**SUMMARY OF WRITTEN SUBMISSIONS: BILL**

* Table 1 provides a clause by clause summary of the submissions.
* Table 2 reflects general recommendations.

**TABLE: 1**

**Submissions by clause**

| **CLAUSE/THEME** | **NAME** | **SUBMISSION / RECOMMENDATION** | **DOJCD RESPONSE** |
| --- | --- | --- | --- |
| 1 (Definitions) | Victoria Mxenge Group of Advocates (VM Group) | 1. The definition of arbitration agreement does not specify whether South Africa intends to adopt the definition as set out in option 1 or 2 of Article 7 of the Model Law. If the intention is to adopt the definition detailed in option 2, the additional aspects set out in option 1, such as the nature of the written agreement and whether electronic communication would be acceptable as a written agreement should be incorporated elsewhere in the Bill. It is therefore proposed that the definition of arbitration agreement clearly state that the definition in arbitration in option 1 of Article 7 is adopted and the definition should be reproduced in the Bill.  2. The word “international” should be defined. This will prevent any dispute on whether the guidance provided in Article 1(3) of the Model Law is deemed to be the understanding of “international” for the purposes of the Bill. | VM Group indicated during the public hearings on the Bill that their concern has been addressed in the Bill introduced into Parliament because Option 1 in Article 7 of the Model Law has been adopted in the Bill.  2. VM Group indicated in a presentation during the public hearings on the Bill that their comment in this regard is no longer relevant. |
| 2. Interpretation | VM Group | Clause 2 provides that a word or expression in Chapter 2 of the Act (the chapter on international commercial arbitration) bears the same meaning as it has in the Model Law, unless inconsistent with the context and the Constitution.  It is not clear whether the words “the context” mean the context of the Bill. If this is so it should be stated clearly in order to remove any ambiguity. | This clause is relevant when interpreting Chapter 2 of the Bill, dealing with international arbitration. Therefore the word “context” is used with reference to the context in which the word in question is used in Chapter 2 of the Bill. |
| 4: Exclusion of Arbitration Act 42 of 1965 | Cliffe Dekker Hofmeyr(CDH) | Chapter 3 of the Bill is aimed at regulating the recognition and enforcement of foreign arbitral awards contemplated in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. (the New York Convention). This Convention is not applicable to the recognition and enforcement of arbitration agreements and arbitration awards rendered in South Africa, but such agreements are enforceable by South African courts under the Bill or under the Arbitration Act, 1965. The New York Convention and Chapter 3 should only be made applicable when an arbitration agreement concluded and executed outside of South Africa (a foreign arbitration agreement) or an arbitral award (foreign or non-domestic) not awarded in South Africa is to be recognised and enforced in South Africa.  The reference to South African awards for purposes of recognition and enforcement in South Africa in terms of Chapter 3 will create confusion and is not legally sound. | Regarding clause 4(1): The intention is for South Africa to have separate systems for international and domestic arbitration. The Model Law will not apply to domestic arbitration held in South Africa. Conversely, the Arbitration Act, 1965, (particularly the powers of the court, which differ from those under the Model Law) will not apply to arbitration agreements and awards that are covered by Chapters 2 and 3 of the Bill.  Regarding clause 4(2), Chapter 2, which implements the Model Law and which applies to international commercial arbitration, is intended to be self-contained and therefore has its own definition of matters which are arbitrable in clause 7. The operation of the Arbitration Act is generally excluded by clause 4(1) from the Bill, because the Arbitration Act is intended for domestic arbitration.  Chapter 3 of the Bill deals with the enforcement of arbitration agreements and the recognition and enforcement of foreign arbitral awards under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (NYC). The Republic, when acceding to the NYC in 1976, did not make the commercial reservation referred to in Article I(3) of the NYC. Where a court in the Republic is approached under Chapter 3 of the Bill (i.e. the NYC) to enforce an arbitration agreement or a foreign award relating to a non-commercial dispute, the court is entitled to refuse if the matter is not arbitrable. Section 2 of the Arbitration Act, which deals with matters which are not arbitrable, should therefore apply. Therefore, while the rest of the 1965 Act does not apply to the enforcement of arbitration agreements or foreign awards under the NYC, its definition of matters which are not arbitrable will continue to apply. The main implication is that matters relating to matrimonial causes will continue to be non-arbitrable, pending reform of domestic arbitration law. |
