

INTERNATIONAL ARBITRATION BILL 2017
(BILL NO. 37 OF 2017)

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BILL NO. 37 OF 2017**A BILL**

FOR AN ACT TO MAKE PROVISION FOR THE CONDUCT OF INTERNATIONAL ARBITRATIONS BASED ON THE MODEL LAW ADOPTED BY THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW ON INTERNATIONAL COMMERCIAL ARBITRATION AND TO GIVE EFFECT TO THE NEW YORK CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS AND FOR RELATED MATTERS

ENACTED by the Parliament of the Republic of Fiji—

PART 1—PRELIMINARY*Short title and commencement*

1.—(1) This Act may be cited as the International Arbitration Act 2017.

(2) This Act comes into force on a date or dates appointed by the Attorney-General by notice in the Gazette.

Interpretation

2. In this Act, unless the context otherwise requires—

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

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

“arbitration agreement” means an arbitration agreement defined under section 11; and

“Arbitration Model Law” means the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985 and as amended by the United Nations Commission on International Trade Law on 7 July 2006.

Act to bind the State

3. This Act binds the State.

PART 2—ARBITRATION

Division 1—Preliminary

Scope of application

4.—(1) This Act shall apply to international arbitration commenced on or after the commencement of this Act under an arbitration agreement whenever made.

(2) The provisions of this Act, except sections 12, 14, 31, 32, 33, 53, 54 and 55, shall apply only if the place of arbitration is in the territory of Fiji.

(3) An arbitration is international if—

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) one of the following places is situated outside the State in which the parties have their places of business—

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one State.

(4) For the purposes of subsection (3)—

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;

(b) if a party does not have a place of business, reference is to be made to his or her habitual residence.

(5) This Act shall not affect any other law of Fiji by virtue of which certain disputes shall not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Act.

Interpretation of Part 2

5.—(1) In the interpretation of this Act, reference shall be made to the Arbitration Model Law.

(2) Without affecting the generality of subsection (1), in making reference to the Arbitration Model Law, regard is to be had to the international origin of the Arbitration Model Law and to the need to promote uniformity in its application and the observance of good faith.

(3) Questions concerning matters governed by this Act which are not expressly settled in it are to be settled in conformity with the general principles on which the Arbitration Model Law is based.

(4) Where a provision of this Act, except section 46, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorise a third party, including an institution, to make that determination.

(5) Where a provision of this Act refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement.

(6) Where a provision of this Act, other than in sections 42(a) and 50(2)(a), refers to a claim, it also applies to a counterclaim, and where it refers to a defence, it also applies to a defence to such counterclaim.

Receipt of written communications

6.—(1) Unless otherwise agreed by the parties—

(a) any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his or her place of business, habitual residence or mailing address; if none of these can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last known place of business, habitual residence or mailing address by registered letter or any other means which provides a record of the attempt to deliver it;

(b) the written communication is deemed to have been received on the day it is so delivered.

(2) The provisions of this section do not apply to communications in court proceedings.

Waiver of right to object

7. A party who knows that any provision of this Act from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his or her objection to such non-compliance without undue delay or, if a time limit is provided therefor, within such period of time, shall be deemed to have waived his or her right to object.

Extent of court intervention

8. In matters governed by this Act, no court shall intervene except where so provided in this Act.

Court for certain functions of arbitration assistance and supervision

9. The functions referred to in sections 10(2), 16(3), 16(4), 16(5), 18(3), 19, 22(4), 31, 32, 33, 52, 53 and 54 shall be performed by the High Court of Fiji established under section 100 of the Constitution of the Republic of Fiji.

Application of Limitation Act 1971

10.—(1) The Limitation Act 1971 shall apply to arbitral proceedings as they apply to proceedings before any court and any reference in the Limitation Act 1971 to the commencement of proceedings shall be construed as a reference to the commencement of arbitral proceedings.

