THE CAYMAN ISLANDS
LAW REFORM COMMISSION

REVIEW OF THE ARBITRATION LAW OF THE CAYMAN ISLANDS

Final Report

4th January, 2012

The Cayman Islands Law Reform Commission

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CONTENTS

ACKNOWLEDGEMENTS

The Law Reform Commission extends thanks to all stakeholders and the general public for the invaluable contribution which facilitated the conclusion of this Final Report on the review of the arbitration regime in the Cayman Islands.

EXECUTIVE SUMMARY

The Law Reform Commission published a Consultation Paper entitled "the Review of the Arbitration Laws of the Cayman Islands"[1] in order to seek views on the reform of the law of arbitration in the Cayman Islands. The Consultation Paper was later supported by a draft Arbitration Bill, 2010 and a revised draft Arbitration Bill, 2011.

Both the Consultation Paper and respective Bills sought to give accord to our recommendation that a unitary regime of arbitration should be created on the basis of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law") for all types of arbitration in the Cayman Islands, thereby abolishing the distinction between domestic and international arbitrations.

The general purpose of the reform is to modernise the Arbitration Law (2001 Revision) of the Cayman Islands and to make it more user-friendly. The critical element of the modernisation relates to ensuring that the Bill provides for party autonomy in the arbitration process while limiting judicial intervention.

Given the general awareness of the Model Law by arbitration practitioners from civil law as well as common law jurisdictions, it was felt that a law formulated along the lines of the Model Law would allow these Islands to become a jurisdiction in which arbitration practitioners can operate in a regime which accords with widely accepted international arbitration practices and development.

It is further anticipated that with the reform of the legislative regime, the Cayman Islands would be seen as a jurisdiction which business parties would choose as the seat to conduct arbitral proceedings, thereby generally promoting Cayman as a regional centre for legal services and dispute resolution.

Accordingly, the final draft Arbitration Bill, 2012 adopts for the most part the structure and formulation of the Model Law as its framework. The draft Bill is also informed by the legislative provisions of other jurisdictions in which the conduct of arbitral proceedings is prominent.

The Bill contains provisions dealing with the formation of an arbitration agreement, the power of the court to stay legal proceedings in order to facilitate an arbitration agreement, the commencement of arbitration proceedings, the composition of an arbitral tribunal, the jurisdiction of the arbitral tribunal, the conduct of arbitral proceedings, interim measures, power of the arbitral tribunal to order interim measures, making of the arbitral award, power of the court in relation to an award and enforcement of awards.

[1] 11th May, 2009.

INTRODUCTION

1. The Law Reform Commission agreed to place the review of arbitration on its law reform agenda pursuant to a referral from the Attorney General in January 2009.

2. The objectives of the review were threefold:

(i) to determine whether a single regime of arbitration should be formulated on the basis of the UNCITRAL Model Law on International Commercial Arbitration[2] ("Model Law") for all types of arbitration;

(ii) to ensure that the law on arbitration is responsive to the issues surrounding the resolution of domestic and transnational commercial disputes by enabling the business community and arbitration practitioners to operate in a regime which is consistent with acceptable international arbitration practices and developments; and

(iii) to consider whether any steps can be taken to promote the Cayman Islands as a jurisdiction of choice for international arbitration.

3. This review was prompted by the fact that the financial services industry does not generate any international arbitration business which is actually conducted in the Cayman Islands. Rather, the majority of the civil litigation concerning the financial services industry is dealt with in the Grand Court. While this state of affairs has never been a source of complaint, it is widely believed that the outmoded Arbitration Law of the Cayman Islands is a deterrent to arbitration business. The goal therefore was to introduce proposals for the reform of a legislative regime which, having regard to the interconnected global village in which we function, should out of necessity assume an international context.

RESEARCH AND CONSULTATION PROCESS

4. The Law Reform Commission (LRC) commenced its research by examining the arbitration concept and the thinking behind the increasing recognition of arbitration as an important method of resolving commercial and other disputes. The objects of a modern arbitration statute were also explored. In informing our research we examined the following legislation-

- Cayman Arbitration Law (2001 Revision);
- the UNCITRAL Model Law on International Commercial Arbitration;
- the United Kingdom Arbitration Act, 1996;

[2] UNCITRAL Model Law on International Commercial Arbitration (United Nations documents A/40/17, annex I and A/61/17, annex I) (As 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).

- the Bermuda Arbitration Act 1986 and the International Conciliation and Arbitration Act 1993;
- the Singapore Arbitration Act, 2001 and the International Arbitration Act, 1994;
- the Hong Kong Arbitration Ordinance, 1997 CAP 341;
- the Bahamas Arbitration Act, 2009[3]; and
- the Arbitration (Scotland) Act, 2010.

5. The research findings of the LRC were relied upon in the formulation of a draft discussion paper entitled "the Review of the Arbitration Laws of the Cayman Islands"[4]. This paper was forwarded to the following stakeholders for consultation:

- the Hon. Attorney General;
- the Hon. Chief Justice;
- Cayman Islands Law Society;
- Cayman Islands Bar Association;
- Cayman Islands Society of Professional Accountants;
- Society of Trust & Estate Practitioners;
- Cayman Islands Chamber of Commerce;
- Cayman Islands Bankers' Association;
- Cayman Islands Compliance Association;
- Cayman Islands Financial Services Association.

Discussion of Arbitration Concept:

6. The paper defined arbitration as a mechanism of binding dispute resolution which is the equivalent of litigation in the courts. At the same time however, it is distinct from the various forms of non-binding dispute resolution techniques, such as negotiation or mediation.[5] It entails resolving disputes outside the courts in accordance with procedures, structures and substantive legal or non-legal standards chosen by the parties.[6]

7. It was pointed out that an arbitration may be classed as international if the parties to the arbitration are domiciled in different countries and the dispute originated in a foreign state. Additionally, an arbitration is deemed to be international if the subject matter of the dispute involves a state other than the state of which the parties are nationals.

8. In contrast, it was indicated that a domestic classification of an arbitration may arise where the claims by individuals are made locally in the state in which the action originated. Further, we noted that it is not unusual for arbitrations to be classified as ad

[3] Both the Bahamas and Scotland Acts informed our final proposals but were not examined during the form formulation of the discussion paper.
[4] 11th May, 2009.
[5] Arbitration - Law.com Dictionary.
[6] Julian D.M. Lew, *et al*, Comparative International Commercial Arbitration 1 (Kluwer Law International, 2003).

hoc in circumstances where the parties, when agreeing to submit their dispute for arbitration, do not stipulate procedural rules of any particular arbitration body to govern the conduct of their arbitration.[7]

9. The arbitration mechanism commences with the referral by the parties of a dispute to one or more persons sitting on an arbitral panel (the "arbitrators" or "arbiters"), by whose decision (the "award") they agree to be bound. Arbitrators do not have adjudicatory power over individuals or institutions if the individuals or institutions do not submit themselves to the jurisdiction of the tribunal.[8]

10. It was noted that the critical aspect of arbitration is that it is based on an agreement between parties to conduct proceedings outside of the publicity and formality of the courts of law[9] and such agreement cannot come into existence unless the parties contractually undertake to pursue its creation. The result is that an arbitration agreement becomes the primary source of the rights, powers and duties of the arbitral tribunal.[10]

11. Among the potential advantages[11] that may emerge from engaging in arbitration proceedings are the flexibility of the arbitration procedure, privacy of arbitration proceedings, opportunity to determine choice of arbitrator, finality of arbitration proceedings, opportunity to identify a neutral forum to conduct the proceedings, efficiency in the conduct of the proceedings and cost effectiveness.

12. Theoretically[12], the arbitration process has several cost advantages over the litigation process. These are as follows:

(a) depending on the size of the claim, expertise of the arbitrator, and expenses, the costs for the arbitration process are limited to the fee of the arbitrator and attorney fees whereas the costs for litigation include attorney fees and court costs, which can be very high;
(b) the arbitration process permits less discovery than litigation and gives rise to fewer discovery disputes and motions;
(c) the arbitration process eliminates almost all pre-trial motions to dismiss and for summary judgment;
(d) the arbitration process eliminates detailed pre-trial orders and moves promptly towards a final evidentiary hearing;
(e) the arbitration process permits evidence to be presented in a simpler, less technical manner; and

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[7] Rajah & Tann, Arbitration as a Method of Dispute Resolution, November 2004 p.1.
[8] National Law, Rules & Procedure: The Assistance of the National Courts in International Commercial Arbitration – The Singapore Experience, 13th February, 2004 By: Mr. Leslie Chew SC M/s Khattar Wong & Partners Singapore p. 3.
[9] *Ibid.*
[10] Michael Mustill, 'The New Lex Mercatoria: The First Twenty-Five Years' (1988) 4 *Arbitration International* 86.
[11] Rajah & Tann, Arbitration as a Method of Dispute Resolution, supra at p.1.
[12] Mitchell L. Marinello, Protecting The Cost Advantages Of Arbitration, 2008.

(f) the arbitration process acts as a final ruling, with very limited bases for appeal.

13. Over time arbitration practices have evolved to enhance their conduct by removing procedural barriers in the way of parties proceeding to arbitration or to prevent excessive intrusion by national laws and courts. In the process, the principle of party autonomy has been firmly entrenched in arbitration proceedings and is described as the benchmark for international arbitration law worldwide.[13] This principle has facilitated the increased prominence of arbitration practices, particularly in the context of disputes involving international commercial transactions.[14]

Issues Identified for Consultation:

14. In the discussion paper stakeholders and the general public were asked to comment in particular on the need for reform of the Cayman Islands Arbitration Law (2001 Revision) (the CIAL) to reflect the aforementioned principles. It was pointed out that modern legislative trends seem to lean towards repealing existing arbitration laws and replacing them with a new law substantially based upon the UNCITRAL Model Law, which would apply to both domestic and international arbitrations.

15. The LRC in giving a background to the CIAL indicated that that Law deals with judicial supervision of domestic arbitration proceedings and the enforcement of domestic arbitration awards. This Law is based on the United Kingdom Arbitration Act, 1950[15] which conferred upon the courts extensive powers to intervene in the conduct of arbitrations, thus providing the losing parties with an opportunity to delay the resolution of disputes. In this regard, the UK law was thought to be inconsistent with that of other jurisdictions, with the result that the City of London was not viewed as being an attractive venue to conduct arbitration business.

16. This situation was corrected in the UK Arbitration Act 1979 by the introduction of fundamental and far-reaching changes in the power of the courts to intervene in and control arbitral awards. Later, the UK Arbitration Act 1996[16] repealed all statutes governing the law of arbitration, consolidated earlier enactments, codified the principles established by English case law and incorporated the provisions of the UNCITRAL Model Law.[17]

17. However, it was pointed out that the CIAL had not since been amended to reflect the changes adopted by the UK Arbitration Act, 1996. The Law continues to reflect the pre-1979 UK provisions with the result that the Grand Court still has extensive powers to intervene in the arbitration process in a way which was thought to be counter-productive in the UK. Further, the Law facilitates the court's maintenance of a supervisory

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[13] *Ibid.*
[14] *Source: Wikipedia.*
[15] As amended and supplemented by the English Arbitration Acts of 1975 and 1979.
[16] The 1996 Act applies to England, Wales and Northern Ireland.
[17] See later discussion on the UNCITRAL Model Law.

jurisdiction over arbitration matters that originate domestically and where the circumstances require, it provides interim relief in support of the arbitral process.

18. Under the CIAL an arbitrator can be required to "state a case" for the decision of the Grand Court in respect of any question of law arising in the course of an arbitration or in respect of any award.[18] The Grand Court has power to order that any matter referred to arbitration be "remitted" back to the arbitrator for further consideration by him on the grounds that there is some error on the face of the award, the arbitrator has made a mistake, new evidence has become available or that the arbitrator has improperly conducted the reference to arbitration.[19] The Grand Court also has power to set aside an award on these grounds.[20]

19. The Grand Court's supervisory jurisdiction however appears never to have been invoked.[21] The LRC is not aware of any reported case in which the Grand Court has required an arbitrator to "state a case", ordered a reference to be "remitted" or set aside an award.[22] The absence of any such litigation is no doubt a reflection of the fact that only a small handful of arbitrations have been conducted in the Cayman Islands over the past thirty years. The LRC found it difficult to judge whether the mere existence of an outdated law has deterred international arbitration business which might otherwise have been conducted in the Cayman Islands.

20. From all indications the court seeks to exercise its jurisdiction in a manner which preserves the integrity and independence of the arbitration process.[23] This core objective is consistent with the principle of allowing the parties to an arbitration dispute to resolve that dispute in accordance with the established arbitration agreement. In fact, in recent times, the court has decided cases in support of the arbitration principle[24] and has maintained its consistency by respecting the autonomy of the parties in circumstances in which there was a valid agreement to refer a dispute to arbitration.[25]

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[18] Arbitration Law, s.17.
[19] Arbitration Law, s.18.
[20] Arbitration Law, s.19.
[21] Law Reform Commissioner, Mr. Andrew Jones, QC arbitrated insurance claims arising out of both Hurricane Lilley and Hurricane Ivan. He is not aware of the Grand Court ever having adjudicated upon a "case stated" or ordered that a reference be remitted or an award to be set aside.
[22] There is a reported case in 1988 in which an application to set aside or remit an arbitral award was struck out on the ground that it disclosed no reasonable cause of action. See *CH Limited –v- F* [1988-89] CILR 516.
[23] Cayman Islands: Recent developments in Arbitration Law, Jeremy Walton and Chris Easdon Appleby– the Arbitration Review of the Americas 2009, *supra*.
[24] *Cayman General Insurance Co. etc v. Divi Hotels and others (Grand Ct) 2003* CILR 363.
[25] Alternative Dispute Resolution ("ADR") in the Cayman Islands, Anna Peccarino, Attorney, Maples and Calder, July 2002, see http://www.adrlawinfo.com/cayman.html.

21. Notwithstanding these cases, the LRC pointed out that over the past thirty years,[26] compared to other established jurisdictions in which arbitration proceedings are prominent, there have been very few domestic or other arbitrations in the Cayman Islands. The LRC believes that arbitration could be a useful tool in resolving disputes, not only in any of the areas mentioned above, but more particularly in the area of hedge funds. A conservative estimate reveals that more than half of the world's offshore funds are domiciled in the Cayman Islands and there is a large pool of professionals engaged in the industry as administrators, lawyers, auditors, insolvency practitioners and independent directors.