| 4 | VM Group | Insert provisions in the Bill similar to those in section 2 of the Arbitration Act, 1965(Act 42 of 1965), rather than including them by reference. | Clause 4(1) of the Bill excludes the Arbitration Act, 1965(Act 42 of 1965). Where a court is approached to recognise and enforce an arbitration agreement or foreign arbitral award relating to a non-commercial dispute, the court will refuse if the matter is not arbitrable. Section 2 of the Arbitration Act excludes from arbitration matters which are not arbitrable. Section 2 provides as follows:  “**2.   Matters not subject to arbitration.**—A reference to arbitration shall not be permissible in respect of—  (*a*) any matrimonial cause or any matter incidental to any such cause; or  (*b*) any matter relating to status.  Clause 7 of the Bill contains matters that are arbitrable while section 2 of the Arbitration Act contains matters that are not arbitrable, and clause 4(1) makes this section applicable under the Bill. The submission is` not supported. |
| 5: Act binds public bodies | 1. CDH  2. Chartered Institute of Arbitrators(CIArb) | Because the Bill is intended to regulate only international commercial arbitration, it is suggested that the words “international commercial” be inserted in clause 5 as follows: This Act, subject to the provisions of section 13 of Promotion and Protection of Investment Act, 2015 (Act No. 22 of 2015), binds public bodies and applies to any international commercial arbitration in terms of an arbitration agreement to which a public body is a party. This will eliminate any interpretation problems. | The Department has no objection to the proposal. |
| 7: Matters subject to international commercial arbitration | CDH | There is a concern that this clause may result in international commercial disputes, which are otherwise arbitrable in accordance with the laws of another State, based on the choice of law provisions contained in such contract, being precluded from arbitration in South Africa for being contrary to South African law or public policy. When South Africa is merely the seat of arbitration from a procedural perspective, an arbitration of a dispute based on the substantive law of another State should not be barred from arbitration in South Africa.  CDH argues that if the intention of the Bill, as set out in clause 3(a) is “to facilitate the use of arbitration as a method of resolving international commercial disputes” in South Africa, the “arbitrability” clause 7 for international commercial disputes should be made less restrictive to ensure that arbitration based on the substantive law of another State should not be barred in South Africa. See for instance the approach adopted in Singapore and Mauritius.   |  | | --- | | The following example is given by CDH, where a dispute involves competition and antitrust claims with the governing law of the contract being, say New York Law. In South Africa competition law matters may in principle not be arbitrable, but in New York law and US Federal Law such dispute would be arbitrable. The US Supreme court has held that "*federal antitrust claims were arbitrable, provided that they arose from an international transaction.*" In that event, where the substantive law regulating the dispute (i.e. example of New York Law) by contract permits such arbitrations, the clause may result in the matter not being arbitrable in South Africa, despite South Africa only being the "procedural seat" for such arbitration. | | The relevance of South African substantive law will depend on the particular circumstances. If the subject matter of the dispute has no connection with South Africa, apart from the parties’ choice of South Africa as the seat, and the parties, for instance choose US Federal law and the law of the state of New York to govern their contract, South African competition law, for example, can have no possible relevance to the dispute. On the other hand, if the dispute does have a real connection with South Africa, the parties cannot contract out of SA competition law by choosing a foreign system of law to govern their contract. The proposed test in section 7 was chosen after a careful review of the tests used in foreign jurisdictions. Like its Singapore counterpart, the International Arbitration Act 23 of 1994 (as amended) section 11(1), clause 7(1)(b) of the IAB prohibits arbitration under an arbitration agreement which is contrary to public policy. The fact that the dispute, for example, raises aspects of US anti-trust law (competition law) would not by itself make it contrary to public policy to arbitrate the dispute in South Africa. However, were the arbitral tribunal to be asked to award treble damages under US anti-trust law against one of the parties to the arbitration, that part of the award could well be set aside in South Africa or at least not be enforced, by reasons of public policy.[[1]](#footnote-1) |