(2) The court may order that in computing the time prescribed by the Limitation Act 1971 for the commencement of proceedings (including arbitral proceedings) in respect of a dispute which was the subject matter of—

- (a) an award which the court orders to be set aside or declares to be of no effect; or
- (b) the affected part of an award which the court orders to be set aside in part, or declares to be in part of no effect,

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

(3) For the purposes of the Limitation Act 1971 in determining when a cause of action accrued, any provision that an award is a condition precedent to the bringing of legal proceedings in respect of a matter to which an arbitration agreement applies shall be disregarded.

*Division 2—Arbitration agreement**Definition and form of arbitration agreement*

11.—(1) “Arbitration agreement” is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing.

(3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

(4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; “electronic communication” means any communication that the

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

(5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

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

Arbitration agreement and substantive claim before court

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

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

(3) If the court refuses to refer the parties to arbitration, any provision of the arbitration agreement that an award is a condition precedent to the bringing of legal proceedings in respect of any matter shall have no effect in relation to those proceedings.

(4) If the court refers the parties to arbitration under subsection (1), it shall make an order staying the legal proceedings in that action.

(5) A decision of the court to refer the parties to arbitration under subsection (1) shall be subject to no appeal.

(6) For any appeal from any decision of a court to refuse to refer the parties to arbitration under subsection (1), leave of the court making that decision shall be required.

(7) A decision of the court to refuse leave under subsection (6) shall be subject to no appeal.

Death, bankruptcy or winding up of party to arbitration agreement

13.—(1) Unless otherwise agreed by the parties, an arbitration shall not be discharged by the death, bankruptcy or winding up of a party, and may be enforced by or against the representatives of that party.

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

Arbitration agreement and interim measures by court

14. It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

*Division 3—Composition of arbitral tribunal**Number of arbitrators*

- 15.—**(1) The parties are free to determine the number of arbitrators.
- (2) Failing such determination, the number of arbitrators shall be 3.

Appointment of arbitrators

16.—(1) No person shall be precluded by reason of his or her nationality from acting as an arbitrator, unless otherwise agreed by the parties.

(2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of subsections (4) and (5).

(3) Failing such agreement—

(a) in an arbitration with 3 arbitrators, each party shall appoint one arbitrator, and the 2 arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within 30 days of receipt of a request to do so from the other party, or if the 2 arbitrators fail to agree on the third arbitrator within 30 days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority;

(b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he or she shall be appointed, upon request of a party, by the court or other authority.

(4) Where, under an appointment procedure agreed upon by the parties—

(a) a party fails to act as required under such procedure; or

(b) the parties, or 2 arbitrators, are unable to reach an agreement expected of them under such procedure; or

(c) a third party, including an institution, fails to perform any function entrusted to it under such procedure,

any party may request the court or other authority to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(5) A decision on a matter entrusted by subsection (3) or (4) to the court or other authority shall be subject to no appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

Grounds for challenge

17.—(1) When a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him or her.

(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his or her impartiality or independence, or if he or she does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him or her, or in whose appointment that party has participated, only for reasons of which he or she becomes aware after the appointment has been made.

Challenge procedure

18.—(1) The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of subsection (3).

(2) Failing such agreement, a party who intends to challenge an arbitrator shall, within 15 days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in section 17(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his or her office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(3) If a challenge under any procedure agreed upon by the parties or under the procedure of subsection (2) is not successful, the challenging party may request, within 30 days after having received notice of the decision rejecting the challenge, the court to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

(4) An arbitrator who is challenged under subsection (2) is entitled to withdraw from his or her office as an arbitrator.

(5) The mandate of a challenged arbitrator terminates in one of the following circumstances—

- (a) the arbitrator withdraws from his or her office;
- (b) the parties agree to the challenge;
- (c) the challenge is upheld according to the parties' agreed procedure or by the arbitral tribunal, and no request is made for the court to decide the challenge; or
- (d) the court, upon request to decide on the challenge, upholds the challenge.

Failure or impossibility to act

19.—(1) If an arbitrator becomes *de jure* or *de facto* unable to perform his or her functions or for other reasons fails to act without undue delay, his or her mandate terminates if he or she withdraws from his or her office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court to decide on the termination of the mandate, which decision shall be subject to no appeal.

(2) If, under this section or section 18(2), an arbitrator withdraws from his or her office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this section or section 17(2).