22. The LRC is of the view that one of the main reasons contributing to the lack of growth in the range of arbitrations dealt with in the Cayman Islands, including those relating to the hedge fund industry, is that the CIAL is perceived to provide a discredited model likely to have been unacceptable to those foreign investors and investment managers who have contemplated the possibility of conducting arbitral proceedings in the Cayman Islands. Local professionals have tended not to promote arbitration, no doubt partly because their clients are comfortable using the court system and partly because they are reluctant to promote an arbitration regime which is inconsistent with modern legislative trends.

23. Reform of the CIAL is a necessary pre-condition to the growth of international arbitration business.[27] With the establishment of a legislative framework which minimises the scope for judicial intervention in the arbitral process, the jurisdiction is likely to attract arbitration work arising out of the hedge fund industry, possibly attract some insurance arbitration, in addition to the purely domestic matters that may arise in ordinary business relations and natural disasters.[28]

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[26] Former Law Reform Commissioner, Mr. Andrew Jones, QC indicated that he has conducted international arbitrations under the American Arbitration Rules during the past 25 years but none of them have involved actual hearings in the Cayman Islands. During this time he has conducted international arbitrations in writing and conducted an arbitration with oral hearings outside the jurisdiction, but none of these cases have involved any local parties or law firm.

[27] Cayman Islands: Recent developments in Arbitration Law, Jeremy Walton and Chris Easdon Appleby – the Arbitration Review of the Americas 2009, *supra*- stakeholder practitioners seem to share the same thoughts as the Commission by underscoring the need to build upon the existing arbitration regime and in so doing putting in place a comprehensive and modern legislative framework to respond to issues arising from developments in arbitration proceedings. Practitioners have alluded to the fact that reforms are more pertinent against the background of the current global financial crisis. The circumstances indicate that investors and creditors are losing confidence in finance mangers and as a recovery mechanism; proceedings are likely to be initiated concerning Cayman domiciled funds.

[28] In our research we noted that Singapore has emerged as an arbitration authority by virtue the establishment of the Singapore International Arbitration Centre (SIAC) established in 1991 and the enactment of the International Arbitration Act, 1994 (IAR). This Act incorporates the UNCITRAL Model Law on Commercial Arbitration. In order to attract the conduct of arbitration proceedings in Singapore, the SIAC has ensured that the facilities it offers, and the fees it charges remain competitive in comparison with other major arbitration centres. It has also formulated a comprehensive set of rules governing international arbitrations, with the emphasis always on upholding party autonomy while preserving the integrity of the arbitral process by continually seeking to improve the transparency and efficiency.

24. The LRC in its paper proposed for consideration the adoption of the UNCITRAL Model Law as the foundation upon which a unitary regime for arbitration law may be established in the Cayman Islands. Under such a proposal there would be no distinction between domestic and international arbitrations. It was argued that the UNCITRAL Model Law provides a sound framework within which arbitrations can be conducted and that the general philosophy behind the Model Law of giving more autonomy to the arbitrator is one which is more likely to appeal to practitioners and parties. As the Model Law is familiar to practitioners from civil law as well as common law jurisdictions, this would have the added benefit of enabling the Cayman business community and arbitration practitioners to operate in an arbitration regime which accords with widely accepted international arbitration practices and developments.

25. The LRC also recommended that the legislative proposals should be informed by several other legislative models that have adopted the UNCITRAL Model Law as the foundation for the formulation of their laws. These include the laws of the United Kingdom, Singapore, Bermuda and Hong Kong, among others.[29] The arbitration regime in these jurisdictions reflects a modern approach from both a legislative and jurisprudential perspective to dealing with arbitration proceedings from which the Cayman Islands can benefit.

26. It was further pointed out that it is useful for any country attempting to establish itself as a venue for international arbitration to have in place an immigration system which facilitates the free movement of arbitrators, parties, witnesses and advocates. In this regard, it may be desirable to reconsider the laws and procedures relating to the application and grant of temporary work permits for those involved in international arbitration in a way which facilitates freedom of choice. Indeed freedom of choice in respect of legal representation is an essential feature of any successful international arbitration venue. The Cayman Islands has met this need in the context of litigation. Similar or greater flexibility may however be required in respect of arbitration.[30]

27. The paper noted that while other jurisdictions have gone the route of establishing an arbitration centre to facilitate the conduct of arbitral proceedings, it is the belief of the LRC that the establishment of an arbitration centre comprising physical facilities and an administrative staff may require a significant financial investment on the part of Government. It could be argued that any form of Government funding of an arbitration centre may lead to potential interference with the centre's independence and should therefore be avoided. In the final analysis however, there may be no other way to guarantee its existence. Comfort may perhaps be taken in the fact that in the Cayman Islands where the independence of the judiciary is firmly respected, the risks of interference are very minimal. Further, the public interest in providing an orderly and legitimate way to settle disputes will most likely override any adverse policy that would

[29] Our research was later informed by the Bahamas Arbitration Act, 2009 and the Scotland (Arbitration) Act, 2010.

[30] For example, the parties should not be restricted to employing lawyers as advocates and, if they do employ lawyers, they should not be obliged to employ only those who are eligible to be admitted as Cayman Islands attorneys under the Legal Practitioners' Law.

impact the conduct of arbitral proceedings. In any event, much of the funding of an arbitration centre will eventually come from the fees paid by its users with the effect that overtime there will be no reliance on Government.

28. Accordingly, the LRC's view is that the establishment of such a centre is not a necessary pre-condition for the immediate growth of international arbitration business in the Cayman Islands. However, it would be useful to gradually work towards the establishment of such a centre through the encouragement of a joint Government and private investment initiative.

29. At this stage emphasis should be placed on providing the appropriate legislative framework which facilitates the satisfactory conduct of arbitration in these Islands.

Comments on Discussion Paper:

30. The consultation period on the Discussion paper expired on 19th June, 2009 by which time the Commission received responses from the Cayman Islands Bar Association (CBA) and the Cayman Islands Society of Professional Accountants.

31. Offers of assistance in formulating our legislative proposals were received from Ms. Corinne Montineri, Legal Officer at the UNCITRAL Secretariat; Mr. Veeraraghavan Inbavijayan, an Advocate/International Arbitrator based in India; and Dr. David M. Binder, Attorney-at-Law and Arbitration consultant based in Austria.

32. The Cayman Islands Society of Professional Accountants (CISPA) indicated that it had no comment on the Discussion Paper.

33. The Caymanian Bar Association[31] supported the recommendation of the Commission to modernise the Cayman Islands Arbitration Law by using the UNCITRAL Model as the guide. The CBA pointed out that the ultimate objective should be to promote the Cayman Islands as an "effective international arbitration venue" by establishment of an arbitration centre. It however cautioned that to foster a "conflict resolution culture" a broad range of conflict resolution mechanisms in addition to arbitration, such as mediation and conciliation, also need to be supported and encouraged.

34. The CBA believes that adopting this multi-discipline approach may relieve pressure on the Grand Court as well as promote more efficient and effective dispute resolution processes. This in turn, it is viewed, will promote the Cayman Islands as a choice venue for such dispute resolution.

35. Further, the CBA is of the view that a combined law to cover both international and domestic arbitration should be put forward. The CBA also suggests that arbitrators be given similar powers to judges to promote arbitration as a true alternative to the court process. They opine that success would depend on offering a "user-friendly" package of

[31] Letter dated 19th June, 2009

arbitration support structures and services and that a modern Arbitration Law is fundamental to that "package".

36. While the CBA noted that some overseas recruitment may be desired, they recommend that appropriate measures should be adopted, along the lines of Bermuda, to safeguard and protect work and employment for lawyers, accountants and other connected professionals already legally resident in the Islands. A suggestion is made that the definition of "practising law" in the Legal Practitioners Law needs re-visiting. In support of the LRC's view, they recommend that consideration be given to amending the Immigration Regulations to facilitate the free movement of witnesses, arbitrators and counsel connected with arbitration proceedings.

37. Dr. Peter M. Binder[32] stated that while choosing the UNCITRAL Model Law was a good decision, adopting the Model Law should be pursued with caution. Dr. Binder explained that it is important to recognise the real needs of the international investor and business community. He opined that the Discussion Paper failed to address the use of electronic communications and did not include any mention of relevant existing legislation concerned with electronic communication.[33] Like the CBA, he suggested expanding the exercise to also review the legal regime for mediation/conciliation, claiming that these and other methods of alternative dispute resolution have become steadily more popular in the commercial world.

38. The Cayman Islands Law Society forwarded, for our assistance, a draft International and Domestic Arbitration Bill and a supporting paper entitled "Arbitration Law of the Cayman Islands: A comparative Case for Reform". These documents were not forwarded in response to our discussion paper. Rather, the LRC was advised that they are the result of the findings of the Law Society Sub-Committee looking at the reform of the Arbitration Law. The CILS proposals were in line with our own proposals and the articulation of the issues as represented in our discussion paper.

Publication of Arbitration Bills:

39. Based on the comments made by stakeholders on the discussion paper, the LRC proceeded to formulate a draft Arbitration Bill, 2010. This Bill was published and forwarded to the following primary stakeholders for consultation on 18th June, 2010.

- the Hon. Attorney General;
- the Hon. Chief Justice;
- Cayman Islands Law Society;
- Cayman Islands Bar Association;
- Cayman Islands Society of Professional Accountants;
- Society of Trust & Estate Practitioners;
- Cayman Islands Chamber of Commerce;

[32]Letter dated 19th June, 2009

[33] The issue of electronic communications has been addressed in the final draft Arbitration Bill

- Cayman Islands Bankers' Association;
- Cayman Islands Compliance Association;
- Cayman Islands Financial Services Association;
- Dr. David M. Binder;
- Ms. Corinne Montineri; and
- Mr. Veeraraghavan Inbavijayan.

40. The Bill contained provisions dealing with-

(a) the formation of an arbitration agreement;
(b) the power of the court to stay legal proceedings in order to facilitate an arbitration agreement;
(c) the commencement of arbitration proceedings;
(d) the composition of an arbitral tribunal;
(e) the jurisdiction of the arbitral tribunal;
(f) the conduct of arbitral proceedings;
(g) the power of the arbitral tribunal to order interim measures;
(h) making of an arbitral award; and
(i) power of the court in relation to an award.

41. The consultation period expired on 30th July, 2010. By that time we received responses from the Government Legal Department, the Cayman Islands Bar Association (CBA), the Cayman Islands Law Society (CILS) and Mr. Veeraraghavan Inbavijayan.

42. Generally, the responses from all commentators supported the introduction of a modernised Bill. However, the CBA and CILS expressed particular concerns in relation to certain provisions of the Bill. We examined those concerns and offered our responses in Appendix I. Based on the comments we received the LRC revised the 2010 Arbitration Bill in order to include the suggestions with which there was agreement.

43. On 1st April, 2011, a revised Bill was forwarded for general stakeholder consultation and sent directly to the CILS and CBA as the primary concerns came from both the CILS and CBA. The Bill was also sent to the judiciary and the Cayman Islands Association of Mediators and Arbitrators.

44. This third round of consultation expired on 6th May, 2011 but was however extended to facilitate all stakeholders. The LRC subsequently received comments from the CILS, CBA, Justice Peter Creswell[34] and Mr. Hew Dundas, a Chartered Arbitrator based in London. The LRC also met on 1st July, 2011 with the CILS and CBA representatives in order to discuss outstanding issues. The comments of the respective stakeholders and responses of the LRC are also to be found in Appendix I.

[34] Justice Creswell, indicated his willingness to assist the LRC in formulating the Bill and he referred us to the comments of Mr. Hew Dundas for information.

45. The LRC accordingly formulated a final draft of the Arbitration Bill based on the additional comments of all stakeholders.

FINAL DRAFT ARBITRATION BILL, 2012

46. As earlier pointed out, arbitration is increasingly recognised as an important method of resolving domestic and commercial disputes. This can help to assuage the burden on the civil justice system.

47. It is clear that the success of an arbitration regime requires the support of appropriate legislation. The objects of a modern arbitration statute are the fair resolution of disputes by an impartial tribunal without unnecessary delay and expense; party autonomy; balanced powers for the courts; and adequate powers for the arbitral tribunal to conduct the reference effectively.

48. In May 2009 when the LRC published its discussion paper in which it was recommended that the UNCITRAL Model Law on International Commercial Arbitration be used to inform the reform of the Cayman legislation, the LRC felt that there were three basic options for a new arbitration statute. The first was to improve the existing Law while retaining its basic provisions. However, in light of the several improvements to arbitration legislation in other jurisdictions during recent years, this option did not appear to be practical.

49. The second option was to follow the approach adopted by several other countries by adopting the UNCITRAL Model Law for both domestic and international arbitration because of the need, in the context of international arbitration, to keep changes to the content and language of the Model Law to a minimum. This approach also appeared to be inappropriate for the needs of a new domestic arbitration statute for the Islands.

50. The third approach, and that proposed by the LRC for consideration, is to introduce a new law combining the relevant features of the Model Law and the laws of other jurisdictions while retaining certain elements of the current Arbitration Law which have worked well in practice.

Provisions of the Arbitration Bill, 2012

51. It is the view the LRC that legislation enacted along the lines of our proposals is likely to serve as an important plank towards establishing the Cayman Islands as a venue in which arbitrations may be conducted. The main provisions of the Bill are generally discussed below.

PART I – PRELIMINARY

Appointing Authority:

52. Under clause 2 of the Bill, "appointing authority" means a competent person or authority agreed by the parties in an arbitration agreement for the purposes of appointing an arbitral tribunal. The court may also designate any person or authority to appoint an arbitrator. One of the unanimous comments by stakeholders was that the role of the court in the arbitration process should be kept to a bare minimum. Earlier drafts of the Bill had stipulated that the court or Chief Justice may act as the appointing authority for purposes of appointing an arbitral tribunal.

53. While this is the position reflected in other jurisdictions[35] which permit the court to deal with any failure of the appointments process, the argument against such a stipulation seems to be that the court really has no experience in appointing arbitrators and it takes away from the autonomy of the arbitration process when court involvement is allowed to such a degree.

54. Accordingly, the Bill seeks to permit the parties the right to decide who will be the appointing authority and the court has the power to designate a person to be an appointing authority if the parties fail to agree on the appointment of an arbitrator. Essentially, the parties are provided with autonomy to agree on an appointments authority and are free to select a designated person or entity.

