Mr. V Ramaano
Portfolio Committee on Justice
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BY COURIER AND E-MAIL:
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RE: PCA COMMENTS ON SOUTH AFRICA'S INTERNATIONAL ARBITRATION BILL

Dear Mr. Ramaano,

The Permanent Court of Arbitration ("**PCA**") has seen that the Portfolio Committee on Justice and Correctional Services has published South Africa's International Arbitration Bill [B10 – 2017] ("**Bill**") for comments. The PCA offers the below comments for consideration by the Government of the Republic of South Africa and would be grateful if you would convey them to the relevant government bodies.

Reforms contained in the Bill and the promotion of South Africa as an arbitration venue

The PCA recalls that it has a Regional Facilities Agreement in place with South Africa, which functions as a legal framework under which PCA-administered proceedings can be conducted in South Africa on an *ad hoc* basis.

We note that among the objects of the Bill is the object to "facilitate the use of arbitration as a method of resolving international commercial disputes". To this end, the Bill incorporates into South African law the 2006 Revision to the UNICTRAL Model Law on International Commercial Arbitration, as adapted in Schedule I of the Bill ("**Adapted Model Law**"). We also note that the Bill provides for the recognition and enforcement of arbitration agreements and foreign arbitral awards under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, and amends the Protection of Businesses Act 1978 such that it will no longer be applicable to the enforcement of foreign arbitral awards.

The *Memorandum* published with the Bill notes that these reforms are aimed at ensuring that South African arbitration legislation "remains at the forefront of international arbitration best practices", and that South Africa "is an attractive venue for parties around the world to resolve their commercial disputes".

The PCA remains dedicated to promoting South Africa as a venue for PCA-administered proceedings in the region, and thus welcomes the complementary efforts by South Africa to bring its international arbitration legislation in line with current international practice.

Immunity of assistants of arbitrators

We see that Section 9(4)(a) of the Bill excludes liability of "employees" of an arbitrator. However, there may be cases in which the individual serving as secretary to a tribunal is not *employed* by the

arbitrator or by the administering institution. In order to cover such circumstances, the exclusion of liability could be expanded to include "employees *or assistants* of an arbitrator" (suggested additional text shown in italics).

The PCA as appointing authority

Finally, we note with interest that Article 6 of the Adapted Model Law, contained in Schedule I of the Bill, provides that certain courts shall fulfill, *inter alia*, the functions referred to in Articles 11(3) and 11(4) of the Adapted Model Law. These functions relate to making arbitrator appointments in instances where the parties or tribunal members have failed to act as required by the default appointment procedure (Article 11(3)) or as required by the party-agreed appointment procedure (Article 11(4)).[1] While of course the functions set out under those articles may be fulfilled by a court, we submit that the PCA could also perform this role.

In this regard we note that the PCA has considerable experience in fulling these appointment functions (commonly called "acting as an appointing authority"). For example, the Secretary-General of the PCA performs an appointing authority role in the Mauritian International Arbitration Act 2008, as well as in a wide variety of treaties and international instruments. In addition, since 1976 the UNCITRAL Arbitration Rules have entrusted to the Secretary-General of the PCA the role of designating an appointing authority in certain situations under those rules.

The PCA's vast experience in acting as appointing authority, and in designating appointing authorities, makes it able to respond to requests from parties in a timely, efficient fashion. Moreover, the PCA's unique status as an intergovernmental organization, with a broad membership, makes it a neutral arbitral institution, well-positioned to make appointments in international disputes. You can find further information on our website about the PCA's appointing authority services, as well as a sample of the pieces of national legislation and other international instruments in which the PCA is named as appointing authority.[2]

Should the Government of South Africa wish to give further consideration to a possible role for the PCA in respect of the appointing authority functions set out in Articles 11(3) and 11(4) of the Adapted Model Law, we would be happy to answer any questions that you may have.

Yours sincerely,

Jennifer Nettleton-Brom
Legal Counsel

cc: Mr. Andre Stemmet, Legal Counsellor, Embassy of South Africa to the Netherlands
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[1] In respect of Adapted Model Law Article 11(3)(a) we note that there appears to be a small typographical error: "… if a party ***falls*** to appoint the arbitrator within thirty days …" [emphasis added].

[2] *See* https://pca-cpa.org/en/services/appointing-authority/pca-secretary-general-as-appointing-authority/ and https://pca-cpa.org/en/documents/instruments-referring-to-the-pca/.