| 7(1)(a) | VM Group | VM Group raises the question whether clause 7(1)(a) is intended to refer to a dispute that is excluded by a specific law from being subject to arbitration, or that the subject matter/dispute is inherently not capable of resolution by arbitration. | The clause provides that any international commercial dispute which the parties have agreed to submit to arbitration under an arbitration agreement and which relates to a matter which the parties are entitled to dispose of by agreement may be determined by arbitration, unless—  *(a)* such a dispute is not capable of determination by arbitration under any law of the Republic.  This refers to the situation where arbitration is excluded by a specific law. Restrictions on arbitrability of matters under the common law, for example regarding criminal liability, cannot be settled by agreement and an arbitration agreement purporting to deal with criminal liability is in any event contrary to public policy. Matters inherently not capable of arbitration are therefore covered by the other provisions of clause 7. |
| 7(1)(b) | VM Group | 1. VM Group suggests that “public policy of the Republic” in clause 7(1)(b) should be defined.  2. It appears as if the clause seeks to exclude certain transactions from the ambit of international commercial dispute. The intended exclusions must be outlined on an open-list basis. Guidance can be found in Article 1 of the Model Law. | 1.1 It would be very difficult to define “public policy”. The question whether or not an arbitration agreement is contrary to public policy is best left to the courts to decide against the Constitution and the circumstances of every case.  1.2 Further submissions on the issue of “public policy” from Adv LG Nkosi-Thomas, SC, on behalf China-Africa Joint Arbitration Centre (CAJAC) and the Arbitration Foundation of Southern Africa (AFSA) provide additional useful insights. They argue that it is not necessary to define “public policy”. They refer in this regard to the following excerpt from the judgment of Chief Justice Ngcobo in the matter of Barkhuizen v Napier in the Constitutional Court:  “What is public policy is …. must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable.”.  Adv Nkosi-Thomas goes on to say that “this construction of public policy serves to ensure that the moral code of South African people, as it exists from time to time, is given effect to in the recognition and enforcement of arbitration agreements and foreign arbitral awards. Given the clear constitutional jurisprudence in place as regards the meaning to be ascribed to the words ‘public policy in the Republic’, very little purpose will be served, in our respectful submission, by the inclusion of a definition of the words ‘public policy of the Republic’, as they occur in various parts of the Bill.”.  2. Article 1 of the Model Law does not deal with arbitrability (see article 1(5)), but in article 1(1) it does restrict the application of the Model Law to international commercial Arbitration. (This does not necessarily mean that non-commercial disputes are not arbitrable, but merely that they are not subject to the Model Law). The Model Law does not define “commercial”. UNCITRAL provided guidance by way of a footnote regarding relationships of a commercial nature. This footnote of UNCTIRAL, which is not included in the Bill, indicates that the term “commercial” should be widely interpreted. However, State-to-State disputes of a non-commercial nature are excluded. Sufficient guidance on the term “commercial” is available by referring to the material to which an arbitral tribunal or a court may refer in interpreting Chapter 2 of the Bill and Model Law, namely the relevant reports of UNCITRAL and its secretariat. See clause 8 of the Bill which deals with the interpretation of the Model Law.  Clause 7 is intended to identify disputes that are not arbitrable. Clause 7 is not intended to identify transactions falling outside the terms “international” and “commercial”. In **Lufuno Mphaphuli & Associates Pty Ltd vs Andrews** 2009(4)529 CC, the Constitutional Court did not foresee any difficulty in determining when an arbitration agreement was contrary to public policy in the light of the Constitution on a case by case basis. An arbitration agreement dealing with a non-commercial dispute, even if the parties are from different countries will be subject to the Arbitration Act, 1965, and will be subject to the restrictions on arbitrability in section 2 of that Act. |