Arbitral Tribunal:

55. "Arbitral tribunal" is defined as a sole arbitrator, a panel of arbitrators or an arbitral institution. The LRC felt that the definition of arbitral tribunal should be appropriately widened to cover an arbitral institution since in jurisdictions in which arbitration proceedings are prominent, arbitral institutions do have the liberty to act as an arbitrator if the parties agree.[36]

Arbitration Agreement:

56. "Arbitration agreement" is defined as an agreement between parties to submit to arbitration all or certain disputes that have arisen or that may arise between them whether or not contractual.[37] This definition is broad enough to cover any type of agreement made by the parties.

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[35] For example, section 18 of the UK Arbitration Act 1996.
[36] Clause 2.
[37] *Ibid.*

Seat of Arbitration:

57. The "seat of arbitration" is defined as the juridical seat of the arbitration[38] that is agreed upon in the arbitration agreement by the parties or determined by the arbitral tribunal. The term "juridical seat" is a specific reference to the domicile or juridical capital of the arbitration and the place where the arbitration draws its legal legitimacy and nationality. It is to be distinguished from the place where the hearing is merely held. This definition is therefore wide enough to capture any location.

Application of the Law:

58. In the interests of giving the law the widest possible scope, the new unitary regime should apply to all cases, domestic and international, and should not be limited to commercial arbitrations. Accordingly, it is provided that the Law applies[39] to any arbitration agreement where the seat of arbitration is in the Islands. A formulation of this nature extends to every arbitration under any other enactment whether enacted before or after the commencement of this Law. Further, it is envisage that the Law will apply not only to domestic and international arbitrations but also to any type of arbitration under an agreement in writing.

PART II – ARBITRATION AGREEMENT

Arbitration Agreement:

59. Under clause 4 an arbitration agreement may be in the form of a separate document or arbitration clause in a commercial contract. To assist parties in advancing the arbitration process, a model arbitration clause is included in the schedule to facilitate parties who may need some guidance in stipulating the rules of engagement. The arbitration agreement is required in most cases to be in writing. This requirement would be met if the arbitration agreement is contained in a document signed by the parties, by exchange of letters, telex, telegrams, electronic communications or other means of communications which are evidence of an agreement. The wider words "other means of telecommunications" are intended to cover the use of electronic mail and digital signatures. Based on recommendations from stakeholders[40] we have included and defined electronic communications in the formulation.

60. The requirement for writing may be waived if the existence of such an agreement was alleged and not denied by the other party in their exchange of statements of claim and defence following the commencement of arbitral proceedings.

61. It is recognised that different trades or industries may have prescribed their own rules or standard terms of contract or references may be made to master agreements. It is also not uncommon for some companies to set their own standard terms to which they

[38] Clause 2
[39] Clause 3
[40] CBA recommended the inclusion of electronic communications.

make reference to when doing business. These rules, terms or conditions may sometimes include an arbitration clause or a set of arbitral procedures. The Bill therefore provides that if in a written contract, reference is made to a document containing an arbitration clause, such reference constitutes an arbitration agreement if the reference is such as to make the arbitration clause in the document part of the contract.

62. An exception was created in respect of contracts of carriage by sea evidenced in bills of lading. Many bills of lading contain arbitration clauses or make references to terms containing an arbitration clause. The ultimate holders of such bills of lading would in most instances have no direct dealing with carriers.

63. Under the circumstances it would therefore be difficult at times to comply with the strict requirement of writing. Further, a bill of lading is not usually itself the contract, but evidence of the contract of carriage. Thus, in theory, a reference in a bill of lading to an arbitration clause not in the bill of lading may not constitute an arbitration agreement between the parties. The exception is therefore necessary to avoid frustrating the intentions of the shipping community who have traditionally resolved their disputes through the arbitral process.

Arbitration agreement enforceable after death:

64. The present statutory provision is that an arbitration agreement is not discharged by the death of a party and may be enforceable by or against the personal representative of the deceased. Clause 5 of the Bill re-states the position by providing that an arbitration agreement survives the death of a party. It continues to bind and may be relied upon by the estate of the deceased. This provision however does not have effect on any rule of law or statutory provision which extinguishes a cause of action upon death of a party, for example, defamation, libel or slander. It seeks to give effect to party autonomy so that the parties can agree that death shall have the effect of discharging the arbitration agreement.

PART III – STAY OF LEGAL PROCEEDINGS

Stay of legal proceedings:

65. Clause 9 substantially retains the requirements under the current law upon which a court would stay court proceedings that have been commenced in breach of an arbitration agreement. The Bill gives to the court granting a stay the additional power to order a stay on terms as it thinks fit. The court may also make interim ancillary or supplementary orders relating to property which is the subject matter of the dispute.

Reference of interpleader issue to arbitration:

66. The reference to interpleader relief granted to arbitration is a discretionary power given to the court to ensure that its discretion is unfettered. Clause 11 of the Bill seeks to make it mandatory for the court in interpleader proceedings to refer the competing claimants to arbitration if the subject matter falls within the scope of an arbitration

agreement between those claimants. Where an interpleader issue is covered by an arbitration agreement, a court before which an action is brought may refuse to refer the parties to arbitration where it finds that an arbitration agreement is null and void, inoperative or incapable of being performed.

PART IV – COMMENCEMENT OF ARBITRATION

Commencement of arbitration proceedings:

67. Clause 12 of the Bill stipulates that an arbitration shall, unless otherwise agreed by the parties, commence when one party to the arbitration agreement serves on the other party a notice requiring him to appoint or concur in appointing an arbitrator. The Bill also contemplates that if an arbitration agreement provides that the reference shall be to a person named or designated in the agreement, requiring him to submit the dispute to the person so named or designated that submission would commence the arbitration.

68. It is to be noted that the point in time at which arbitral proceedings are commenced is relevant in determining the application of appropriate time-bars, whether contractually agreed or statutorily imposed. The statutory time limits prescribed in the Limitation Law (1996 Revision) and other statutes, apply to arbitration in the same manner as they apply to other matters. The time and mode for commencement is when the demand for arbitration is served on the other party. The term "service" or "to serve" implies an act which concludes with the sending out, with or without need for actual receipt by the other party.

69. Under clause 13, the court is given a discretionary power to allow an extension of time for commencement of arbitration proceedings that have been or would be commenced out of an agreed contractual time.

PART V – ARBITRAL TRIBUNAL

Arbitral tribunal and appointment of arbitrator:

70. Clause 16 of the Bill contains provisions which establish the basic principle that the parties may agree on a procedure for appointment of an arbitrator. In the absence of agreement by the parties, a mechanism for such appointment is applied.[41] If the procedure agreed on by the parties fails to produce the necessary appointment, the appointing authority shall appoint the arbitrator unless the agreement on the appointment procedure provides other means for securing that appointment. Guidelines are provided in subclause (2) for the exercise of the power of appointment of an arbitrator by the appointing authority.

71. Provisions of this nature are particularly important in providing the appointment procedures for arbitrations with an even or uneven number of arbitrators. Clause 17 provides that any appointment of an arbitrator shall be deemed to have been made with

[41] See clause 16(2)

the agreement of all parties and shall be irrevocable except with leave of the court. Where no number of arbitrators is agreed upon, the Bill preserves the existing position that one arbitrator will be appointed.

Challenge procedure:

72. The grounds for challenging an arbitrator and the requirement for disclosure of circumstances which are likely to affect the impartiality and independence of persons who have been approached for possible appointment as arbitrators are set out in clause 12. Arbitrators are required to be independent and impartial. As such the Bill recognises the freedom of the parties to agree on a procedure for challenging an arbitrator and further provides a supplementary challenge procedure in cases where the parties fail to agree on a specific procedure to challenge an arbitrator. In such circumstances, the challenge shall be decided in the first instance by the arbitral tribunal appointed and then by the court.

73. If a challenge before the arbitral tribunal is unsuccessful, the aggrieved party may, within thirty days after receiving notice of the decision rejecting the challenge, apply to the court to decide on the challenge and the court may make an order it thinks fit. A decision of the court on the challenge shall not be subject to appeal.

74. An arbitrator who is challenged may withdraw from his office if he considers it appropriate in the circumstances of the challenge. The court is empowered, upon deciding that a challenge to an arbitrator should be upheld, to set aside an arbitral award which was made by the challenged arbitrator during the period when the request for the court to decide on the challenge was pending.

Removal of arbitrator:

75. Clause 20 provides that arbitrators may be removed in the course of the arbitration for personal misconduct, misconduct in the conduct of the proceedings, a delay in proceeding with the arbitration and a delay in making the award.

76. The term misconduct may be applied in many different circumstances such as breaches of natural justice, dealing with one party in the absence of the other or unjustified refusal to hear evidence. The term also embraces situations where the arbitrator has shown bias, or potential for bias against, a party in the arbitration. It may be considered misconduct where the arbitrator acted fairly but has given a party reason to suspect that he might not be able to act fairly in the resolution of the dispute as the proceedings progress. Incompetence may also be regarded as misconduct.

77. In the application of the provision however, one must consider, when assessing misconduct, whether the power of removal for misconduct may be abused by parties who are seeking to use it as an avenue of appeal against the arbitrator's ruling. If that is the case such applications may disrupt the arbitral process and as a result should be properly assessed.

78. Another instance in which the parties may remove an arbitrator is if he becomes incapable of conducting the proceedings by reason of physical or mental incapacity or if there are justifiable doubts as to his capacity to conduct the proceedings. The provision as drafted contemplates two different situations. The first is where the arbitrator is shown to be physically or mentally incapable by medical or other evidence and another where there could well be insufficient evidence to prove incapacity but nevertheless the court is persuaded that there are justifiable doubts as to that capacity.

79. Further, the court is empowered to remove an arbitrator should he fail to properly conduct the proceedings or to use reasonable dispatch to proceed with the reference and make an award.

80. This ground is not intended to allow a court to substitute its own view of the law or of procedure with that of the arbitrator. It is intended to cover only those cases where an arbitrator conducts the proceedings in a manner that actually frustrates the object of the arbitration and causes substantial injustice. The burden of proving substantial injustice as a ground for removal is placed on the party asserting same. The objective is to filter out frivolous applications. It is to be noted that mere procedural errors made in the course of arbitral proceedings would not entitle a party to remove the arbitrator.

81. Prior to an application for removal being considered by the court, the applicant must satisfy the court that any arbitral process challenge has been exhausted. To further weed out unmeritorious and or disruptive applications, the Bill allows the arbitrator against whom the application is made to continue the proceedings while such application for removal is pending. The question as to what would be the effect of an award made if the arbitrator was successfully removed by the court would then be dealt with by the court as it thinks fit when ordering the removal.

Arbitrator ceasing to hold office:

82. Clauses 22 and 23 deal with the circumstances in which an arbitrator ceases to hold office and for the appointment of a substitute arbitrator in such an eventuality. An arbitrator who fails to discharge his duty by failing to make progress in the arbitration or to make the award would be removed. An arbitrator may opt to withdraw from office if challenged as to qualifications or impartiality. The mere fact of his withdrawal from office does not however imply acceptance of the grounds of challenge.

83. The question may arise as to whether provision should be included in arbitration legislation to take into account the possibility that an arbitrator may resign. In accepting the appointment, an arbitrator has the duty to continue in his office until the termination of the mandate or the arbitral process. In theory therefore, an arbitrator cannot resign unilaterally. It may however be practically difficult to compel an arbitrator to continue acting if he wishes to resign.

84. It can be argued that taking up an arbitral appointment must be treated as a serious responsibility. An arbitrator is entrusted with the duty to adjudicate the dispute and the parties would have incurred expense in facilitating his appointment. Therefore, to allow

unilateral resignation would mean a waste of resources for the parties. Further, unilateral resignations may also attract irresponsible persons to accept appointments and casually resign for frivolous reasons. Where there are special and genuine reasons for an arbitrator to vacate his office, he should be able to persuade the parties to consent to his doing so. Therefore no provision is made in the Bill for an arbitrator to resign unilaterally.[42]

Appointment of substitute arbitrator:

85. Clause 23 provides a mechanism for appointing substitute arbitrators in circumstances where an arbitrator ceases to hold office. The parties may agree on how the vacancy is to be filled; whether and, if so, to what extent the previous proceedings should stand; and what effect, if any, an arbitrator ceasing to hold office has on any appointment made by him alone or jointly.

Liability of arbitrators, appointing authority, experts, legal representatives and witnesses:

86. It is a generally accepted view that arbitrators should enjoy some immunity as they perform quasi-judicial functions and adjudicatory functions. In the absence of specific statutory provision or contractual exemptions however, there is no certainty that where an arbitrator is engaged by the parties to undertake the task of adjudicating the dispute and fails in his duty or negligently performs his tasks, he would not be liable to the parties. Therefore, clause 25 seeks to protect arbitrators by providing that an arbitrator is not liable for any consequences or costs resulting from negligence in respect of anything done or omitted to be done by him in his capacity as arbitrator or from any mistake of law, fact or procedure made by him in the course of arbitration proceedings or in the making of an arbitral award. Acting in good faith when these negligent acts are committed must however be proved before the arbitrator is absolved. This immunity extends to those who participate in arbitration proceedings such as the appointing authority, experts, legal representatives and witnesses unless it can be shown that bad faith was involved.

PART VI – JURISDICTION OF ARBITRAL TRIBUNAL

Separability and competence:

87. The concepts of separability and competence are dealt with in clause 27. The doctrine of separability has evolved to save the continuing application of arbitration clauses in contracts which could have been terminated, whether by breach, repudiation, frustration, rescission or avoided by reason of illegality. By this doctrine, an arbitration clause in a commercial contract is treated as a separate and distinct agreement with collateral obligations and would therefore survive the termination or avoidance of all the primary obligations assumed under the underlying contract. An arbitration clause in a

[42] This view reflects the position of the Singapore Review of Arbitration Laws Committee, LRDD 2001

contract therefore constitutes a self-contained contract which is collateral or ancillary to the underlying contract and is capable of independent existence.

88. The clause reflects this concept of separability with the effect that even if the underlying commercial contract was held to be invalid, the arbitration clause survives such invalidity.