(3) The mandate of the arbitrator shall terminate on the arbitrator's death.

Appointment of substitute arbitrator

20. Where the mandate of an arbitrator terminates under section 18 or 19 or because of his or her withdrawal from office for any other reason or because of the revocation of his or her mandate by agreement of the parties or in any other case of termination of his or her mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

Liability and immunity

21.—(1) An arbitrator is not liable for anything done or omitted to be done by the arbitrator in good faith in his or her capacity as an arbitrator.

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

(3) The appointing authority, or an arbitral or other institution or person by whom an arbitrator is appointed or nominated, shall not be liable, by reason only of having appointed or nominated him or her, for anything done or omitted by the arbitrator, his or her employees or agents in the discharge or purported discharge of his or her functions as arbitrators.

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

*Division 4—Jurisdiction of arbitral tribunal**Competence of arbitral tribunal to rule on its own jurisdiction*

22.—(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

(2) The power of the arbitral tribunal to rule on its own jurisdiction under subsection (1) includes the power to decide on any of the following issues—

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

(3) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he or she has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

(4) The arbitral tribunal may rule on a plea referred to in subsection (3) either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within 30 days after having received notice of that ruling, the court to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

Division 5—Interim measures and preliminary orders

Subdivision 1—Interim measures

Power of arbitral tribunal to order interim measures

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

(2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to—

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

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

Conditions for granting interim measures

24.—(1) The party requesting an interim measure under section 23(2)(a), (b) and (c) shall satisfy the arbitral tribunal that—

- (a) harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
- (b) there is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

(2) With regard to a request for an interim measure under section 23(2)(d), the requirements in subsection (1)(a) and (b) shall apply only to the extent the arbitral tribunal considers appropriate.

*Subdivision 2—Preliminary orders**Applications for preliminary orders and conditions for granting preliminary orders*

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

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

(3) The conditions defined under section 24 apply to any preliminary order, provided that the harm to be assessed under section 24(1)(a), is the harm likely to result from the order being granted or not.

Specific regime for preliminary orders

26.—(1) Immediately after the arbitral tribunal has made a determination in respect of an application for a preliminary order, the arbitral tribunal shall give notice to all parties of the request for the interim measure, the application for the preliminary order, the preliminary order, if any, and all other communications, including by indicating the content of any oral communication, between any party and the arbitral tribunal in relation thereto.

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

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

(4) A preliminary order shall expire after 20 days from the date on which it was issued by the arbitral tribunal. However, the arbitral tribunal may issue an interim measure adopting or modifying the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.

(5) A preliminary order shall be binding on the parties but shall not be subject to enforcement by a court. Such a preliminary order does not constitute an award.

Subdivision 3—Provisions applicable to interim measures and preliminary orders

Modification, suspension and termination

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

Provision of security

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

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

Disclosure

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

(2) The party applying for a preliminary order shall disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal's determination whether to grant or maintain the order, and such obligation shall continue until the party against whom the order has been requested has had an opportunity to present its case. Thereafter, subsection (1) shall apply.

Costs and damages

30. The party requesting an interim measure or applying for a preliminary order shall be liable for any costs and damages caused by the measure or the order to any party if the arbitral tribunal later determines that, in the circumstances, the measure or the order should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

Subdivision 4—Recognition and enforcement of interim measures

Recognition and enforcement

31.—(1) An interim measure issued by an arbitral tribunal, irrespective of the country in which it was issued, shall be recognised as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the court, subject to the provisions of section 32.

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

(3) The court where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.

Grounds for refusing recognition or enforcement

- 32.—**(1) Recognition or enforcement of an interim measure may be refused only—
- (a) at the request of the party against whom it is invoked if the court is satisfied that—
 - (i) such refusal is warranted on the grounds set forth in section 54(1)(a) (i), (ii), (iii) or (iv); or
 - (ii) the arbitral tribunal’s decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or
 - (iii) the interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the State 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 54(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 subsection (1) shall be effective only for the purposes of the application to recognise and enforce the interim measure. The court where recognition or enforcement is sought shall not, in making that determination, undertake a review of the substance of the interim measure.

