104. Consideration has been given to the possibility of including a further provision in Part V of the Act to deal expressly with the question of confidentiality in arbitral proceedings conducted under the Act. The Amended Model Law contains no such provision, and the question is one of great complexity (as is demonstrated, for instance, by the recent lengthy provisions inserted in the New Zealand Act in 2007 in that respect). Further, as recent debates within UNCITRAL have demonstrated, different types of arbitration governed by the Act (in particular investment arbitration on the one hand and international commercial arbitration on the other hand) may well call for very different rules on confidentiality (with confidentiality being the norm in international commercial arbitration, and

²¹ Consideration has been given to the possibility of giving the powers contained in Section 30 not to the PCA, but to the arbitral tribunal. This would however mean that the arbitral tribunal may end up being judge and party in certain situations (for instance where the relevant time limit relates to the obligation to render an award within a given period). This was not considered desirable.

transparency being increasingly advocated as the norm in investment arbitration). As a result, it has been decided not to include specific provisions on confidentiality in the Act, in line with the Amended Model Law and with a number of modern arbitration laws. This does not detract from the basic rule that parties to commercial arbitrations expect their arbitral proceedings to be confidential, and that this expectation should only be overridden in exceptional and limited circumstances. The exact nature and limit of these exceptions will fall to be shaped by arbitral tribunals and/or by the Supreme Court in the exercise of its supervisory functions under the Act.

Part VI – The Award

Section 32 “Rules applicable to substance of dispute”

105. Section 32 of the Act enacts Article 28 of the Amended Model Law without any substantive modification.

Section 33 “Remedies and costs”

106. Section 33 of the Act is not an Amended Model Law provision.
107. The Amended Model Law does not expressly set out the substantive remedies available to an arbitral tribunal, and it was thought useful to include a provision expressly dealing with this issue, in line with most modern laws, including legislation based on the Model Law²². This has been done in Section 33(1) of the Act, the drafting of which is derived from Sections 48 and 49 of the English Act. Section 33(1) deals with substantive remedies, and does not set out an exhaustive list of the substantive powers otherwise available to arbitral tribunals (it being intended that international arbitration tribunals sitting in Mauritius should have available the widest powers possible).
108. Similarly, the Amended Model Law contains no specific provisions on the costs of the arbitration, and it was thought useful to include default provisions in line with most modern laws. This has been done in Section 33(2) which draws to some extent from Section 6 of the Second Schedule of the New Zealand Act, and from

²² See for instance Sections 38 (“General powers exercisable by the arbitral tribunal”), 48 (“Remedies”) and 49 (“Interest”) of the English Act, Section 12 of the Singapore International Arbitration Act (as amended in 2002), Section 12 of the New Zealand Act.

sections 59 to 63 (Costs) of the English Act. Unlike the New Zealand Act, the default rules apply to all international arbitrations in Mauritius, and do not require an “opt in” by the parties.

109. Of particular importance is the principle that *real* costs should follow the event. This principle is not of wide application in Mauritian civil procedure. While such domestic procedural rules have no application to matters covered by the Act (see Section 3(10) of the Act), it was thought important to make it clear in the Act that the successful party in an arbitration should in principle recover the real costs it has incurred in the arbitration (insofar as these are reasonable), and not only a nominal amount labelled as “costs”: see Section 33(2)(a)(ii) of the Act. How costs are to be apportioned, and what constitutes “reasonable costs”, are ultimately matters for the tribunal to determine in the exercise of its discretion. In this respect, the drafters have not followed the approach of the English Act, which sets out more detailed guidelines as to the exercise of that discretion. International tribunals have considerable flexibility in that respect, and it is expected that they will take into account the usual factors (respective success of each party overall and/or on different issues or claims, respective reasonableness of each parties’ behaviour in bringing or defending the various claims or issues etc.). For instance, where a particular claim has been brought or defended on a wholly unreasonable basis, a tribunal may if it chooses award the successful party the whole of his costs whether strictly “reasonable” or not (a practice known in English civil procedure as an award of “indemnity costs”).
110. Finally, and still in relation to costs, thought has been given as to whether to include a provision derived from Section 60 of the English Act, which renders void any pre-dispute agreement between the parties allocating costs by requiring one or more parties to pay their own costs irrespective of the outcome of the arbitration. The purpose of such a provision would have been to prevent the situation in which a party who wishes to pursue his claim in arbitration finds that he is unable to do so because, whatever the result, he has agreed to bear some or all of the costs. Following consultation with the UNCITRAL Secretariat, it was decided not to include such a provision, which would for instance have the effect of invalidating the (increasingly common) small arbitration schemes whereby companies agree to bear the costs of their arbitrations with their customers. When faced with less disinterested companies seeking to impose unbalanced terms in their own favour, consumers will normally be able to rely on Section 8 of the Act (see above).