89. The concept of competence relates to the power of the arbitral tribunal to rule on its own jurisdiction. It is a necessary corollary to the doctrine of separability. The advantage of empowering the tribunal to decide on issues of jurisdiction is the avoidance of delay and expense. If the courts were permitted to decide on such issues, it would mean that a party could deliberately delay the arbitral proceedings by making spurious applications to the court indefinitely to challenge the jurisdiction of the arbitral tribunal.

90. The Bill therefore seeks to prevent such a possibility by empowering the tribunal to rule on its own jurisdiction, including rulings on questions relating to the existence and validity of the arbitration agreement. However, as the issue of jurisdiction goes directly to the root of arbitration, it is further provided that an appeal may be made on the tribunal's decision upholding jurisdiction. Thus, the tribunal though competent to decide, is not the final arbiter on its own jurisdictional matters. Consistent with the concept of separability, a decision by the arbitral tribunal that the underlying contract is null and void will not affect the validity of the arbitration clause.

91. To further prevent the abuse of the right to challenge arbitral jurisdiction and cause unnecessary delay, the clause sets out the time within which any application should be made and allows the arbitral tribunal to either make its ruling as a preliminary issue or as part of the final award. Where a decision upholding jurisdiction is made by the tribunal, the tribunal is also empowered to continue with the arbitration and make an award even if there is a pending appeal against upholding its arbitral jurisdiction.

92. It should be noted however that the clause is intended to deal with challenges of the arbitral tribunal's initial jurisdiction such as the existence of an arbitration agreement or validity of its appointment or constitution. These points should therefore be raised early in the proceedings and may involve pleas by a party that the tribunal may have exceeded its authority. The ruling of an arbitral tribunal that it does not have jurisdiction to decide a dispute shall not be subject to appeal.

PART VII – ARBITRAL PROCEEDINGS

General duties of tribunal:

93. While parties and arbitrators may always agree on the procedure relating to the conduct of the arbitration, certain basic principles must nevertheless be followed. The Bill sets out in clause 28 the general duties of the tribunal in the conduct of the arbitration. The duties identified are to act fairly and impartially, give each party a reasonable opportunity to be heard and to adopt procedures suitable for the particular

case. These principles are common to all arbitrations and are included as a reminder to arbitrators of their duties.

94. In adopting these principles, we are conscious that it may be seen as an invitation to parties dissatisfied with an award, to launch attacks on the tribunal with allegations of breaches of such duties. However, as the grounds for challenging an award[43] and for appeal against an award are comprehensive, it is not anticipated that this pronouncement of the duties of the tribunal would avail the parties much assistance if they are unable to prove those grounds.

Rules of procedure:

95. The conduct of the arbitration rests in the hands of the parties and it is their right to determine the type of rules they consider appropriate. Under clause 29 these rules however must accord with the general duties of the tribunal as set out in clause 28. The rules must not be such as would allow the arbitrator to act unfairly or deprive a party of the reasonable opportunity to be heard. It will of course be extremely unlikely that parties would agree to such rules. Where the parties fail to agree, or did not agree on the rules, the arbitral tribunal may then adopt such rules as it considers appropriate. However, irrespective of what rules are adopted, they must be in accordance with the general principles attached to the conduct of an arbitral tribunal.

Appointing experts:

96. Clause 37 provides the tribunal with a useful power to appoint experts on specific issues which are the subject of the proceedings. Failure to allow a party to comment on a tribunal appointed expert's report or to adduce contrary evidence in response is in practice viewed as a denial of the ability of the affected party to present his case.

97. To ensure that parties are given the opportunity to test any views or points taken by an arbitral tribunal-appointed expert, it is further provided for a party upon request to put questions to the expert or to present other expert witnesses to testify on the points in issue. It is to be noted that every person who participates in an arbitration as an expert, witness or representative has the same immunity in respect of acts or omission as that person would have if the arbitration were civil proceedings.

General powers of the tribunal:

98. As with the case of rules of procedure, the parties are permitted under clause 38 to provide the tribunal with agreed powers. Those powers may be conferred by the consensual adoption of rules or by conferment at the onset of the arbitration proceedings.

99. Increasingly, parties in arbitration expect that the arbitral tribunal would be able to deal with all matters in dispute including any interlocutory procedural matters and to conduct the proceedings swiftly. Involving the court in interlocutory matters during the

[43] Clause 18.

course of the arbitration often means the element of confidentiality may be compromised. This would introduce into the arbitral process some degree of judicial intervention which tends to impede the progress of the arbitration.

100. The powers which the Bill seeks to confer on the arbitral tribunal are now extensive. They represent a greater recognition that the arbitral process should be controlled by the arbitral tribunal. Many of the powers which were exercised by the court, are now also conferred on the tribunal. These include making orders relating to security for costs, the discovery of documents and interrogatories, the preservation of and interim custody of any evidence, ordering the taking of samples and the preservation of property which is the subject matter of the dispute.

101. Traditionally, the power to order security for costs had been withheld from the arbitral tribunal. One of the grounds to justify such an application is the fact that the claimant is not resident within the jurisdiction. The sanction in court proceedings where a party fails to furnish security for costs is that those proceedings would be stayed. Such a sanction could be seen as being a fundamental impingement of a party's right to arbitrate in accordance with the consensual agreement. It is therefore necessary that in arbitral proceedings such a power should be exercised only in exceptional circumstances and not be made as a matter of course. The parties must be taken to have accepted the risks when entering into an agreement with the other.

102. The Bill provides that orders for security of costs should not be made on the ground only that the claimant is foreign, ordinarily resident outside Cayman or is incorporated or whose central management and control is outside Cayman. An order should be made only after considering all the circumstances of the case and must in all cases not operate oppressively.

Arbitral tribunal's powers in the event of default by party:

103. To ensure the expeditious conduct of the proceedings and the execution of the other powers of the arbitral tribunal to make orders and directions in interlocutory matters, it is expedient to empower the tribunal to deal with situations of default in complying with directions and orders without the need to seek specific extension of such powers from the court.

104. In court proceedings, a prolonged delay in prosecution of the claim could invite an application from the defendant to the court to dismiss the case for want of prosecution. A similar state of affairs could be possible in arbitral proceedings. This could in some circumstances operate unfairly against the respondents in arbitration.

105. To address this situation, clause 39 provides that the arbitral tribunal may terminate the proceedings or dismiss the claim if the claimant defaults in submitting his case or inordinately and inexcusably failed to prosecute his claim. A provision of this nature emphasises the claimant's duty to act promptly in the prosecution of a claim. In addition, no party may ignore the arbitral tribunal's directions with impunity and the

tribunal is empowered to proceed with the arbitration and make an award should a respondent fail to submit the defence or any party fails to appear or tender any evidence at the hearing.

Supportive powers of the court:

106. The court is given power under clause 40 to issue subpoenas to compel the attendance of witnesses at arbitration proceedings and to give oral evidence or produce documents. The court's power to make directions in relation to a pending arbitration is intended to be supportive only and should not be exercised if the effect is to circumvent the otherwise legitimate role of the arbitral tribunal.

107. Additionally, an alternative avenue is provided for the parties to apply to the court if applications for interlocutory relief may not be conveniently made to the tribunal or if it is more expedient to do so in court. Matters dealt with by the court under this provision are to be treated as provisional only and any order made by the court will lapse if the tribunal subsequently makes an order relating to the matter.

PART VIII – INTERIM MEASURES

Interim Measures:

108. There is recognition[44] that interim measures of protection are increasingly being found in the practice of commercial arbitration and that the effectiveness of arbitration as a method of settling commercial disputes depends on the possibility of enforcing such interim measures.

109. Arbitral tribunals, in response to requests of parties may order interim measures of protection before issuing an arbitral award in the dispute. Such measures, directed to one or both of the parties, are referred to by expressions such as "interim measures of protection", "provisional orders", "interim awards", "conservatory measures" or "preliminary injunctive measures". The purpose of such measures include facilitating the conduct of arbitral proceedings; avoiding loss or damage; preserving a certain state of affairs until the dispute is resolved or facilitating later enforcement of the arbitral award.

110. In practice, interim measures of protection can encompass a wide variety of measures. Common examples include orders for not removing goods or assets from a place or jurisdiction, orders for preserving evidence or for selling goods and orders for posting monetary guarantees. An interim measure may be imposed for the duration of the arbitration or it may be of a more temporary nature and expected to be modified as matters evolve. The measure may be in the form of an order by the arbitral tribunal or in the form of an interim award.

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[44] Adhipathi, Sandeep , "Interim Measures in International Commercial Arbitration: Past, Present and Future" (2003).

111. Clause 45 therefore deals with the issue of interim measures issued by the arbitral tribunal and enables the arbitral tribunal to order any party, at the request of another party, to take interim measures of protection in respect of the subject matter of the dispute.

112. This is however subject to agreement to the contrary by the parties. The general purpose of such interim orders as contemplated by the provision is to prevent or minimise any disadvantage which may be due to the duration of the arbitral proceedings until the final settlement of the dispute and the implementation of its result.

113. Some of the interim measures contemplated include the imposition of measures for the preservation, custody or sale of goods that are the subject matter of the dispute; orders to provisionally determine and stabilise the relationship of the parties to prevent irreparable harm and securing evidence. While clause 44 identifies the possible interim measures, the tribunal is nevertheless permitted a discretionary power to impose measures which relate to the circumstances.

PART IX - AWARD

Applicable laws:

114. Clause 55 seeks to recognise that the law applicable to the substance of a dispute shall be chosen by the parties. If there is no specific choice of law in the contract or agreed by the parties, the arbitral tribunal is directed to determine the applicable law based on conflict of law rules.

115. Additionally, the tribunal is permitted to decide the dispute if the parties agree in accordance with other considerations agreed by them or determined by the arbitral tribunal. The objective is to allow a tribunal flexibility to decide matters in a dispute in accordance with considerations other than those based on law. As a result, agreements which allow the arbitral tribunal to decide a matter on extra-legal criterion would be enforceable.

Awards on different issues:

116. To cater for complex cases where issues raised may mean protracted and expensive hearings, clause 56 allows the tribunal, in the absence of agreement to the contrary, to make awards on certain specific issues at different times. This empowers the tribunal to identify and deal with issues it deems to be critical or priority. It effectively allows the tribunal to manage the case in a manner it thinks fit taking into consideration factors of time and costs savings. At the same time however, such considerations are not to be applied in a manner which compromises the need to ensure that parties are treated fairly.

Remedies:

117. The arbitral tribunal's power to grant relief and remedies in arbitration is provided in clause 57**.** This provision contemplates giving the tribunal the same powers of the court as if the dispute had been the subject matter of proceedings in court.

Interest:

118. The imposition of non-contractual interest in addition to sums awarded is quite separate from the general relief a tribunal may order. In the absence of specific statutory power or agreement, it is generally accepted that the tribunal may not have any power to award interest. However, clause 58 empowers the tribunal to award interest on all sums awarded to any party, including interest on a compound basis. This allows the tribunal full discretion to determine the interest rate, the period (up to the date of the award) and the basis for its computation. Interest, as a specific available remedy, is intended to be compensatory in nature and not punitive. Post-award interest on sums awarded would carry with it the same interest as from the date of the award as a judgment of the court.

Extension of time to make award:

119. Whether by agreement of the parties or by the applicable rules adopted by the parties in the arbitration, the tribunal is required to make the award in the arbitration within a specified time. If the tribunal fails to do so, it would be technically *functus officio* and an award made late may be set aside. In such an event, the parties may have to recommence another arbitration or seek relief elsewhere. Such situations are likely to prejudice the rights of the parties, in particular the party in whose favour the award was given.

120. Clause 60, however, permits the court to extend the time to make an award. It also requires that the arbitral processes for extension of time be first exhausted such as, by the tribunal seeking the agreement of the parties. The court is also directed not to make an extension of time as a matter of course but to do so only if a substantial injustice would otherwise ensue should an extension be refused. It is left within the discretion of the court to determine what factors are to be considered and how the justice of the matter should be balanced.

Award on agreed terms:

121. In the course of the arbitral proceedings, if the parties settled the matters in dispute, the arbitration would be terminated. The terms of settlement may be embodied in a consent award and be enforceable as an award. This saves the party in whose favour the award is made the need to prove its claims afresh or sue on the settlement agreement should there be a default in the performance of the agreed terms. Clause 62, therefore, empowers the arbitral tribunal to make an award on agreed terms but the tribunal may refuse to make an award if there is reason to believe that the award was intended to or may mislead third parties.

Form and contents of award:

122. Clause 63 requires that the award be in writing and be signed by the arbitrator. Where the tribunal consists of more than one arbitrator, the award is to be signed by all or a majority of the arbitrators. This formula allows a dissenting arbitrator to state his dissent or his alternative views or position. Where the award is signed only by a majority of the arbitrators, the reason for the omitted signature must be stated. The date and place of arbitration must also be stated.

123. The tribunal is required to be give reasons for the award but the parties may however dispense with such reasons. In circumstances where an award is based on agreed terms, reasons are also not required to be given.

124. The making of an award is only complete when the award is communicated to the parties. The act of delivering the award to the parties crystallizes the parties rights and liabilities as set out in the award. The process of enforcement and execution may follow if there is non-compliance with the terms of the award. A signed copy of the award should be given to each of the parties and the award shall be deemed to be made at the place of arbitration.

Costs of arbitration:

125. Clause 64 deals with costs attached to arbitration proceedings. The term "cost of the arbitration" is commonly understood to be the costs and expenses of a party (other than the costs of the award) in the preparation and conduct of the arbitration. The costs generally incurred by parties in arbitration such as the fees of the tribunal, the fees for administering the proceedings, the costs of legal representation, work incidental to the preparation of the defence of the claims in the arbitration, expert witnesses, traveling expenses of witnesses, or advisers consulted are all matters to be dealt with by the arbitral tribunal in its award.

126. If the tribunal fails to address the issue of who should bear the costs and if costs are to be apportioned, in what proportion, then any party may within fourteen days of the delivery of the award apply to the tribunal to amend the award to include such directions. The power to award costs and determine who and in what proportion they should be borne is a discretionary power which rests with the arbitral tribunal.

Fees of arbitrator:

127. The services of an arbitrator are rendered to the parties in the arbitration. Under clause 65 fees payable to the arbitrators are therefore the joint and several responsibilities of the parties to the arbitration and are not dependent on who had initially appointed or nominated the arbitrator. An arbitral tribunal may withhold delivery of an award pending payment of its fees. Where however the amount of the tribunal's fees is disputed and a party applies for the court to assess the fees, the court may order the delivery of the award

to the parties upon payment into court of the amount claimed pending assessment under clause 67.