| 7(2) | The Maritime Law Association of Southern Africa (MLA) | Bills of lading are evidence of a contract of carriage between, initially, the carrier and the shipper and subsequently the carrier and the consignee or holder. Most ocean carriage is carried out by shipping lines that are foreign to South Africa. As a result most bills of lading provide for disputes under the bills of lading to be referred to a foreign court or arbitration tribunal. Most disputes are referred to London for arbitration. The effect of this is that South African cargo interests and their insurers would, in the normal course, be compelled, in the event of a claim under a bill of lading, to pursue that claim against a foreign ship owner in a foreign court. For a South African cargo owner and insurer this can be prohibitively expensive to the point of depriving them from pursuing an otherwise valid claim under a bill of lading. This situation is worsened by the fact that the South African consignee or holder of a bill of lading for cargo discharged in South Africa is not responsible for negotiating the terms of the bill of lading contract and has no choice where disputes are heard because the bill of lading contract is concluded by the shipper of the cargo in a foreign country with the foreign shipping line. The South African importer has the choice of law and jurisdiction forced on him or her.  In order to address this situation and recognizing the injustice to South African interests section 3 was included in the Carriage of Goods by Sea Act, 1986 (COGSA) which reads as follows:  “**Jurisdiction of courts**  **3.** (1)  Notwithstanding any purported ouster of jurisdiction, exclusive jurisdiction clause or agreement to refer any dispute to arbitration, and notwithstanding the provisions of the Arbitration Act, 1965 ([Act No. 42 of 1965](http://dojcdnoc-ln1/nxt/gateway.dll/jilc/kilc/c0pg/t8pg/u8pg#g0)), and of [section 7 (1) (*b*)](http://dojcdnoc-ln1/nxt/gateway.dll/jilc/kilc/c0pg/g3pg/h3pg/92yg#g3) of the Admiralty Jurisdiction Regulation Act, 1983 ([Act No. 105 of 1983](http://dojcdnoc-ln1/nxt/gateway.dll/jilc/kilc/c0pg/g3pg/h3pg#g0)), any person carrying on business in the Republic and the consignee under, or holder of, any bill of lading, waybill or like document for the carriage of goods to a destination in the Republic or to any port in the Republic, whether for final discharge or for discharge or for discharge for further carriage, may bring any action relating to the carriage of the said goods or any such bill of lading, waybill or document in a competent court in the Republic.  (2) The provisions of [subsection (1)](http://dojcdnoc-ln1/nxt/gateway.dll/jilc/kilc/egqg/ihqg/jhqg/sf6g?f=templates$fn=document-frame.htm$3.0$q=$x=$nc=6610#g1) of this section shall not apply to arbitration proceedings to be held in the Republic which are subject to the provisions of the Arbitration Act, 1965.”.  This provision ensures that South African businesses or parties who have cargo discharged in South Africa can turn to the South African courts to resolve any disputes under bills of lading. This is apparently in line with practice in many countries where domestic courts are given jurisdiction to hear domestic disputes by domestic plaintiffs.  According to the MLA, clause 7(2) of the Bill, as it is currently worded, removes the protection afforded by section 3 of COGSA and effectively deprives South African claimants and their insurers of their right to access to courts, in conflict with section 34 of the Constitution. In other words, it overrides the protection provided by the said section 3.  The Bill also creates an anomaly that a South African cargo owners can proceed in a South African court where a bill of lading refers disputes to a foreign court but cannot do so if the bill of lading refers a dispute to a foreign arbitral tribunal.  The MLA therefore proposes that clause 7(2) be amended by the addition of the underlined wording below:  “Arbitration may not be excluded solely on the ground that an enactment confers jurisdiction on a court or other tribunal to determine a matter falling within the terms of an arbitration agreement: Provided this does not apply to disputes falling within the provisions of section 3 of the Carriage of Goods by the Sea Act, 1986 (Act No. 1 of 1986.”.  The MLA submits that such an amendment would ensure that local claimants are not put to the cost and expense of proceeding with domestic claims by way of arbitration against foreign ship owners in foreign arbitration tribunals. | Presenters at the public hearings were invited, should they so wish, to make supplementary submissions. It was also suggested that the MLA should engage with representatives of CAJAC and AFSA on the issue raised by the MLA.  Adv Nkosi-Thomas, on behalf of AFSA and CAJAC, made further submissions on the aspects raised by the MLA with which the Department agrees. The further submissions are to the effect that clause 7(2) is not in conflict with the right to access to courts enshrined in section 34 of the Constitution. In Lufuno Mphaphuli Associates v Andrews the Constitutional Court in 2009 held “that section 34 of the Constitution is not implicated in private arbitration, in that the parties to the arbitration agreement have chosen not to exercise their rights under section 34.”.  The following alternative proposal is suggested, namely a consequential amendment to section 3 of the COGSA:  **“Jurisdiction of courts**  **3.