Section 34 “Decision making by panel of arbitrators”

111. Section 34 enacts Article 29 of the Amended Model Law with one important modification. Section 34 provides that (unless the parties have agreed otherwise)

the chairman of an arbitral tribunal may decide alone in the absence of a majority. This topic has proved controversial within the UNCITRAL Working Group when addressed in the context of modification of the UNCITRAL Arbitration Rules, but it was felt that the provision is necessary in a law (as opposed to arbitration rules), if complete deadlock situations are to be avoided. If the parties wish to agree a “majority only” decision process, and thereby to take the risk of such a deadlock, they are free so to agree.

Section 35 “Settlement”

112. Section 35 of the Act enacts Article 30 of the Model Law without any substantive modification.

Section 36 “Form and contents of award”

113. Section 36 of the Act enacts Article 31 of the Amended Model Law with some important modifications.
114. First, Sections 36(1) and 36(2) are not Amended Model Law provisions, and have been added to make it clear that tribunals are free to issue awards at different times in the proceedings on different aspects of the arbitration. Terminology such as “partial award”, “interim award”, “interim final award” or “final partial award” has been deliberately omitted as such terminology has become increasingly confused, and confusing, over the years. The new paragraph is modelled on section 47 of the English Act²³.
115. Section 36(3) of the Act enacts Article 31(1) of the Amended Model Law, modified to cater for the new default rule authorising decisions by the presiding arbitrator alone (see the comment on Section 34 above).
116. Section 36(4) of the Act enacts Article 31(2) of the Amended Model Law, with no substantive modification.
117. Section 36(5) of the Act enacts Article 31(3) of the Amended Model Law, modified:
- (a) To introduce the modifications to Article 20 of the Amended Model Law made in Section 10 (change of terminology to “juridical seat”); and

²³ See also section 19A of the Singapore International Arbitration Act.

- (b) To introduce a deeming provision which provides that all awards are deemed to have been signed at the juridical seat of the arbitration. As already noted in the comments on Section 10 above, this is meant to avoid any potential problems with awards signed at locations other than the juridical seat of the arbitration, and is in line with the current consensus within the UNCITRAL Working Group as to a proposed update to Article 16 of the UNCITRAL Arbitration Rules²⁴.
118. Section 36(6) of the Act enacts Article 31(4) of the Amended Model Law, with no substantive modification.
119. Finally, and in line with discussions currently taking place within the UNCITRAL Working Group, three new sub-sections (Sections 36(7), 36(8) and 36(9)) have been added to make it clear that awards are meant to be final and binding (i) on the parties and (ii) (save for interim measures under Chapter IVA of the Amended Model Law / Section 21 of the Act and subject to the Tribunal’s right to modify or correct an award under Sections 38 and 39) on the arbitral tribunal. These paragraphs are modelled on Section 19B of the Singapore International Arbitration Act.

Section 37 “Termination of proceedings”

120. Section 37 of the Act enacts Article 32 of the Amended Model Law without any substantive modification.

Section 38 “Correction, interpretation and additional award”

121. Section 38 of the Act enacts Article 33 of the Amended Model Law with the following minor modifications:
- (a) The language has been modified to be compatible with multi-party situations.
 - (b) A new provision has been added in Section 38(4)(a) to make it clear that, when considering claims presented in the arbitral proceedings but omitted from the award, the arbitral tribunal may (if it sees fit) issue further procedural directions or hold further hearings in relation to the omitted claim(s).