Legal practitioner costs:

128. Clause 68 seeks to preserve an attorney's charge over property recovered in arbitration. This clause would recognise the rights of attorneys as they exist in court proceedings.

Additional award and corrections:

129. Under clause 69 the court is empowered to correct both clerical mistakes and other statements or misstatements in an award. The errors in contemplation are those relating to mistakes arising out of miscalculations, use of wrong data in calculations, omission of data in calculations and clerical or typographical errors made in the course of typing or drafting the award.

130. The mistake or omission need not have been directly attributable to the tribunal. Corrections may be made on the tribunal's own initiative or at the request of any of the parties to the tribunal within thirty days of the date of the award. However, mistakes or errors of judgment, whether of law or fact, cannot be corrected by the invocation of this rule.

131. Apart from the correction of errors, clause 69 also permits the arbitral tribunal, on the application of a party, to give an interpretation or clarification of the award or part of the award. The interpretation or clarification when made would form part of the original award. In relation to claims made but omitted from the decisions in the award, the tribunal may also make an additional award on claims presented in the arbitral proceedings but omitted from the award. It is to be noted however that these powers are not intended to permit the tribunal to re-visit issues raised and decided or to re-consider any part of the decision.

PART X – POWER OF COURT IN RELATION TO AWARD

Determination of preliminary point of law:

132. Clause 71 preserves the consultative procedure which allows questions of law to be dealt with by the court if all the parties agree or if a party applies with the consent of the arbitral tribunal. On such an application, the court would have to be satisfied that the question of law substantially affects the rights of one or more of the parties. An appeal to the court is permitted if the question is of general importance or if there is some special reason for it to be considered by the court.

No judicial review of award:

133. In keeping with the objective of minimising judicial intervention in arbitration proceedings, clause 73 provides for the exclusion of judicial review by the court of any award unless specifically provided for in the law. The principle here is to leave the deliberations of an arbitral tribunal within the control of the parties and the arbitration process.

Setting aside of awards:

134. The grounds for setting aside an award are set out comprehensively in clause 75. These include incapacity, invalidity of arbitration agreement or flawed composition of tribunal. The power to set aside an award is discretionary. The court may consider the severity of the transgression and the prejudice it may have on the respective parties notwithstanding that one or more of the grounds have been satisfied. The burden of proving these grounds lies with the party applying to set aside the award.

Appeal against awards on a point of law:

135. The LRC considered the desirability of abolishing the right of appeal to the court on substantial issues in arbitration given that the aim of arbitration proceedings is to allow for party autonomy. The argument in favour of abolishing the right of appeal is that the parties having chosen to arbitrate should be bound by the finding of the tribunal and not that of the court. So whether the court would reach a similar conclusion would not be relevant and if the court were to come to a different view, the substitution of the court's view with that of the arbitral tribunal would inevitably subvert the agreement of the parties.

136. However, the LRC is of the view that an absolute abolition of the right of appeal may not be desirable. Retaining a limited degree of review, as provided in clause 76, by the court is consistent with the parties desire to have the matter decided in accordance with the law as properly understood and as applied. The right of appeal against awards on questions of law is thus an important element of the Bill.

137. The right to appeal is limited by-

(a) the requirement that the law in question must substantially affect the rights of the parties;
(b) the issue of law must have been raised before the tribunal – this is intended to prevent situations where parties raise issues not raised before the tribunal and for which the tribunal appears to have made some error on the face of the award; and
(c) the issue of law must have as its basis the findings of fact by the tribunal- this is to prevent attempts by parties trying to review a tribunal's finding of facts by expressing it in the form of an issue of law. It also operates to ensure that the question of law has relevance to the facts as found.

138. The power of the court to grant leave to appeal is discretionary and the court may refuse leave unless it is just and proper in all the circumstances.

Effect of order of court in relation to an award:

139. Under clause 78, where the court makes an order, a variation order made by the court has the effect as part of the award and is enforceable. Where the court remits the award to the arbitral tribunal, the tribunal's jurisdiction is revived for the purposes of reconsidering the matters remitted.

140. In circumstances where an award has been set aside or declared to be of no effect, the difficult question parties have often to face is whether to re-commence arbitration proceedings or proceed to have the matter litigated in court. Quite often, the parties would by then be frustrated and could well settle the matter or proceed in court. Unless the arbitration agreement itself is set aside, the matter would have to proceed by a fresh arbitration if no agreed method of resolution is reached.

141. In many insurance policies arbitration clauses require a party to first obtain an arbitral award as a condition precedent to commencement of court proceedings. The Bill however gives the court the discretionary power to override the effect of such a clause over the subject matter covered in the award which has been set aside.

142. It should be noted that the arbitration agreement is not automatically displaced merely because an award made has been set aside. The court's power is limited to allowing the matters covered under the award which had been set aside to proceed in the court.

PART XI - MISCELLANEOUS

Proceedings to be heard in open court unless otherwise ordered:

143. The view is taken that it is necessary to balance the need to protect the confidentiality of arbitral proceedings as a consensual method of dispute resolution on the one hand, and the public interest in having transparency of process and public accountability of the judicial system on the other. Under clause 83 matters dealt with by the court relating to arbitral proceedings shall be heard in open court. However, upon application of any party, the court shall order those proceedings to be heard otherwise than in open court unless, in any particular case, where the court is satisfied that those proceedings ought to be heard in open court.

Private and confidential arbitral proceedings:

144. The principles of privacy and confidentiality are critical to preserving the integrity of arbitration proceedings. Clause 81, accordingly, provides that an arbitral tribunal shall conduct the arbitral proceedings in private and that disclosure by the arbitral tribunal or a party of confidential information relating to the arbitration is to be actionable as a breach

of an obligation of confidence. A breach would not occur if the disclosure, among other factors is authorised, is required by the tribunal, can reasonably be considered as being needed to protect a party's lawful interests, is in the public interest, or is necessary in the interests of justice.

Restrictions on reporting of proceedings heard otherwise than in open court:

145. Clause 84 empowers the court to give directions as to what information relating to proceedings heard otherwise than in open court may be published. It provides that a direction of the court given shall be subject to no appeal.

Regulations and rules:

146. Clause 88 empowers the Governor in Cabinet to make any regulations or rules necessary to give effect to the operation of the Law. As it relates to rules, the UNCITRAL Model Arbitration Rules are a part of the UNCITRAL Model Law. There was a divergence of views among stakeholders[45]as to whether the Cayman Islands should append the default UNCITRAL rules to the Bill. It is conceivable that that default rules may assist the arbitration process in the event the parties were unable to agree on set rules to govern the arbitration. At the same time however, the LRC pointed out that the Bill was formulated based on the Model Law and as such contained many of the UNCITRAL rules in contemplation. It therefore would not be appropriate from a drafting standpoint to duplicate such rules. It is in this regard that the Governor in Cabinet is given the power to make rules, which do not duplicate the proposed Law, if it is deemed necessary. As it stands however, under the Bill, the parties maintain autonomy in choosing the rules they wish to regulate arbitral proceedings.

Transitional provisions:

147. The transitional provisions stipulated in clause 89 provide that the Bill shall not apply to an arbitration that has commenced before the date of commencement of the Arbitration Bill 2012, unless the parties otherwise agree. The law applicable to an arbitration commenced before the date of commencement of the Arbitration Law (2001 Revision) is the Law applicable to such arbitration as if Law had not been enacted.

RECOMMENDATIONS

148. Based on the foregoing, the Law Reform Commission recommends the following-

(a) The proposed modernised Arbitration Bill be adopted and viewed as a vital element in advancing these Islands as an attractive option for the conduct of both domestic and international arbitration proceedings arising from any contractual relationship. It is the view of the LRC that the Bill provides for party autonomy, limited court intervention and it permits

[45] CILS did not view default rules as necessary, whereas the CBA felt that default rules would distinguish the proposed Arbitration Law from other jurisdictions.

arbitrators to decide on their own jurisdiction. It also provides for confidentiality and recognition of the doctrine of separability of the arbitration clause. All these elements are arguably the hallmark of a sound arbitration legislative regime. [46]

(b) For the Cayman Islands to attain full recognition as an effective seat of arbitration, the legal framework will overtime have to be supported by other legislative and administrative policies which facilitate the following-

(i) public education to sensitize society to and encourage the use of the arbitral process in the resolution of disputes;
(ii) establishment of an arbitration centre in order to provide an appropriate venue for arbitral hearings and a means through which efficient administrative services may be provided;
(iii) enhancement of the relevant local infrastructure in order to provide for matters such as communication, transportation and accommodation;
(iv) compatibility of the immigration regime with international arbitration by permitting the fast and efficient movement in and out of the jurisdiction of all stakeholders in the arbitration process including the parties, arbitrators, legal and non-legal representatives and witnesses;
(v) representation by foreign legal and non-legal practitioners of their clients in international arbitrations without any undue local practicing restrictions; and
(vi) streamlining the Foreign Arbitral Awards Enforcement Law (1997 Revision) to ensure that it is compatible with the proposed arbitration legislative regime and gives effect to the New York Convention 1958 in terms of recognizing an agreement in writing under which the parties undertake to submit to arbitration.

CONCLUSION

149. Alternative dispute resolution methods in the form of mediation, arbitration and conciliation are becoming far more prominent having regard to the increasing costs of litigation and the burden on court systems. The mediation mechanism has been recommended by the Law Reform Commission as a legislative option in resolving disputes concerning social issues arising in the Islands. The Residential Tenancies Law, 2009 is a recent example. Another is the recommendation of mediation as an aspect of family law reform. We have further seen the recent formation of the Cayman Islands Association of Mediators and Arbitrators which comprises several trained mediators who have gained certification in mediation over the last two years.

150. Arbitration should be seen as an integral element necessary to solidify the Islands as a jurisdiction amenable to alternative dispute methods. Indeed, arbitration proceedings

[46] Neil Kaplan, Journal of the Chartered Institute of Arbitrators, August 2004.

can be treated as a mechanism which provides relief to an already overburdened judicial system by removing disputes which ordinarily would fall within the jurisdiction of the court and placing them within the purview of the arbitral process. It allows the parties to resolve more complex disputes and contributes to a greater degree of specialisation. Arbitrations become indispensable by conferring upon those who participate in trade and international exchange activities, clear, efficient and safe conditions in order to resolve the disputes that may inevitably arise.[47]

151. A successful arbitral process can only be realised if its awards and the outcome of the case between the parties are enforceable. Enforcement of an arbitral award requires that the enforcing party seek the intervention of a national body within the territory in which the enforcing party desires to enforce the arbitral award.

152. Since the arbitral tribunal issuing the award is not a national body, there is no immediate obligation for any territory to enforce or indeed recognise the arbitral award itself. The immediate implication is that arbitral awards, certainly those made by international arbitral tribunals, require national law to legitimise their enforcement.[48]

153. If Cayman sees value in transforming itself into an effective international arbitration venue, it must further enhance its own legislative strengths which would be considered by parties upon choosing Cayman as their seat of international arbitration. The main strength is provision of the appropriate legislative framework which offers the legal safeguards to protect the arbitration system.

154. While there can be no perfect arbitration law, the hallmark of a good arbitration law is that it grants the maximum autonomy to the parties to define their own arbitral procedure.[49] The LRC has therefore sought to strike a balance between establishing a default legislative framework and at the same time enabling the parties to contractually vary the legal position.

155. Against the background of the issues identified, the legislative models examined and the comments of stakeholders the Law Reform Commission submits for the consideration of the Hon. Attorney General our Final Report including a draft Arbitration Bill, 2012

Chairman
4th January, 2012

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[47] Chilean Experience.
[48] National Law, Rules & Procedure: The Assistance of the National Courts in International Commercial Arbitration– The Singapore Experience, 13th February, 2004 By: Mr. Leslie Chew SC M/s Khattar Wong & Partners Singapore p. 4.
[49] International Comparative Legal Guide Series- The Arbitration Act Ten Years On – A Paragon of Party Autonomy?

Appendix I

THE LAW REFORM COMMISSION

RESPONSES TO ARBITRATION BILL

CONSULTATION

18th June, 2010 – 30th July, 2010
&
1st April, 2011 – 6th May, 2011

Respondents:

The Cayman Islands Government Legal Department
The Cayman Islands Law Society
The Cayman Islands Bar Association
Mr. Veeraraghavan Inbavijayan
Mr. Hew Dundas

Arbitration Bill	Consultation Comments	LRC Response
PART I – PRELIMINARY		
	Cayman Islands Government Legal Department Suggest that the words "Cayman Islands" instead of "the Islands" should be used throughout the Bill or that "Islands" should be added as meaning "Cayman Islands as a definition in Clause 2.	Section 3 of the Interpretation Law (1995 Revision) provides that "the Islands" means the Cayman Islands. This provision stipulates, unless the context otherwise requires, the manner in which certain words and expressions are to be interpreted in the legislation in which they appear. In this instance, the use of the word "Islands" is intended to reflect the meaning as defined in section 3.
2. (1) In this Law- "commercial transactions" includes the following- (a) trade transactions for the supply or exchange of goods or services; (b) distribution agreements; (c) commercial representation or agency; (d) factoring; (e) leasing; (f) construction of works;	**Mr. V Inbavijayan** In enumerating the various kinds of commercial transactions, we may compromise the flexibility of the interpretation. It may hamper the cause of Arbitration in that such a definition is relatively rigid and leaves little scope for dispute resolution through arbitration in any form of Commercial Transaction outside the list.	To avoid any restrictiveness the final Bill no longer identifies commercial transactions as specifically covered.

Arbitration Bill	Consultation Comments	LRC Response
(g) consulting; (h) engineering; (i) licensing; (j) investment; (k) financing; (l) banking; (m) insurance; (n) joint venture and other forms of industrial or business co-operation; and (o) carriage of goods or passengers by air, sea, rail or road;	**Law Society Sub-Committee on Arbitration Law** The title of the draft Bill refers to "domestic" and "international" arbitrations, and defines these terms in section 2. We agree that the Bill should not provide for differing regimes. However, the references to "domestic" and "international" in the title and in section 2 should be deleted.	Recommendation accepted.
	Caymanian Bar Association Sub-Committee on Arbitration The Bill does not provide for different regimes for International and Domestic arbitrations. Therefore these terms should not be defined?	Recommendation accepted.
	Mr. V. Inbavijayan In interpreting the term International Arbitration Agreement there is no need for sub-section (a), which makes it necessary for an explicit statement by the parties to state that they are entering into an international arbitration agreement at the time of conclusion of the agreement.	The definition of international arbitration has now been deleted in its entirety in the final Bill.
	Caymanian Bar Association Sub-Committee on Arbitration The following terms should be defined-	"Question of law" speaks for itself.