*Subdivision 5—Court ordered interim measures**Court ordered interim measures*

33. The court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of Fiji, as it has in relation to proceedings in the court. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration.

*Division 6—Conduct of arbitral proceedings**Equal treatment of parties*

34. The parties shall be treated with equality and each party shall be given a full opportunity of presenting his or her case.

Representation in arbitral proceedings

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

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

Determination of rules of procedure

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

Place of arbitration

37.—(1) The parties are free to agree on the place of arbitration. 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.

(2) Notwithstanding the provisions of subsection (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.

Commencement of arbitral proceedings

38. 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.

Language

39.—(1) The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal.

(2) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

Statements of claim and defence

40.—(1) Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his or her claim, the points at issue and the relief or remedy sought, and the respondent shall state his or her defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements. The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

(2) Unless otherwise agreed by the parties, either party may amend or supplement his or her 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.

Hearings and written proceedings

41.—(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. However, 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.

(2) 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.

(3) All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also, any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

Default of a party

42. Unless otherwise agreed by the parties, if, without showing sufficient cause—

- (a) the claimant fails to communicate his or her statement of claim in accordance with section 40(1), the arbitral tribunal shall terminate the proceedings;
- (b) the respondent fails to communicate his or her statement of defence in accordance with section 40(1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;
- (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.

Expert appointed by arbitral tribunal

43.—(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 or her 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 or her written or oral report, participate in a hearing where the parties have the opportunity to put questions to him or her and to present expert witnesses in order to testify on the points at issue.

Court assistance in taking evidence

44. The arbitral tribunal or a party with the approval of the arbitral tribunal may request from the court assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.

Confidentiality

45.—(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 subsection (1) prevents the publication, disclosure or communication of information referred to in that subsection by a party—

- (a) if the publication, disclosure or communication is made to protect or pursue a legal right or interest of the party; or
- (b) if the publication, disclosure or communication is made to enforce or challenge the award referred to in that subsection, in legal proceedings before a court or other judicial authority in or outside Fiji; or
- (c) if the publication, disclosure or communication is made to any government body, regulatory body, court or tribunal and the party is obliged by law to make the publication, disclosure or communication; or
- (d) if the publication, disclosure or communication is pursuant to an order made by the arbitral tribunal, allowing a party to do so. 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) if the publication, disclosure or communication is made to a professional or any other adviser of any of the parties.

*Division 7—Making of award and termination of proceedings**Rules applicable to substance of dispute*

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

(2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

(3) The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorised it to do so.

(4) 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.

Decision making by panel of arbitrators

47. In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. However, questions of procedure may be decided by a presiding arbitrator, if so authorised by the parties or all members of the arbitral tribunal.

Settlement

48.—(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 49 and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case.

Form and contents of award

49.—(1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.

(2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under section 48.

(3) The award shall state its date and the place of arbitration as determined in accordance with section 37(1). The award shall be deemed to have been made at that place.

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

Termination of proceedings

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

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

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

(3) The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of sections 51 and 52(4).

Correction and interpretation of award; additional award

51.—(1) Within 30 days of receipt of the award, unless another period of time has been agreed upon by the parties—

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

If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within 30 days of receipt of the request. The interpretation shall form part of the award.

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

(3) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within 30 days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within 60 days.

(4) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation or an additional award under subsection (1) or (3).

(5) The provisions of section 49 shall apply to a correction or interpretation of the award or to an additional award.

Division 8—Recourse against award

Application for setting aside as exclusive recourse against arbitral award

52.—(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with subsections (2) and (3).

(2) An arbitral award may be set aside by the court only if—

- (a) the party making the application furnishes proof that—
 - (i) a party to the arbitration agreement referred to in section 11 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the laws of Fiji; or
 - (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his or her case; or

- (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
 - (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act; or
- (b) the court finds that—
- (i) the subject matter of the dispute is not capable of settlement by arbitration under the laws of Fiji; or
 - (ii) the award is in conflict with the public policy of Fiji.