²⁴ See UN Document A/CN.9/WG.II/WP.147/Add.1 pages 5-6.

Section 39 “Exclusive recourse against award”

122. Section 39 of the Act enacts the all-important provisions of Article 34 of the Amended Model Law, without any significant modifications.
123. Considerable thought has been given to the desirability of expanding Article 34 along the lines of sections 67 and 68 (mandatory rights of recourse) of the English Act. This was rejected on the basis that this would substantially alter the essence and structure of the Amended Model Law.
124. Article 34 has accordingly been retained in its original form, with one minor exception mentioned immediately below. In particular, Section 39(1) reproduces Article 34(1) and, together with Section 3(8) of the Act (which enacts Article 5 of the Amended Model Law), will ensure that arbitral awards can only be challenged pursuant to Section 39²⁵.
125. One minor modification to Article 34 has been made to clarify that a right of recourse lies where the making of the award was induced or affected by fraud or corruption, or where a breach of the rules of natural justice occurred during the arbitral proceedings or in connection with the making of the award: see Section 39(2)(b)(iii) and (iv). This is in line with modifications already made in Singapore and in New Zealand.

Section 40 “Recognition and enforcement”

126. Section 40 of the Act is not an Amended Model Law provision. It sets the regime for the recognition and enforcement of arbitral awards rendered in international arbitrations under the Act. It does so by using the possibility given under Article I.1 of the New York Convention to submit “arbitral awards not considered as domestic awards” in the Enforcing State to the regime of the Convention.
127. This solution will mean that, where an award is rendered in an international arbitration in Mauritius, and is to be enforced in Mauritius, the losing party may choose not to challenge it under Sections 20 or 39 of the Act (which enact Articles 16 and 34 of the Amended Model Law, and which both contain strict time limits), but to wait until the successful party applies for enforcement, and then seek to resist that enforcement under the New York Convention. An

²⁵ There is no other right of recourse or appeal under the Act. Where the arbitral tribunal has ruled on a plea of jurisdiction as a preliminary question, the matter may be submitted for decision by the Supreme Court pursuant to Section 20 (7) of the Act: see above.

- alternative would have been (for instance) to make any award rendered in an international arbitration in Mauritius enforceable as of right upon expiry of the time limits for challenges under the Amended Model Law (as modified by the Act). That solution has not been adopted, essentially because the questions (i) of supervision of arbitral awards by the Court of the seat and (ii) of enforcement of awards, are conceptually different. Further, as for the issue of timing, where the losing party decides to await enforcement proceedings, it is entirely in the hands of the successful party to apply for enforcement of the award promptly.
128. Where a challenge has been made under Sections 20 or 39 of the Act, and has failed, it will be for the Supreme Court to determine to what extent questions of *res judicata*, issue estoppel etc. may arise on any subsequent resistance to enforcement in Mauritius.
129. Finally, it should be noted that Articles 35 and 36 of the Amended Model Law (which constitute Chapter VIII of the Amended Model Law, “Recognition and enforcement of awards”) are not being enacted in Mauritius, as Mauritius is already party to the New York Convention (which has been enacted into Mauritius law through the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 2001).

Part VII - Miscellaneous

Section 41 “Limitation and prescription”

130. Section 41 of the Act is not an Amended Model Law provision, and is intended:
- (a) To make it clear that Mauritian rules on limitation (or *prescription*) do not apply to international arbitrations simply by virtue of the fact that the juridical seat of the arbitration is Mauritius: see Section 41(1); and
 - (b) To set a substantive rule whereby issues of limitation (or *prescription*) are to be determined by reference to the rules applicable to the substance of the dispute, as determined by the tribunal pursuant to Section 32 of the Act: see Section 41(2).
131. In addition Section 41(3) is derived from Section 13(2) of the English Act, and (in particular) gives the Supreme Court power to avoid the unfair operation of a time-bar where arbitral proceedings have to be re-initiated following the setting aside or annulment of an award or of any part thereof.