Arbitration Bill	Consultation Comments	LRC Response
	"Question of Law", "Dispute", "Arbitral Institution", "Legal Practitioner", "Electronic Communication", "Secretariat" "Local Attorney at Law".	"Dispute" speaks for itself and can be ascribed the ordinary dictionary meaning. "Arbitral institution" is now included in the definition of "arbitral tribunal". "Legal practitioner" is now defined in clause 2 of the final Bill . "Electronic communication" is now defined in clause 4(11) of the final Bill. "Secretariat" and "local attorney" are not words reflected in the Bill. Provisions dealing with the establishment of a Secretariat can more appropriately be dealt with outside of these proposals.
PART II - ARBITRATION AGREEMENT		
Arbitration agreement enforceable after death of a party to the agreement 5. (1) An arbitration agreement shall continue to be enforceable by or against the personal representative of the deceased party after the death of a party to the agreement. (2) The authority of an arbitrator shall not be revoked by the death of a party by whom he was appointed. (3) Nothing in this section shall be taken to affect the operation of any law by virtue of which any right of action is	**Caymanian Bar Association Sub-Committee on Arbitration** The words "*Unless the parties otherwise agree in writing*, should be inserted in clause 5(1). **Mr. V. Inbavijayan** Clause 5, 6 and 7 are well thought out and display foresight in countering ancillary problems of death, bankruptcy and insolvency by promoting the principle of Party Autonomy.	Recommendation accepted. Comment supports the provisions.

Arbitration Bill	Consultation Comments	LRC Response
extinguished by the death of a person.		
Consumer arbitration agreement 8. (1) Where a contract contains an arbitration agreement and a person enters into a contract as a consumer, the arbitration agreement is enforceable against the consumer only if the consumer, by separate written agreement certifies that, having read and understood the arbitration agreement, he agrees to be bound by that agreement. (2) Subsection (1) applies to every contract containing an arbitration agreement entered into in the Islands notwithstanding a provision in the contract to the effect that the contract is governed by a law other than the law of the Islands. (3) Where a party to a consumer arbitration agreement knows that any provision of this Law from which he may derogate or any requirement under the arbitration agreement has not been complied with and that party proceeds with the arbitration without making an objection to that non-compliance without undue delay or, if a time limit is provided, within that period of time, that party shall be deemed to have waived the right to object and an arbitration agreement that would otherwise be unenforceable by reason of non-compliance shall be treated as operative.	**Caymanian Bar Association Sub-Committee on Arbitration** We do not consider that it necessary to include a requirement for a "separate written contract". **Mr. V. Inbavijayan** This section is essential in providing consumers with adequate protection against unforeseen arbitration. Especially, the use of sub-section (2) protects consumer-residents and consumer-citizens of the Cayman Islands from potentially malicious arbitration agreements they may unknowingly be made to enter into. In addition, sub-section (3) makes way for these very citizens and residents to waive this right in case they are aware of the agreement and would like to initiate arbitration proceedings. **Law Society Sub-Committee on Arbitration Law** Section 8 seeks to introduce special provisions relating to "consumer" arbitration agreements. We query whether such provisions are necessary and desirable at all but, if they are, then a definition of "consumer" will be required in section 2.	Recommendation accepted. Comment supports the provision. The provision recognises that arbitration can be used as a means to resolve disputes between merchants and consumers outside of the court system. A definition of "consumer" has been included in clause 8(4) of the final Bill.

Arbitration Bill	Consultation Comments	LRC Response
PART III - STAY OF LEGAL PROCEEDINGS		
Stay of legal proceedings 9. (1) Where a party to an arbitration agreement institutes proceedings in a court against another party to that agreement in respect of any matter which is the subject of the agreement, either party to the agreement may, at any time after the acknowledgement of service and before delivering any pleading or taking any other step in the proceedings, apply to a court to stay the proceedings so far as the proceedings relate to that matter. (2) The court to which an application has been made in accordance with subsection (1) may, if it is satisfied that- (a) there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement; and (b) the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to facilitate the conduct of the arbitration, make an order, upon such terms as the court thinks fit, staying the proceedings so far as the proceedings relate to that matter. (3) Where a court makes an order under subsection (2), the court may, for the	**Mr. V. Inbavijayan** An intent to further arbitration has been displayed by encouraging a stay on legal proceedings by the Court if it sees no reason for the dispute to be referred to arbitration under the arbitration agreement. It is advisable to explicitly discourage courts from looking into the applicability of the law that will be considered by the arbitral tribunal during the arbitration proceedings, so as to ensure autonomous functioning of the Arbitral Tribunal. **Law Society Sub-Committee on Arbitration Law** This provision vests a discretion in the Grand Court to stay legal proceedings brought in breach of an arbitration agreement. Provisions of this nature in the arbitration laws of other jurisdictions have been criticized for not upholding the integrity of arbitration agreements, generating uncertainty and allowing for forum shopping by parties. As a result, those jurisdictions have enacted provisions which follow Article 8(1) of the Model Law. Concern is also expressed that the discretion provided in s.9 (2) of the draft Bill might be struck down altogether by the Grand Court, as	The Bill generally stipulates the specific instances in which court intervention is permitted. The intent of the legislation is to allow party autonomy. As far as choosing a law is concerned the parties are permitted to choose the law applicable to a dispute. This is reflected in clause 55(1). There are no provisions which signal that the court can become involved in this regard. Recommendation accepted

Arbitration Bill	Consultation Comments	LRC Response
purpose of preserving the rights of parties, make an interim order as the court thinks fit in relation to any property that is or forms part of the subject of the dispute to which the order under that subsection relates. (4) For the purposes of this section and section 11, a reference to a party includes a reference to any person claiming through or under that party.	being contrary to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. **Caymanian Bar Association Sub-Committee on Arbitration** In 9(1) allow "any party" (rather than "either party to the agreement") to apply for a stay. In 9(1) Insert "any step in these proceedings to answer the substantive claim" instead of "any other step". For 9(2) the equivalent Bahamian provision could be adopted to reduce the potential for "forum shopping".	 Recommendation accepted. Recommendation accepted. Clause 9(2) has been deleted and the Bahamian equivalent substituted.
Court's powers on any stay of proceedings 10. (1) Where a court stays proceedings under section 9, the court may, if in those proceedings property has been seized or security has been given to prevent or obtain release from arrest, order that- (a) the property seized be retained as security for the satisfaction of any award made on the arbitration; or (b) the stay be conditional on the provision of equivalent security for the satisfaction of any such award.	**Mr. V. Inbavijayan** Respect is shown towards the principles of party autonomy in concurrence with the inviolable principle of equity in looking at retaining equivalent security for the satisfaction of the Arbitral Award.	Comment supports provision.

Arbitration Bill	Consultation Comments	LRC Response
(2) Subject to the Rules of Court and to any necessary modification, the same law and practice shall apply in relation to property retained in pursuance of an order under this section as would apply if it were held for the purposes of proceedings in the court that made the order.		
Reference of interpleader issue to arbitration 11. Where in proceedings before any court, relief by way of interpleader is granted and any issue between the parties is one in respect of which there is an arbitration agreement between them, the court granting the relief may direct the issue between the parties to be determined in accordance with the agreement.	**Caymanian Bar Association Sub-Committee on Arbitration** The court should be bound to direct the parties. Change "may" to "shall" for certainty.	Recommendation accepted.
PART IV - COMMENCEMENT OF ARBITRATION		
Commencement of arbitration proceedings 12. (1) An arbitration shall, unless otherwise agreed by the parties, commence when one party to the arbitration agreement serves on the other party a notice requiring him to appoint or concur in appointing an arbitrator, or where an arbitration agreement provides that the reference shall be to a person named or designated in the agreement, requiring him to submit the dispute to the person so named or designated. (2) A notice mentioned in subsection (1) may be served by- (a) delivering it to the person on whom it is to be served;	**Caymanian Bar Association Sub-Committee on Arbitration** A general concern [*whole of Part IV*] is that the Tribunal has very limited autonomy at the start of the process. The court has apparently excessive power to become involved in the process.	These provisions were formulated based on the Singapore Arbitration Act and Hong Kong Arbitration Ordinance. The Bahamas Act also contains similar provisions. The proposed formulation seeks to ensure the tribunal has autonomy in the process. The Courts involvement is not intended to impede the arbitration proceedings.

Arbitration Bill	Consultation Comments	LRC Response
(b) leaving it at the person's usual or last known place of residence, or in the case of a body corporate, at its registered office, in the Islands; (c) sending it by post in a registered letter addressed to that person at his usual or last known place of residence, or in the case of a body corporate, at its registered office, in the Islands; or (d) in any other manner provided in the arbitration agreement, and where a notice is sent by post in the manner prescribed in paragraph (c), service shall, unless the contrary intention is proved, be deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of the post.		
Parties may obtain subpoena 13A. (1) The court may, on the application of any party to an arbitration agreement, and in accordance with rules of court, issue a subpoena requiring a person to attend for examination before the arbitrator or umpire or to provide at the examination before the arbitrator or umpire the document or documents specified in the subpoena.	**Law Society Sub-Committee on Arbitration Law** These provisions include references to attending before an "umpire". Since the draft Bill does not provide for umpires to be appointed in arbitrations, these references should be deleted.	References to umpire in the Bill has been deleted.

Arbitration Bill	Consultation Comments	LRC Response
(2) A person shall not be compelled under any subpoena issued in accordance with subsection (1) to answer any question or produce any document which that person could not be compelled to answer or produce on the trial of an action.		
Refusal or failure to attend before arbitrator or umpire etc. 13B. (1) Unless a contrary intention is expressed in the arbitration agreement, where any person (whether or not a party to the agreement)- (a) refuses or fails to attend before the arbitrator or umpire for examination when required under a subpoena or by the arbitrator or umpire to do so;	**Mr. V. Inbavijayan** This clause elucidates the role of the Court in promoting arbitration in the country and facilitating any requirements of the tribunal, in case these requirements are not being fulfilled otherwise.	Comment supports the provision.
Application of Limitation Law (1996 Revision) 14. (1) The Limitation Law (1996 Revision) shall apply to arbitration proceedings as it applies to proceedings before any court and a reference in that Law to the commencement of any action shall be construed as a reference to the commencement of arbitration proceedings. (2) The court may order that in computing the time prescribed by the Limitation Law (1996 Revision) for the commencement of proceedings, including arbitration proceedings, in respect of a dispute that was the subject-matter of-	**Mr. V. Inbavijayan** In equating the Limitation Laws for Court based litigation and Arbitrations, this clause is important in providing arbitration with desired importance and giving an arbitrator similar powers to a judge. **Law Society Sub-Committee on Arbitration Law** The wording of this provision is unclear and difficult to follow; it is apt to cause	Comment supports the provision. Recommendation accepted. The provision has been reformulated to

Arbitration Bill	Consultation Comments	LRC Response
(a) an award that the court orders to be set aside or declares to be of no effect; or (b) the affected part of an award that 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) Notwithstanding any term in an arbitration agreement to the effect that a cause of action shall not accrue in respect of any matter required by the agreement to be referred until an award is made under the agreement, the cause of action shall, for the purpose of the Limitation Law (1996 Revision), be deemed to have accrued in respect of any such matter at the time when it would have accrued but for that term in the agreement.	confusion inasmuch as a cause of action does not automatically accrue: it normally accrues when someone relies upon it, and this aspect of the Limitation Law appears to be missed. The following language, which appears in section 13(3) of the English Arbitration Act 1996 and the Bahamian Arbitration Act 2009: "*In determining for the purposes of the Limitation Act 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*."	ensure clarity.
PART V - ARBITRAL TRIBUNAL		
	Caymanian Bar Association **Sub-Committee on Arbitration** There is too much reliance on the court for the appointment and removal of arbitrators.	This comment goes back to the point that a Secretariat should be established to deal with appointment and removal of arbitrators and not the court. The provisions are based on the Singapore formulation. The Bahamas Act also contains provisions which allow for court involvement. In both laws, the

Arbitration Bill	Consultation Comments	LRC Response
		court involvement is permissible only where the parties agree or where the proceedings are being conducted contrary to the agreement or fraudulently. The objective is to ensure that the agreement is executed in accordance with its terms and not to have the court frustrate the autonomy of the process.
Number of arbitrators 15. (1) The parties to an arbitration agreement may choose any amount of arbitrators. (2) Where the parties fail to determine the number of arbitrators, there shall be a single arbitrator.	**Law Society Sub-Committee on Arbitration Law** The word "number" should replace with "amount".	Recommendation accepted.
Appointment of arbitrators 16. (1) Unless otherwise agreed by the parties, a person shall not be precluded by reason of his nationality from acting as an arbitrator. (2) The parties shall agree to a procedure for appointing the arbitral tribunal. (8) For the purposes of this Law, subject to subsection (9), the appointing authority shall be the Chief Justice. (9) The Chief Justice may, if he thinks fit, by notification published in the Gazette, appoint any other person to exercise the powers of the appointing authority under this section.	**Mr. V. Inbavijayan** These provisions with respect to appointment of arbitrators are pretty standard and should prove to be adequate. **Law Society Sub-Committee on Arbitration Law** Should the Chief Justice be the appointing authority? This provision may suggest an undesirable level of control or intervention by the judiciary over an essential part of the arbitration process, which is contrary to the UNCITRAL Model. The appointing	Comment supports provision. The final Bill now empowers the court to designate an appointing authority in circumstances where the parties fail to agree on the selection of an appointing authority.