** (1)  Notwithstanding any purported ouster of jurisdiction, exclusive jurisdiction clause or agreement to refer any dispute to arbitration, and notwithstanding the provisions of the Arbitration Act, 1965 ([Act No. 42 of 1965](http://dojcdnoc-ln1/nxt/gateway.dll/jilc/kilc/c0pg/t8pg/u8pg#g0)), ~~and~~ of [section 7 (1) (*b*)](http://dojcdnoc-ln1/nxt/gateway.dll/jilc/kilc/c0pg/g3pg/h3pg/92yg#g3) of the Admiralty Jurisdiction Regulation Act, 1983 ([Act No. 105 of 1983](http://dojcdnoc-ln1/nxt/gateway.dll/jilc/kilc/c0pg/g3pg/h3pg#g0)) and the International Arbitration Act, 2017, any person carrying on business in the Republic and the consignee under, or holder of, any bill of lading, waybill or like document for the carriage of goods to a destination in the Republic or to any port in the Republic, whether for final discharge or for discharge or for discharge for further carriage, may bring any action relating to the carriage of the said goods or any such bill of lading, waybill or document in a competent court in the Republic.  (2) The provisions of [subsection (1)](http://dojcdnoc-ln1/nxt/gateway.dll/jilc/kilc/egqg/ihqg/jhqg/sf6g?f=templates$fn=document-frame.htm$3.0$q=$x=$nc=9036#g1) of this section shall not apply to arbitration proceedings to be held in the Republic which are subject to the provisions of the ~~Arbitration Act, 1965~~ arbitration laws of the Republic.”.  This proposed amendment of section 3 of COGSA is intended to ensure that local claimants are not put to the expense and inconvenience of proceeding with domestic claims by way of arbitration against foreign ship owners in foreign arbitration tribunals.  Because COGSA is administered by the Department of Transport, the proposed amendment was submitted to it for an input. The DOT shares the view of the MLA that the amendment will ensure that local claimants are not put to the expense and inconvenience of proceeding with domestic claims by way of arbitration against foreign ship owners in foreign arbitration tribunals. This proposal is fully in line with the one of the key strategic objectives of the South African Comprehensive Maritime Transport Policy approved by Cabinet that of promoting South Africa as an International Maritime Transport Centre in Africa. |
| 8: Interpretation of the Model Law | Professor Jan Neels | Prof Neels indicates that the Model Law, in Article 28(1), makes provision for a dispute to be decided in accordance with the rules of law as chosen by the parties. However, no detailed rules on choice of law are provided, for instance on partial choice of law, modification of a choice of law, tacit choice of law and the formal validity of a choice of law clause. He is of the view that an arbitral tribunal or court in South Africa may be greatly assisted with guidance from an international instrument such as the “Hague Principles on Choice of Law in International Commercial Contracts”. These Principles were adopted by 80 countries including South Africa. The Principles could be used to interpret, supplement and develop rules of private international law by arbitral tribunals and courts. He therefore suggests that a paragraph be added to clause 8, as indicated below with underlining:  “**Interpretation of Model Law**  **8.** The material to which an arbitral tribunal or a court may refer in interpreting this Chapter and the Model Law includes relevant reports of UNCITRAL and its secretariat. In the interpretation of Article 28(1) and (4) of the Model Law, arbitral tribunal or court may be guided by the Hague Principles on Choice of Law in International Commercial Contracts.”. | Although this was raised in the context of clause 8 of the Bill, which deals with the interpretation of the Model Law in its entirety, the submission seems to relate to, or focus more on, Article 28 of the Model Law, which deals with the rules applicable to the substance of the dispute. The submission suggests that the tribunal may be guided by the “Hague Principles on Choice of Law in International Commercial Contracts” of 2015 when applying “Article 28(1) and (4) of the Model Law”. Article 28(1) requires the tribunal to decide the dispute “in accordance with such rules of law as are chosen by the parties”. Where the parties choose the law of a particular state, in the absence of a contrary indication, this must be construed as a direct reference to the substantive law of that state. This provision gives effect to party autonomy. There seems to be no justification for applying conflict of laws rules or the Hague principles in the context of article 28(1).  Article 28(2) states: “Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.”  The drafters of the Model Law deliberately restricted the tribunal’s discretion, in the first instance, to determining “the applicable conflict of laws rules” as well as to ultimately designating a single system of law. Part of the justification was to encourage arbitrators to give reasons for their decision. In practice, Article 28(2) will only apply in a relatively small proportion of cases, namely where the parties have not chosen the applicable law under Article 28(1) and where the parties have not designated a set of arbitral rules to govern their arbitration. Such rules will typically empower the tribunal to choose the applicable law in the absence of a choice by the parties, and will usually do so in words which differ in effect from those of article 28(2). In that event, in accordance with party autonomy, the provision in the parties’ chosen rules should normally supersede the statutory formula in article 28(2).  It should also be noted that the wording of article 28(4) is mandatory. Irrespective of whether the applicable substantive law has been chosen by the parties or the tribunal, the tribunal must “in all cases” decide in accordance with the terms of the contract and taking into account applicable trade usages. |