Section 42 “Constitution of Supreme Court and appeal”

132. Section 42 is an important provision of the Act which gives effect to the decisions mentioned in Part A above that all Court applications under the Act are to be made to a panel of three judges of the Supreme Court, with a direct and automatic right of appeal to the Privy Council. As noted in Part A above, this will provide international users with the reassurance that Court applications relating to their arbitrations will be heard and disposed of swiftly, and by eminently qualified jurists.

Section 43 “Consequential amendment”

133. As already noted above (see comments on Section 40 of the Act), the New York Convention is already part of Mauritius law, having been enacted through the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 2001 (“the New York Convention Act”). Section 43 makes a number of consequential amendments to that Act.
134. The first important amendment is designed to ensure consistency and uniformity in Mauritian law in the field of international arbitration law, through the use of the same Courts to hear all matters relating to international arbitration, whether under this Act, or under the New York Convention Act. This has been achieved:
- (a) By amending the definition of “Court” in Section 2 of the New York Convention Act to give exclusive jurisdiction under that Act to the Supreme Court constituted as specified in Section 42 of the Act: see Section 43(a) of the Act;
 - (b) By amending Section 4 of the New York Convention Act to incorporate an express and automatic right of appeal to the Privy Council, in line with the position under Section 42(2) of this Act: see Section 43(c) of the Act.
135. Secondly, Section 3 of the New York Convention Act is being amended by the addition of a new Section 3(2) which directs the Mauritian Courts to have regard to the important “Recommendation regarding the interpretation of Article II(2) and Article VII(1) of the Convention” adopted by UNCITRAL in 2006 when applying the Convention.
136. Thirdly, the opportunity has been used to correct an error in Section 5(1) of the New York Convention Act. Section 5(1) of the New York Convention Act, as currently drafted, requires a party seeking to enforce an award in Mauritius to obtain the seal (mis-spelt “seat”), or the signature of a Judge or officer, of the

judicial authority of the state in which the arbitral award was made. This is contrary to the spirit of the New York Convention, in that it forces the beneficiary of an award to take steps in two separate jurisdictions (those of the seat of the arbitration to obtain the signature or seal, and then those of Mauritius) in order to obtain recognition and/or enforcement of the award. The new Section 5(1) eliminates this by providing that the Supreme Court may rely on copies certified by reliable persons, including but not limited to those expressly referred to in that Section.

137. Finally, Section 6 of the New York Convention Act is being amended to ensure that the Chief Justice is able to devise a comprehensive set of rules dealing with both the New York Convention Act and the present Act: see Section 43(e) of the Act.

Section 44 “Commencement”

138. Section 44 of the Act is self-explanatory and provides that the Act shall come into operation on a day to be fixed by Proclamation. As noted in footnote 1 above, and to simplify transitional issues, the date of 1 January 2009 has been chosen.

First Schedule – “Optional Supplementary Provisions for International Arbitrations”

139. The First Schedule contains four sections which parties to international arbitrations in Mauritius can “opt into”: see Section 3(4) of the Act. As already noted in Part B above, this “opt in” formula has been used for provisions (in effect preliminary determination of, and appeals on, points of law, consolidation and joinder) which certain parties may consider as useful for their arbitrations, but which are too controversial for inclusion into the “normal regime” for international arbitrations in Mauritius without the express prior agreement of the relevant parties.
140. It is for the parties to select which if any of the provisions of the First Schedule they wish to opt into. In order to avoid any controversy as to whether parties have opted into the Schedule or any specific provision thereof, Section 3(4) requires that the parties *expressly* refer to the First Schedule of the Act or to the specific provision in question in their agreement.

141. As an exception, and as already noted above, the provisions of the First Schedule apply mandatorily to arbitrations under the constitution of a GBL company: see Sections 3(4) and 3(6).
142. The format of such an “opt in” Schedule is modelled on the Second Schedule of the New Zealand Act (as amended in 2007), and the wording of Paragraphs 1 to 3 of The First Schedule is derived from wording used in the Second Schedule of the New Zealand Act.