Arbitration Bill	Consultation Comments	LRC Response
	authority should be a person independent of the judiciary, such as the Chairman of the Judicial Appointments Commission or the President of the Law Society. **Caymanian Bar Association Sub-Committee on Arbitration** We query whether it is appropriate for the Chief Justice to act as appointing authority.	The court will now have the power to designate an appointing authority.
Authority of arbitrator to be irrevocable 17. The authority of an arbitrator appointed by or by virtue of an arbitration agreement shall, unless a contrary intention is expressed in the agreement, be irrevocable except by leave of the court.	**Mr. V. Inbavijayan** While this provision does make for the irrevocability of an Arbitrator's judgement, it would be advisable to limit the Court's say in revoking the arbitrator's authority to situations where such action is necessary.	Clause 20 of the final Bill stipulates the circumstances in which the court may remove an arbitrator from the proceedings.
Power of judges, magistrates, etc., to take arbitrations 18. (1) Subject to the following provisions of this section, a judge, magistrate or public officer, may, if in all circumstances he thinks fit, accept appointment as a sole arbitrator or a member of an arbitral tribunal, by virtue of an arbitration agreement. (2) A judge or a magistrate shall not accept appointment as an arbitrator unless he has received the consent of the Chief Justice. (3) A public officer shall not accept appointment as an arbitrator unless he receives the consent of his Chief Officer.	**Law Society Sub-Committee on Arbitration Law** We respectfully consider that no sitting judge or magistrate should sit as an arbitrator. Such a provision will create an undesirable perception of further court involvement in what should be a largely autonomous arbitral process (subject only to limited rights of court challenges and appeals). In addition, the appointment of sitting judges as arbitrators will also place further strain on the limited resources of the Judicial Administration. The Schedule to the Bill	This provision reflects the Hong Kong model. It becomes operable only by agreement of the parties and is not intended to impact the autonomy of the arbitral process. These provisions have however been deleted in order to remove any perception of undue court involvement.

Arbitration Bill	Consultation Comments	LRC Response
(4) The fees payable, if any, for the services of a judge, magistrate or public officer as an arbitrator shall be paid into the revenue of the Islands. (5) The Schedule shall have effect for modifying, and in certain cases replacing, provisions of this Law in relation to arbitration by a judge as a sole arbitrator or umpire and, in particular, for substituting the Court of Appeal for the court in provisions whereby arbitrators and umpires, their proceedings and awards are subject to control and review by the court. (6) Subject to section 72(3), any jurisdiction that is exercisable by the court in relation to an arbitrator otherwise than under this Law shall, in relation to a judge appointed as a sole arbitrator, be exercisable instead by the Court of Appeal. (7) For purposes of this section, "Chief Officer" has the meaning assigned to it by the Public Service Management Law (2007 Revision).	illustrates a very real practical difficulty associated with the 'judge-arbitrator' concept: because of the infrequency with which the Court of Appeal sits in this jurisdiction, the determination of any challenges to or appeals against awards issued by judge-arbitrators would suffer significant delays which could seriously prejudice losing parties. **Caymanian Bar Association** **Sub-Committee on Arbitration** We do not consider it appropriate to include provision for Judge-arbitrators.	These provisions have been deleted.
Grounds for challenge 19. (1) Where a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstance likely to compromise his impartiality or independence.	**Mr. V. Inbavijayan** These are standard grounds to ensure impartiality of the arbitrators, which is essential for the free, fair and smooth conduct of Arbitration Proceedings.	Comment supports provision.
Challenge procedure 20. (4) If a challenge before the arbitral tribunal is unsuccessful, the aggrieved party may, within thirty days after receiving notice of	**Mr. V. Inbavijayan** Sub-sec. (4), (5) and (6) have ensured the smooth functioning of the Arbitration while the Court reviews a	Comments support provision.

Arbitration Bill	Consultation Comments	LRC Response
the decision rejecting the challenge, apply to the court to decide on the challenge and the court may make such order as it thinks fit. (5) An appeal shall not lie against the decision of the court under subsection (4). (6) While an application to the court under subsection (4) is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitration proceedings and make an award.	challenge to an arbitrator on any of the grounds laid down by the parties or under Sec. 19. In allowing the Arbitration proceedings to continue while the Court reviews the veracity of the challenge, the Arbitration proceedings are respected and the quest for a fair award is not negated.	
Removal of arbitrator 21. (1) A party may request the court to remove an arbitrator- (a) who is physically or mentally incapable of conducting the proceedings or where there are justifiable doubts as to his capacity to do so; or (b) who has refused or failed- (i) to properly conduct the proceedings; or (ii) to use all reasonable despatch in conducting the proceedings or making an award, and where substantial injustice has been or will be caused to that party. (2) If there is a person vested by the parties with power to remove an arbitrator, the court shall not exercise its power of removal unless it is satisfied that the applicant has first	**Mr. V. Inbavijayan** This provision is more than adequate in ensuring the removal of an arbitrator in scenarios where a party/ parties are not convinced of his credentials or his manner of looking into the dispute. In addition, the procedure laid down to ensure that the question of fees is resolved is also a positive. By including sub-section (2) and promoting the universal principle of "Exhaustion of Local Remedies", the Bill does no harm to the Cayman Islands' ambition to increase the inflow of International Commercial Arbitrations.	Comments supports provision.

Arbitration Bill	Consultation Comments	LRC Response
exhausted any available recourse to that institution or person.		
Arbitrator ceasing to hold office 23. (1) An arbitrator shall cease to hold office if- (a) he withdraws from office under section 20(3); (b) an order is made under section 20(4) for the termination of his mandate or his removal; (c) he is removed by a person referred to in section 21(2); or (d) the parties agree on his termination. (2) The withdrawal of an arbitrator or his termination by the parties shall not imply an admission of any ground referred to in section 19(3) or 21(1).	**Mr. V. Inbavijayan** These provisions allow an arbitrator who withdraws or whose position as arbitrator with regard to a dispute has been terminated to withdraw from this position with honour and dignity and is not accused of anything that would damage his reputation. This is a positive move to safeguard the profession so that arbitrators may establish themselves without the fear of humiliation.	Comments support provision.
Appointment of substitute arbitrator 24. (1) Where an arbitrator ceases to hold office pursuant to section 23, the parties may agree- (a) whether and, if so, how the vacancy is to be filled; (b) whether and, if so, to what extent the previous proceedings should stand; and (c) what effect, if any, his ceasing to hold office has	**Mr. V. Inbavijayan** While relating to certain standard provisions in any Arbitration Act, these provisions cover their respective fields while according a high status to the principle of party autonomy in allowing the parties to regulate a majority of procedures.	Comments support provision.

Arbitration Bill	Consultation Comments	LRC Response
on any appointment made by him alone or jointly. (2) Section 16 applies in relation to the filling of the vacancy as in relation to an original appointment. (3) The arbitral tribunal, when reconstituted, shall determine whether and, if so, to what extent the previous proceedings should stand. (4) The reconstitution of the arbitral tribunal shall not affect any right of a party to challenge the previous proceedings on any ground that had arisen before the arbitrator ceased to hold office. (5) The ceasing to hold office by the arbitrator shall not affect any appointment by him alone or jointly, of another arbitrator, in particular any appointment of a presiding arbitrator.		
Liability of arbitrator 26. (1) An arbitrator is not liable for- (a) negligence in respect of anything done or omitted to be done by him in his capacity as arbitrator; or (b) any mistake of law, fact or procedure made by him in the course of arbitration proceedings or in the making of an arbitral award. (2) Notwithstanding subsection (1), an arbitrator is liable for any act or omission	**Mr. V. Inbavijayan** This section is essential in ensuring that the arbitrator's position is honoured and reasonable mistakes that accrue from arbitration proceedings are not held against him. However, it is also a provision that takes a stringent stand on any arbitrator who goes about his work in bad faith.	Comments support provision. In the final Bill we have also extended theses liability principles to the appointing authority and other participants in the arbitration process including the legal representatives and persons assisting the appointing authority.

Arbitration Bill	Consultation Comments	LRC Response
done by him in his capacity as arbitrator, where such an act or omission is shown to be done in bad faith.		
PART VI - JURISDICTION OF ARBITRAL TRIBUNAL		
Arbitration of disputes 27. (1) Any dispute that the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless the arbitration agreement is contrary to public policy or, under any other law, such a dispute is not capable of determination by arbitration. (2) The fact that any other law confers jurisdiction in respect of any matter on the court but does not refer to the determination of that matter by arbitration, does not indicate that a dispute about that matter is incapable of determination by arbitration.	**Mr. V. Inbavijayan** There is a need to prevent the misuse of the 'public policy' clauses. It would be advisable to look into this clause and make it explicitly clear that public policy shall not allow the court to dictate whether the law applied by the arbitrator is suitable.	The Bill generally dictates the boundaries of the courts intervention**.** The public policy concerns will arise only where the law applicable is in breach of policy. It is not intended that court will use public policy to determine the suitability of a law chosen to govern an arbitration agreement but rather it will seek to ensure that the law conforms with public policy.
PART VII - ARBITRAL PROCEEDINGS		
	Caymanian Bar Association **Sub-Committee on Arbitration** Certain of the provisions have been drafted in line with the UNCITRAL Arbitration Rules but several of the provisions in the UNCITRAL Rules have not been included in the Bill. These could usefully be reproduced, to create a set of model procedural rules. It may be appropriate to exhibit the model procedural rules, as a Schedule to	Provisions relating to language and confidentiality have been included at clauses 31 and 81 respectively. However, the LRC does not believe that default rules are necessary for inclusion in the Bill. The Bill is deliberately based on several UNCITRAL Arbitration rules in order to avoid the need to include supporting rules. The parties are not

Arbitration Bill	Consultation Comments	LRC Response
	the Law to act as default rules to guide arbitral proceedings. Having default provisions will no doubt save time and costs.	however precluded from formulating their own rules and the Governor in Cabinet is empowered to formulate additional rules which would assist in the operation of the Law.
Determination of rules of procedure 30. (1) Subject to the provisions of this Law, parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. (2) If the parties fail to agree on the procedure to be followed by the arbitral tribunal, the tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. (3) The power conferred on the arbitral tribunal under subsection (2) includes the power to determine the admissibility, relevance, materiality and weight of any evidence.	**Mr. V. Inbavijayan** This section supports the arbitral process substantially as an autonomous function by granting the parties and the arbitral tribunal the exclusive right to decide on procedure to be followed during the Arbitration Proceedings.	Comment supports provision.
Statements of claim and defence 31. (3) Except as otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitration proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment, having regard to the delay in making the amendment.	**Caymanian Bar Association** **Sub-Committee on Arbitration** Replace the words "either party" with "any party"	Recommendation accepted.
Hearing and written proceedings 32. (1) Subject to any contrary agreement by the parties, the arbitral tribunal	**Caymanian Bar Association** **Sub-Committee on Arbitration** We suggest including reference to	Recommendation accepted.

Arbitration Bill	Consultation Comments	LRC Response
shall determine if proceedings are to be conducted by- (a) oral hearing for the presentation of evidence; (b) oral argument; (c) the production of documents and other written materials; or (d) a combination of the above. (2) Unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall, upon the request of a party, hold such hearings at an appropriate stage of the proceedings. (3) The parties shall be given sufficient notice in advance of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of documents, goods or any other property.	"teleconference, video conference, internet conferencing, email exchanges or the like" in order to facilitate use of such modern communication technology. **Mr. V. Inbavijayan** These provisions boost uniformity in the use of Evidence Laws used in Courts and Arbitration, but also keep in mind the importance of independence of parties while resolving disputes through arbitration.	Comment supports provision.
Representation 33. (1) A party to an arbitration agreement may be represented in proceedings before the arbitral tribunal by a legal practitioner where all the parties agree to the involvement of a legal practitioner. (2) A party to an arbitration agreement may be represented in proceedings before the arbitral tribunal by a representative who is not a legal practitioner. (3) A person not admitted to practise in the Grand Court shall not be taken to have committed an offence under or breached the	**Law Society Sub-Committee on Arbitration Law** This section provides that parties may only be represented by a legal practitioner if all parties agree. Such a provision seems to us to be wrong in principle. Parties should be free to be represented by whomsoever they may choose.	Recommendation accepted.

Arbitration Bill	Consultation Comments	LRC Response
provisions of the Legal Practitioners Law (2007 Revision) or any other Law merely by representing a party in arbitration proceedings in the Islands. (4) In this section- (a) a legal practitioner means a person who is admitted or entitled to practise as an attorney-at-law in the Islands or in any other place other than the Islands; and (b) a legally qualified person means- (i) a legal practitioner; or (ii) a person who, though not a legal practitioner, has such qualifications or experience in law, whether acquired in the Islands or in any place other than the Islands, as, in the opinion of the	**Caymanian Bar Association Sub-Committee on Arbitration** The clause currently allows a party to be represented by a legal practitioner "*where all the parties agree*". This could result in injustice, for example, if a legally qualified and/or more sophisticated party could block a less sophisticated party from being represented. Parties should be free to choose their representation. We consider it is vital to ensure that the role of local Attorneys-at-Law is clearly defined. Whilst the parties should be represented and assisted by person of their choice, there is a necessary role for local attorneys-at-law, especially in relation to international arbitrations.	Recommendation accepted. This matter can be best dealt with as a consequential amendment to the Legal Practitioner's Law. However, it should be noted that the objective is to attract arbitration to the Cayman Islands and any action which is deemed overly protectionist may defeat the objectives of the Law.
Extension of ambit of arbitration proceedings 34. (1) Where- (a) pursuant to an arbitration agreement a dispute between the parties to that agreement is referred to arbitration; and (b) there is some other dispute between those same parties, whenever the dispute arose,	**Mr. V. Inbavijayan** This provision envisions a great step forward for arbitration in the Cayman Islands. By including related disputes arising out of the same agreement so that they can be clubbed under a single tribunal's proceedings at the parties' behest should go a long way in reducing the time as well as expense of arbitration in the Islands. Such steps shall	Comments support the provision.

Arbitration Bill	Consultation Comments	LRC Response
being a dispute to which the same agreement applies, then unless the arbitration agreement otherwise provides, the arbitral tribunal may, upon application being made to the arbitral tribunal by the parties to the arbitration agreement at any time before a final award is made in relation to the first mentioned dispute, make an order directing that the arbitration be extended so as to include that other dispute.	encourage not only international arbitrations, but also facilitate speedy and effective justice for domestic parties.	
Consolidation of proceedings 35. (1) An order or provisional order may not be made under this section unless it appears- (a) that some common question of law or fact arises in all the arbitration proceedings to which this section relates; (b) that the rights to relief claimed in all of the proceedings are in respect of or arise out of the same transaction or series of transactions; or (c) that for some other reason it is desirable to make the order or provisional order. (6) Arbitration proceedings may be commenced or continued, notwithstanding that	**Mr. V. Inbavijayan** This provision is given the detailed explanation required of such an intricate concept as consolidation of various arbitration proceedings. **Caymanian Bar Association Sub-Committee on Arbitration** This provision aims to deal with potentially complex multi-party disputes. However, it can only operate when all relevant arbitration proceedings are subject to the new Law. Some consideration might be given as well to possible consolidation arrangements when arbitration proceedings are governed by different (competing) legal	Comment supports provision. Recommendation accepted.