(3) An application for setting aside may not be made after 3 months have elapsed from the date on which the party making that application had received the award or, if a request had been made under section 51, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

Division 9—Recognition and enforcement of awards

Recognition and enforcement

53.—(1) An arbitral award, irrespective of the country in which it was made, shall be recognised as binding and, upon application in writing to the court, shall be enforced subject to the provisions of this section and of section 54.

(2) The party relying on an award or applying for its enforcement shall supply the original award or a copy thereof. If the award is not made in an official language of Fiji, the court may request the party to supply a translation thereof into such language.

Grounds for refusing recognition or enforcement

54.—(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused by the court only—

- (a) at the request of the party against whom it is invoked, if that party furnishes to the court where recognition or enforcement is sought proof that—
 - (i) a party to the arbitration agreement referred to in section 11 was under some incapacity; or the said agreement is not valid under the

law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

- (ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his or her case; or
- (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced; or
- (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- (v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) if the court finds that—

- (i) the subject matter of the dispute is not capable of settlement by arbitration under the laws of Fiji; or
- (ii) the recognition or enforcement of the award would be contrary to the public policy of Fiji.

(2) If an application for setting aside or suspension of an award has been made to a court referred to in subsection (1)(a)(v), the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

Public policy

55.—(1) Without limiting the generality of sections 32(1)(b)(ii), 52(2)(b)(ii) and 54(1)(b)(ii) of this Act, it is declared, for the avoidance of any doubt, that, for the purposes of those sections, an interim measure or award is in conflict with, or is contrary to, the public policy of Fiji if—

- (a) the making of the interim measure or award was induced or affected by fraud or corruption; or
- (b) a breach of the rules of natural justice occurred in connection with the making of the interim measure or award.

PART 3—MISCELLANEOUS

Regulations

56. The Attorney-General may make regulations prescribing matters that are required or permitted by this Act to be prescribed or are necessary or convenient to be prescribed for carrying out or giving effect to this Act.

Consequential amendments

57. The Arbitration Act 1965 is amended after section 1 by inserting the following new section—

“Scope of application

1A. This Act applies to any arbitration where the place of arbitration is Fiji and to the extent that the International Arbitration Act 2017 does not apply.”.

July 2017

INTERNATIONAL ARBITRATION BILL 2017

EXPLANATORY NOTE

(This note is not part of the Bill and is intended only to indicate its general effect)

1.0 BACKGROUND

- 1.1 Investments in Fiji have been maintained at a strong position of approximately 25 per cent of Gross Domestic Product (GDP) over the years. During consultations on the investment policy and legislative review by the ministry responsible for industry and trade in collaboration with the International Finance Corporation, it was recommended that an arbitration law that is more accommodative to foreign investment be introduced.
- 1.2 The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (**'New York Convention'**) is widely considered as the foundational instrument for international arbitration. Fiji acceded to the New York Convention on 27 September 2010.
- 1.3 Fiji's existing Arbitration Act 1965 covers arbitration at a national level. Recognising the need for a better investment climate and to increase regional and international investor confidence, the International Arbitration Bill 2017 (**'Bill'**) has been drafted according to the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law (**'UNCITRAL'**) on 21 June 1985 and as amended by UNCITRAL on 7 July 2006 (**'Arbitration Model Law'**) to have legislation based on international standards on arbitration.
- 1.4 The Bill mirrors the laws in Australia, New Zealand, Singapore and Hong Kong. Hence, the Bill will provide for uniformity in its application and the observance of international best practices. The Bill also recognises the importance of international arbitration as a means of settling international commercial disputes.
- 1.5 It is envisioned that the Bill will contribute directly to economic growth by providing a gateway to increasing regional and international investor confidence, which in turn will lead to greater economic development potential.

- 1.6 Additionally, the Bill will provide an alternative, cost effective and time efficient means of dispute resolution between parties, and is recognised in 157 countries, which include Fiji's major sources of foreign direct investment such as the People's Republic of China, Australia, the United States of America and New Zealand.
- 1.7 By enacting and commencing the Bill, Fiji would have modern legislation on international arbitration, with the potential for Fiji to become a regional hub for international arbitration, while complying with our obligations under the New York Convention.