| 9(4): Immunity of arbitrators and arbitral institutions | Permanent Court of Arbitration | An individual serving as secretary to a tribunal may not be employed by the arbitrator or by the administering institution. Therefore immunity should be extended to include assistants of an arbitrator. | It was envisaged that an arbitrator could employ a secretary or personal assistant. Since then, the practice has arisen, particularly in the case of a arbitral tribunal of three arbitrators dealing with disputes involving very substantial amounts, for the tribunal to appoint a secretary to the tribunal, who will provide administrative assistance to the tribunal. Where such assistant is appointed for a tribunal of three arbitrators, the appointment would usually be made by the arbitral tribunal rather than by an individual arbitrator. (In all probability this person will not necessarily be an employee of the arbitral tribunal and will not be employed by the relevant arbitral institution.) Hence both the ICC Rules (2017) article 41 and the Singapore International Arbitration Centre Arbitration (SIAC) Rules (2016) extend immunity to “any person appointed by the arbitral tribunal”. It is suggested that clause 9(4)(a) should be amended to read:  “(a) the employees of an arbitrator or persons appointed by the arbitral tribunal; or” … .  This wording will also extend immunity to an expert appointed by the arbitral tribunal under the Model Law (see Schedule 1 article 29). |
| 10(2): Consolidation of proceedings and concurrent hearings | VM Group | Clause 10(1) provides that the parties to an arbitration agreement may agree that arbitral proceedings be consolidated with other arbitral proceedings or that concurrent hearings be held on such terms as may be agreed. Clause 10(2) provides that an arbitral tribunal may not order consolidation of arbitral proceedings or concurrent hearings unless the parties agree thereto.  VM Group proposed that clause 10(2) be replaced to read as follows:  “**10.** (2) (a) The arbitral tribunal may, on application by one or more of the parties to an arbitration or arbitrations, order that more than one arbitrations proceedings be consolidated or that concurrent hearings be conducted.  (b) Factors that may be taken into account by the tribunal upon application in terms of paragraph(a) of subsection (2) will be the following:  (i) substantially the same question of law or fact would arise in such arbitrations;  (ii) consent by the parties to consolidation of proceedings or that concurrent hearings be conducted; and  (iii) prejudice to one or more of the parties.”. | Clause 10(1) supports the principle of party autonomy in that it indicates that consolidation of other artbitral proceedings or concurrent hearings are only possible if the parties so agree. Clause 10(2) confirms that the tribunal only has the power to order consolidation or joint hearings with the agreement of the parties. In this case specified arbitration rules conferring powers on the arbitral tribunal regarding consolidation, joinder and joint hearings will be used. The proposal is not supported because-  (i) it violates the principle of party autonomy;  (ii) it makes no provision for the reconstitution of the arbitral tribunal;  (iii) there could be difficulties in enforcing the award resulting from consolidated arbitration;  (iv) it can be argued that the composition of the tribunal was not in accordance with the agreement of the parties.  (v) the proposal does not make provision for consent of the parties.  It is best for this matter to be left to the parties themselves. |
| 11: Confidentiality of arbitral proceedings | CDH | Clause 11(1) provides that arbitration proceedings to which a public body is a party are held in public unless, for **compelling reasons**, the arbitral tribunal directs otherwise.  CDH submits that, while the need to hold arbitral proceedings to which a public body is a party in public is understood, the down-side of this provision is that parties to international commercial contracts may tend to rather choose other jurisdictions as the seat of arbitration rather than South Africa. They state that the proposed legal requirement that, as a default, all arbitration proceedings involving public bodies must be held in public may be a catalyst for multi-national private corporations contracting with public bodies to insist that South Africa not be the seat for any arbitration so as to avoid sensitive commercial information being ventilated in the public. This could defeat the purpose of South Africa developing a platform for the resolution of international commercial disputes in South Africa.  