

- (ii) the arbitral tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or
    - (iii) the interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the country in which the arbitration takes place or under the law of which that interim measure was granted; or
  - (b) if the court finds that —
    - (i) the interim measure is incompatible with the powers conferred upon the court unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or
    - (ii) any of the grounds set forth in section 60 (1) (b) (i) or (ii), apply to the recognition and enforcement of the interim measure.
- (2) Any determination made by the court on any ground in sub-section (1) shall be effective only for the purposes of the application to recognise and enforce the interim measure.
- (3) The court shall not undertake a review of the substance of the interim measure when making a determination under sub-section (2).

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

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

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

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

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

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

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

**34 Representation in arbitral proceedings**

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

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

**35 Determination of rules of procedure**

- (1) Subject to this Act, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.
- (2) Failing such agreement, the arbitral tribunal may, subject to this Act, conduct the arbitration in such manner as it considers appropriate.
- (3) The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

**36 Place of arbitration**

- (1) The parties are free to agree on the place of arbitration.
- (2) Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.
- (3) Notwithstanding the provisions of sub-section (1), the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

**37 Commencement of arbitral proceedings**

- (1) Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent but before the expiration of five years from the date on which the cause of action accrued.
- (2) In computing the said period, the period of any previous arbitral proceedings arising from the same arbitration agreement and concerning the same dispute or disputes under that agreement, in respect of which an award has been set aside under this Act, shall be disregarded.

**38 Language**

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

**39 Statements of claim and defence**

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

**40 Hearings and written proceedings**

- (1) Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials.
- (2) Unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.
- (3) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents.
- (4) All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party.
- (5) Subject to section 42, any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

**41 Default of a party**

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

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

- (b) the respondent fails to communicate his statement of defence in accordance with section 39(1)-(4), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations; or
- (c) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.

## **42 Expert appointed by the arbitral tribunal**

- (1) Unless otherwise agreed by the parties, the arbitral tribunal –
  - (a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;
  - (b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.
- (2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

## **43 Court assistance in taking evidence**

- (1) The arbitral tribunal or a party with the approval of the arbitral tribunal may request from the court assistance in taking evidence.
- (2) The court may execute the request according to its rules on taking evidence.
- (3) For the purposes of sub-sections (1) and (2), the court may —
  - (a) make an order of subpoena to compel the attendance of a witness before an arbitral tribunal to give evidence or produce documents; or
  - (b) order any witness to submit to examination on oath or affirmation before the arbitral tribunal, or before an officer of the court, or any other person for the use of the arbitral tribunal.

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

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

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

## 45 Confidentiality

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

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

### **46 Rules applicable to substance of dispute**

- (1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute.
- (2) Any designation of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of laws rules.
- (3) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.
- (4) The arbitral tribunal shall decide on what is fair and right only if the parties have expressly authorised it to do so.
- (5) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.
- (6) The arbitral tribunal may award any remedy or relief that could have been ordered by the court if the dispute had been the subject of civil proceedings in that court.

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

- (1) If there is more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members.
- (2) Questions on rules of procedure may be decided by a presiding arbitrator, if so authorised by the parties or all members of the arbitral tribunal.

### **48 Settlement**

- (1) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.
- (2) An award on agreed terms shall be made in accordance with the provisions of section 51 and shall state that it is an award.
- (3) An award made under this section has the same status and effect as any other award on the merits of the case.