First Schedule Paragraph 1 “Determination of a Preliminary Point of Mauritius Law by Court”

143. The wording of this Paragraph is derived from Section 4 of the Second Schedule of the New Zealand Act, and – where opted into by the parties – will give the Supreme Court the power to determine a preliminary point of Mauritius (note, *not foreign*) law in an international arbitration under the Act, subject to the conditions set out in the Section.
144. Sections 4(3) and 4(4) of the Second Schedule of the New Zealand Act are not being enacted, as the normal regime under Section 42 of the Act (automatic right of appeal to the Privy Council) will apply.
145. Paragraph 1(3) of the First Schedule adopts the amendments made to the New Zealand Act in 2007, and is intended to limit the operation of the Section to true questions of law (and to exclude in particular attempts to extend its application to questions of fact disguised as questions of law).

First Schedule Paragraph 2 “Appeals on questions of Mauritius law”

146. The wording of this Paragraph is derived from Section 5 of the Second Schedule of the New Zealand Act, and – where opted into by the parties – will give the Supreme Court the power to hear an appeal on a point of Mauritius (note, *not foreign*) law arising out of an award in an international arbitration under the Act, subject to the conditions set out in the Section.
147. Sections 5(5) and 5(6) of the Second Schedule of the New Zealand Act are not being enacted, as the normal regime under Section 42 of the Act (automatic right of appeal to the Privy Council) will apply.

148. Paragraph 2(8) of the First Schedule adopts the amendments made to the New Zealand Act in 2007, and is intended to limit the operation of the Section to true questions of law (and to exclude in particular attempts to appeal questions of fact disguised as appeals on a point of law).

First Schedule Paragraph 3 “Consolidation of Arbitral Proceedings”

149. The wording of this Paragraph is derived from Section 2 of the Second Schedule of the New Zealand Act, and – where opted into by the parties – will give the arbitral tribunal and the Supreme Court the power to consolidate arbitral proceedings in international arbitrations under the Act, subject to the conditions set out in the Section.
150. This is a very difficult area of arbitration law, and the Paragraph is accordingly highly technical. It is designed to give parties who genuinely wish to avoid multiplicity of proceedings, and to allow consolidation of their arbitrations, a real chance of achieving that aim. It will fall to arbitral tribunals, and to our Courts, to interpret the provision in a manner which achieves that aim.
151. Section 2(8) of the Second Schedule of the New Zealand Act is not being enacted, as the normal regime under Section 42 of the Act (automatic right of appeal to the Privy Council) will apply.

First Schedule Paragraph 4 “Joinder”

152. This Paragraph is not derived from the Second Schedule of the New Zealand Act, but is modelled on article 22.1(h) of the LCIA Rules. It is a simple provision which gives the Supreme Court power to join third parties into arbitral proceedings under the Act where (a) those third parties, and (b) at least one party to the arbitration, consent to that joinder.
153. This Paragraph may well be of particular importance in the context of disputes under the constitution of a GBL company as it would potentially allow all shareholders in the company, and/or any interested third party who consents to arbitrate the dispute, to participate in the proceedings.

Second Schedule – “Model Arbitration Section for GBL companies”

154. The purpose of this Schedule is to provide existing and future GBL companies a simple and ready-made mechanism to incorporate arbitration agreements into their constitution. That mechanism consists in the adoption of a unanimous resolution of shareholders in the form set out in Paragraph 1 of the Schedule. This will have the effect set out in Paragraph 2 of the Schedule. Future shareholders of the company will then be bound by the arbitration clause (along with all other provisions of the constitution) upon their taking up shares in the company, in accordance with general company law principles.

Third Schedule – “Table of corresponding provisions between the Act and of the Model Law”

155. This Schedule sets out the corresponding provisions of the Act and of the Model Law, and is meant to assist international users in identifying where particular Articles of the Model Law have been incorporated in the Act.

D. Ongoing Process of Review

156. In the course of the Second Reading of the Bill, the Honourable Minister of Finance stated that the International Arbitration Act would be monitored over the years, in order to detect any problems – or possibilities for improvement – in the legislation, with a view to corresponding amendments being implemented from time to time.
157. In order to facilitate this process, a specific e-mail address will be set up and publicised for users of the Act, academics, and other interested parties to provide comments and suggestions on the legislation to the Mauritius State Law Office.