Therefore, it is proposed that **compelling reasons** be clarified because it would seem to be left to the discretion of the arbitral tribunal. Alternatively, it is proposed that the clause be adapted to provide for arbitration to be held in public only where there is a material public interest in the outcome of the commercial dispute. | Defining “compelling reasons” in the legislation could lead to rigidity and unintended consequences. Whether there are compelling reasons in a matter should be left to the court and arbitral tribunals to apply to the facts of the particular case.  While understanding the need to hold arbitral proceedings to which a public body is a party in public, CDH is concerned that foreign parties contracting with public bodies may be discouraged by the requirement to conduct the arbitral proceedings in public, with the result that they will tend to avoid South Africa as the seat. However, international arbitration rules by no means impose a uniform obligation of confidentiality. The 2017 ICC Arbitration Rules, article 22.3, leave this issue to be determined by the tribunal after discussion with the parties, precisely because the ICC Rules are regularly used in arbitrations involving public bodies. It is therefore certainly not a forgone conclusion that arbitral proceedings at another seat will be confidential.  Where possible, legislation should deal with the principles and leave the courts and arbitrators to work out the detailed application on the particular facts of the case. Arbitration between a public body and an ordinary commercial entity, is still a private arbitration, as explained in the *Lufuno Maphaphuli* case, 2009 4 SA 529 (CC) para 198. The Constitutional Court in *De Lange v Methodist Church* 2016 2 SA 1 (CC) paras 36 and 37 had no difficulty in defining “good cause” through a Constitutional prism for purposes of section 3(2) of the Arbitration Act. It has never been suggested that the phrase “good cause shown” gives the court an unfettered discretion, or requires a statutory definition. This surely also applies to the requirement of compelling reasons. Moseneke DCJ in *De Lange* para 37 moreover equates “good cause shown” with “a truly compelling reason”. In practice, the arbitral tribunal ought to discuss confidentiality and compelling reasons with the parties at an early stage of the proceedings. As both the cases referred to stress, courts should be slow to interfere with decisions taken by the arbitral tribunal, in order to avoid undermining the goals of private arbitration. |
| 15: Determination of juridical seat of arbitration | VM Group | Clause 15 deals with the determination of the juridical seat of arbitration and provides that “an award is deemed to be made at the juridical seat of arbitration determined in accordance with the provisions of articles 20(1) and 31(3) of the Model Law”.  1. VM Group proposes an amendment to clause 15 as follows:  **“Determination of juridical seat of arbitration**  **15.** (a) Subject to Articles 20(2) and 31(3) of the Model Law, the juridical seat of the arbitration shall be in South Africa; or  (b) Upon application by any of the parties the juridical seat of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case.”.  2. VM Group suggests the insertion of a new clause 15A in the Bill, to read as follows:  “Subject to Article 11 of the Model Law –  (a) where only one arbitrator is appointed it shall be a South African arbitrator; and  (b) where more than one arbitrator is appointed one of them shall be a South African.”.  The motivation for this is to ensure that parties do not sidestep South Africans in favour of overseas counterparts. | 1. Chapter 3 of the Bill applies to the enforcement of foreign awards, as defined in clause 14. A foreign award is defined as one made in the territory of a State other than South Africa. The question then arises as to where an award may said to be made. Clause 15 ensures consistency with the Model Law. The award is deemed to be made at its seat and should be stated to have been made there, irrespective of where it is actually signed. This excludes the possibility of a court holding the award to have been made where it was signed, when the award is signed at a place outside the seat. It is submitted that clause 15 should be left unchanged.  2. During its presentation VM Group indicated that it was not insisting that this proposal be legislated. The principle of party autonomy must be borne in mind. |
| 16(1): Recognition and enforcement of arbitration agreements and foreign arbitral awards | VM Group | Clause 16(1) provides that an arbitration agreement and a foreign arbitral award **must** be recognised and enforced in the Republic as required by the Convention.  VM Group suggests that the word **“shall”** should be used rather than **“must”**. | The words “shall” and “must” have the same meaning and indicate something that is mandatory. In the interests of plain language, the use of **“shall”** in legal documents is being discarded in favour of the word **“must”**. |