2.0 CLAUSES

- 2.1 There are 3 Parts and 57 clauses in the Bill.
- 2.2 Clauses 1 to 3 of the Bill provide preliminary provisions. These provisions state the short title and commencement of the legislation, and specify that the legislation will bind the State.
- 2.3 Clauses 4 to 10 of the Bill provide the scope of application. The Bill applies to international arbitration that has commenced on or after the commencement of the legislation under an arbitration agreement. The interpretation of certain provisions must be made with reference to the Arbitration Model Law. A court must not intervene except for certain functions stipulated in the Bill and the arbitral proceedings under the Bill are subject to the Limitation Act 1971.
- 2.4 Clauses 11 to 14 of the Bill deal with arbitration agreements. An arbitration agreement is defined as an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between the parties in respect of a defined legal relationship, whether contractual or not. An arbitration agreement must be in writing and may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
- 2.5 Clauses 15 to 21 of the Bill deal with the composition of an arbitral tribunal. Parties are free to determine the number of arbitrators, agree on the procedure of appointing the arbitrator or arbitrators and agree on a procedure for challenging an arbitrator. An arbitrator must disclose conflicts of interest and will not be liable for any act or omission done in good faith in his or her capacity as an arbitrator.
- 2.6 Clause 22 of the Bill provides that the arbitral tribunal may independently rule on the question of whether it has jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement, without having to resort to the High Court. The competence of the arbitral tribunal to rule on its own jurisdiction (i.e. on the foundation, content and extent of its mandate and power) is subject to the control of the High Court.

- 2.7 Clauses 23 and 24 of the Bill provide for the powers of the arbitral tribunal to order interim measures and lay out the conditions for granting interim measures.
- 2.8 Clauses 25 and 26 of the Bill provide for applications for preliminary orders. A party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order unless agreed by the parties. After the arbitral tribunal makes a determination in respect of an application for a preliminary order, the arbitral tribunal must give an opportunity to any party against whom the preliminary order is directed. The preliminary order is binding on the parties but it does not constitute an award.
- 2.9 Clauses 27 to 30 of the Bill set out the rules applicable to interim measures and preliminary orders.
- 2.10 Clauses 31 and 32 of the Bill provide for the recognition and enforcement of interim measures.
- 2.11 Clause 33 of the Bill provides that the High Court shall have power to issue an interim measure in relation to arbitration proceedings, irrespective of whether the place of arbitration is in Fiji. The existence of an arbitration agreement does not infringe on the powers of the High Court to issue interim measures and a party to such an arbitration agreement is free to approach the High Court with a request to order interim measures.
- 2.12 Clauses 34 to 45 of the Bill provide the legal framework for the fair and effective conduct of arbitral proceedings. Parties will be treated with equality and given a full opportunity to present their case and the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting proceedings, the place of arbitration, date of the arbitral proceedings and language to be used. Failing such agreement, the arbitral tribunal decides for the parties having regard to the circumstances of the case.
- 2.13 Clauses 46 to 51 of the Bill deal with the determination of the rules of law governing the substance of the dispute and the rules on the making of the award.
- 2.14 Clause 52 of the Bill provides for the sole recourse against an arbitral award by way of application to the High Court to set aside the award. The application must be made within 3 months of the receipt of the award and according to the conditions laid out in this clause.
- 2.15 Clauses 53 to 55 of the Bill provide for the recognition and enforcement of the award where the award is recognised as binding irrespective of the country in which it was made. However, recognition or enforcement of an arbitral award may be refused by the High Court if a party furnishes proof of the conditions laid out in this clause and if the High Court finds that the subject matter is not capable of settlement by arbitration under the laws of Fiji or the enforcement of the award would be contrary to public policy.

2.16 Clauses 56 and 57 of the Bill provide for miscellaneous provisions. The Attorney-General is empowered to make regulations necessary for the purpose of this Act. The Arbitration Act 1965 is also being amended as a consequence of the Bill.

3.0 MINISTERIAL RESPONSIBILITY

3.1 The Act comes under the responsibility of the Attorney-General.

A. SAYED-KHAIYUM
Attorney-General