| Short title | Professor Jan Neels | In order for the title of the Bill to reflect the title of the Model Law, adapt it to International Commercial Arbitration Bill | The long title of the Bill and the objects of the Bill,as set out in clause 3, indicate that the adoption of the Model Law for use in international commercial disputes is only one of the objects of the Bill. This is achieved in Chapter 2, with the title “International Commercial Arbitration”. An equally important object is to give proper effect in South African law to the Republic’s obligations under the New York Convention, which is achieved in Chapter 3 of the Bill. When South Africa acceded to the Convention in 1976, the Republic did not make the commercial reservation. Had it done so, Chapter 3 would have been restricted to international commercial arbitration, and the submission regarding the change of title would have merited support. However, Chapter 3 applies to international arbitration, whether commercial or not. The existing short title therefore correctly reflects the objects of the Bill. |
| Regulations | CDH | The Bill should empower the Minister to make regulations regarding-  (*a*) The development of international arbitration institutions in South Africa;  (*b*) Training and development requirements relevant to international arbitration for the judiciary;  (*c*) In consultation with the Chief Justice of South Africa or such panel nominated by the Chief Justice of South Africa, develop court rules which ensures that the objectives of the Model Law are achieved in order to encourage the further development of international arbitration in South Africa;  (*d*) In consultation with the Chief Justice of South Africa or such panel nominated by the Chief Justice of South Africa, designate one of the High Courts of the South Africa with exclusive jurisdiction to deal with all international arbitration matters;  (*e*) Matters incidental to the promotion of the use of South Africa as a jurisdiction of choice in the field of international arbitration. | Regarding the proposals in paragraphs (a) and (b) in the previous column, for the Minister to make certain regulations, it is important to note that the purpose of the Bill is to regulate international arbitration. Private arbitration is a non-state process. The State should therefore not develop institutions to conduct private arbitrations. The question of judicial training, a highly sensitive subject, should not be regulated through regulations made under arbitration legislation. It is therefore inappropriate to deal with this in the Bill. This would, furthermore, require in-depth consultation with the judiciary.  Regarding the proposal in paragraph (c) in the previous column, for the Chief Justice to make certain rules, it should be pointed out that section 6 of the Rules Board for Courts of Law Act vests the power to make or amend rules for the High Court in the Rules Board. (This is confirmed by section 30 of the Superior Courts Act). Section 6(2)(a) of the Rules Board for Courts of Law Act provides that “different rules may be made in respect of the Supreme Court of Appeal, High Court of South Africa and the Lower Courts and in respect of different kinds of proceedings.” The power to make special rules for proceedings in the High Court relating to arbitration appears to exist already.    Regarding the proposal in paragraph (d) of the previous column, for Chief Justice or panel to designate one of the Divisions of the High Court with exclusive jurisdiction to deal with all international arbitration matters, the is not supported as it is in conflict with Schedule 1 of the Bill, article 6, where the division of the High Court with jurisdiction in a particular matter is clearly identified. |

**TABLE: 2**

**General comments**

| **CLAUSE/THEME** | **NAME** | **SUBMISSION / RECOMMENDATION** | **DOJCD RESPONSE** |
| --- | --- | --- | --- |
|  | 1. The Arbitration Foundation of Southern Africa (AFSA)  2. SASOL | 1. Bill matches international best standards.  2. The enactment of Bill will -  (a) make South Africa an attractive destination for the resolution of cross-border disputes;  (b) have a significant impact in enhancing trade and investment in South Africa. | Noted  Noted |
|  | China Africa Joint Arbitration Centre (CAJAC) | There is a pressing need for international arbitration legislation in order to bring South Africa into line with other Model Law jurisdictions, thereby enhancing South Africa as an international arbitration destination. The Bill is supported. | Noted |
|  | SASOL | Bill will promote South Africa as a venue of choice during contract negotiations. | Noted |
|  | CIArb | Bill is supported | Noted |

1. *Jones v Krok* (1996 (1) SA 504 (T) 515H-516E. [↑](#footnote-ref-1)