Arbitration Bill	Consultation Comments	LRC Response
an application to consolidate them is pending under subsection (2) or (3) and notwithstanding that a provisional order has been made in relation to them under subsection (3). (7) Subsections (2) and (3) apply in relation to arbitration proceedings whether or not all or any of the parties are common to some or all of the proceedings. (8) Nothing in subsection (2) or (3) prevents the parties to two or more arbitration proceedings from agreeing to consolidate those proceedings and taking such steps as are necessary to effect that consolidation.	regimes (e.g. Bahamas or Hong Kong). **Mr. V. Inbavijayan** Sub-clause (6) of the Bill ensures that there shall be minimal wastage of precious time by allowing separate arbitral proceedings to continue while a decision is taken on the need/ feasibility of a consolidated arbitration.	Comment supports provision.
Powers to appoint experts 36. (1) Unless otherwise agreed by the parties, the arbitral tribunal may- (a) appoint one or more experts to report to it on specific issues to be determined by the tribunal; and (b) require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection. (2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report,	**Mr. V. Inbavijayan** It is an encouraging sign to see how parties are given a chance to enhance their case in a dispute through technical know-how of experts. However, given that such experts can be produced by the parties independently, provisions to discourage misuse of such authority by experts should be incorporated in order to ensure that such experts don't wrongfully take advantage of their qualifications.	It is not necessary for the law to speak to this issue. The onus is placed on the tribunal to ascertain the degree of expertise provided based on its needs.

Arbitration Bill	Consultation Comments	LRC Response
participate in a hearing where the parties have the opportunity to put questions to him and to present other expert witnesses in order to testify on the points at issue.		
General powers exercisable by arbitral tribunal 37. (1) The parties may agree on the powers that may be exercised by the arbitral tribunal for the purposes of and in relation to the arbitration proceedings. (2) Without prejudice to the powers conferred on the arbitral tribunal by the parties under subsection (1), the tribunal may make orders or give directions to any party for- (a) security for costs; (b) discovery of documents and interrogatories; (c) giving of evidence by affidavit; (d) a party or witness to be examined on oath or affirmation, and may for that purpose administer any necessary oath or take any necessary affirmation; (e) the preservation and interim custody of any evidence for the purposes of the proceedings; (f) samples to be taken from, or any observation to be made of or experiment	**Mr. V. Inbavijayan** There seems to be a lack of flexibility in the tribunal's powers under sub-section (2) when one sees that seven very rigid orders have been pre-defined by the Bill. In order to grant some amount of flexibility, as long as the orders are on similar lines, the tribunals must be allowed to digress slightly from those laid down under the aforementioned sub-section. **Caymanian Bar Association Sub-Committee on Arbitration** It is necessary to consider foreign judicial assistance and reciprocity. Currently the Bill makes no reference to the Foreign Arbitral Awards Enforcement Law (1997 Revision) which may require revision in light of the introduction of an Arbitration Act.	The intention is to allow the arbitral tribunal to function similarly to a court in terms of the orders it may grant. The provision as drafted is not intended to provide rigidity. The Foreign Arbitral Awards Enforcement Law (1997 Revision) will be reviewed in order to bring it in line with the provisions of the proposed Arbitration Law. However, this will be dealt with as a consequential amendment.

Arbitration Bill	Consultation Comments	LRC Response
conducted upon, any property that is or forms part of the subject-matter of the dispute; and (g) the preservation, interim custody or sale of any property that is or forms part of the subject-matter of the dispute.		
Powers of arbitral tribunal in case of party's default 38. (1) The parties may agree on the powers that may be exercised by the arbitral tribunal in the case of a party's failure to take any necessary action for the proper and expeditious conduct of the proceedings. (3) If the arbitral tribunal is satisfied that there has been inordinate and inexcusable delay on the part of the claimant in pursuing his claim, and the delay- (a) gives rise, or is likely to give rise, to a substantial risk that it is not possible to have a fair resolution of the issues in that claim; or (b) has caused, or is likely to cause, serious prejudice to the respondent, the tribunal may make an award dismissing the claim.	**Mr. V. Inbavijayan** This provision may prove essential in encouraging parties to put forth their cases quickly and in good faith. Sub-section (3) is crucial in ensuring that no party maliciously delays proceedings so as to further their case.	Comment supports provision.

Arbitration Bill	Consultation Comments	LRC Response
Witnesses may be summoned by subpoena 39. (1) Any party to an arbitration agreement may take out a writ of subpoena ad testificandum (writ to compel witness to attend and give evidence) or a writ of subpoena duces tecum (writ to compel witness to attend and give evidence and produce specified documents). (2) The court may order that a writ of subpoena ad testificandum or a writ of subpoena duces tecum shall be issued to compel the attendance before an arbitral tribunal of a witness wherever he may be within the Islands. (3) A person shall not be compelled under any such writ to produce any document that he could not be compelled to produce on the trial of an action.	**Law Society Sub-Committee on Arbitration Law** These provisions should form part of clause 41 provisions concerning the Court's powers exercisable in support of arbitration proceedings.	It is believed to be more appropriate from a drafting standpoint to deal with the issue of subpoenas in a separate section.
Perjury 40. A person who wilfully or corruptly gives false evidence before an arbitral tribunal is guilty of perjury, as if the evidence had been given in open court, and may be dealt with, prosecuted, and punished accordingly.	**Mr. V. Inbavijayan** In cases where experts are required to give evidence they should be subject to harsher punishment if found guilty of perjury owing to the fact that perjury on their part could lead to a greater impact on the award granted by the tribunal.	The seeks to treat any act of perjury as serious and subject all person in breach to the same punishment. In this regard we do not believe it necessary to treat experts witnessed differently from other parties who participate in arbitral proceedings.
PART VIII - INTERIM MEASURES AND PRELIMINARY ORDERS		
Conditions for granting interim measures 43. (1) A party who requests an interim measure under section 42(a), (b) and (c) shall satisfy the arbitral tribunal that- (a) harm not adequately	**Mr. V. Inbavijayan** An extremely well drafted provision, this section vociferously espouses principles of equity through sub-sections (1) and (2).	Comment supports provision.

Arbitration Bill	Consultation Comments	LRC Response
reparable by an award of damages is likely to result if the measure is not ordered and that the 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. (2) A determination made by the arbitral tribunal under section 43(1)(b) shall not affect the discretion of the arbitral tribunal in making any subsequent determination.		
Specific regime for preliminary orders 45. (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 by indicating the content of any oral communication, between any party and the arbitral tribunal in relation to- (a) the request for the interim measure; (b) the application for the preliminary order; (c) the specifics of the preliminary order, if any;	**Mr. V. Inbavijayan** In giving adequate opportunity for parties against whom a preliminary order is made to present their case, this provision is sound and equitable.	Comment supports provision.

Arbitration Bill	Consultation Comments	LRC Response
and (d) all other communications.		
Provision of security 47. (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.	**Mr. V. Inbavijayan** This section may prove important in order to support the role of the tribunal envisioned by section 10 and section 37.	Comment supports provision.
Costs and damages 49. (1) 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. (2) The arbitral tribunal may award costs and damages at any point during the proceedings.	**Mr. V. Inbavijayan** Keeping in mind the legal doctrine of restitution, this section is essential to ensure that no frivolous petitions to seek interim orders.	Comment supports provision.
Court-ordered interim measures 52. (1) A court shall have the same power of issuing an interim measure in relation to arbitration proceedings.	**Law Society Sub-Committee on Arbitration Law** This provision appears to follow Article 17J of the Model Law, but is missing some key words: it should say	Recommendation accepted.

Arbitration Bill	Consultation Comments	LRC Response
	"A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in [the Cayman Islands], as it has in relation to proceedings in courts." The missing words should be included in order to give full and proper effect to this provision, which would allow the Grand Court to grant interim remedies in support of foreign arbitrations.	
(2) The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration.	**Mr. V. Inbavijayan** In allowing the court to issue interim orders with respect to arbitration, adequate measure does seem to have been taken to ensure respect to arbitral proceedings through the use of sub-section (2).	Comment supports provision.
PART IX – AWARD		
Awards made on different issues 54. (1) Unless otherwise agreed by the parties, the arbitral tribunal may make more than one award at different points in time during the proceedings on different aspects of the matters to be determined. (2) The arbitral tribunal may, in particular, make an award relating to- (a) an issue affecting the whole claim; or (b) a part only of the claim,	**Caymanian Bar Association** **Sub-Committee on Arbitration** We suggest adding at the end of sub-section (2) "including determination as to a particular fact or set of facts, as to existence or non-existence of a particular condition or set of conditions and/or as to a particular rule, standard or quality being met or not met or complied with or not complied with".	Recommendations accepted.

Arbitration Bill	Consultation Comments	LRC Response
counter-claim or cross-claim, that is submitted to the tribunal for decision. (3) If the arbitral tribunal makes an award under this section, it shall specify in its award, the issue, or claim or part of a claim, that is the subject matter of the award.	We also suggest adding a new sub-section (4) "In making any such award, the arbitral tribunal may rely, in whole or in part, on the advice, opinion and/or report of any expert or experts appointed in accordance with section 36."	It is within the purview of the arbitral tribunal to make an award based on the evidence before it and any other opinions or reports that may have been given or submitted to assist the proceedings. It therefore is not necessary to expressly include a provision which speaks to the reliance on the report or opinion of an expert since such reliance is implied.
Remedies 55. (1) The parties may agree on the powers exercisable by the arbitral tribunal in relation to remedies. (2) Unless otherwise agreed by the parties, the arbitral tribunal may award any remedy or relief that could have been ordered by the court if the dispute had been the subject of civil proceedings in that court.	**Mr. V. Inbavijayan** Granting parity among remedies by arbitral tribunals and courts is essential in improving the scope of arbitration, and it is clear that this provision looks to embolden this very cause.	Comments support provision.
Interest 56. (2) An award made by the arbitral tribunal shall, unless the award otherwise directs, carry interest as from the date of the award and at the same rate as a judgment debt.	**Caymanian Bar Association Sub-Committee on Arbitration** Suggest adding at the end of sub-section (2): "in accordance with the relevant Rules of court".	The provision has been reformulated to provide the tribunal with autonomy to decided on the interest payable with in accordance with Rules of court.
Time for making award 57. (1) Subject to section 75(9) and anything to the contrary in an arbitration agreement, an arbitral tribunal shall have power to make an award at any time. (2) The time, if any, limited for	**Caymanian Bar Association Sub-Committee on Arbitration** Suggest adding at the end of sub-section (3): "if so ordered by the court".	Recommendation accepted. Clause 59(3) seeks to reflect this suggestion.

Arbitration Bill	Consultation Comments	LRC Response
making an award, whether under this Law or otherwise, may from time to time be extended by order of the court whether that time has expired or not. (3) The court may, on the application of any party to a reference remove an arbitral tribunal or any member of the tribunal that fails to use all reasonable dispatch in entering on and proceeding with the reference and making an award; and an arbitral tribunal or member of the tribunal that is removed by the court under this subsection shall not be entitled to receive any remuneration in respect of his or its services.		
Extension of time for making award 58. (1) Where the time for making an award is limited by the arbitration agreement, the court may by order extend that time, unless otherwise agreed by the parties (2) An application for an order under this section may be made- (a) upon notice to the parties, by the arbitral tribunal; or (b) upon notice to the arbitral tribunal and the other parties, by any party to the proceedings. (3) An application under this section shall not be made unless all available tribunal processes for application of extension of time have been exhausted.	**Mr. V. Inbavijayan** The use of the phrase 'unless otherwise agreed by the parties' along with the assumption that the time for making an award is limited in the arbitration agreement itself appears to give the parties a chance to think about such a limitation and concur. This is positive in that it allows for a review by the parties themselves before the court can interfere. Another important development is how court based extension of time is treated as the last resort under sub-section (3). This is ideal in order to facilitate granting of greater powers to arbitrators.	Comments support provision.

Arbitration Bill	Consultation Comments	LRC Response
(4) The court shall not make an order under this section unless it is satisfied that substantial injustice would otherwise be done. (5) The court may extend the time for such period and on such terms as it thinks fit, and may do so whether or not the time previously fixed by or under the arbitration agreement or by a previous order has expired. (6) The leave of the court shall be required for any appeal from a decision of the court under this section.	**Caymanian Bar Association Sub-Committee on Arbitration** Insert "not" between "would" and "otherwise" in second line of sub-section (4).	Recommendation accepted.
Form and content of award	**Caymanian Bar Association Sub-Committee on Arbitration** Suggest adding new sub-section 61(6) to read: "If any party to an arbitration so desires, the Secretariat may authenticate an original award registered with it or certify a copy thereof, may certify a copy of any relevant original arbitration agreement, and/or may arrange for translation of any award or agreement not made in English to be translated into English and certified by an official or sworn translator."	The LRC is of the view that the establishment of a secretariat is more appropriately dealt with as a matter consequential to the Bill. Regulations may be formulated to deal with the matters contemplated and further parties are permitted to formulate their rules to deal with such issues.
Power to withhold award in case of non-payment 65. (1) Unless otherwise agreed by the parties, the arbitral tribunal may refuse to deliver an award to the parties if the parties have not made full payment of the fees and expenses of the arbitrators.	**Mr. V. Inbavijayan** This section is essential in guaranteeing that the rights of the members of the tribunal are protected, and that they can take suitable measures to enforce their rights if the parties do not comply.	Comment supports provision.

Arbitration Bill	Consultation Comments	LRC Response
Correction or interpretation of award and additional award 67. (1) A party may, within thirty days of the receipt of an award, unless another period of time has been agreed upon by the parties- (a) upon notice to the other parties, request the arbitral tribunal to correct in the award any error in computation, any clerical or typographical error, or other error of similar nature; and (b) upon notice to the other parties, request the arbitral tribunal to give an interpretation of a specific point or part of the award, if such request is also agreed to by the other parties. (2) If the arbitral tribunal considers the request in subsection (1) to be justified, the tribunal shall make such correction or give such interpretation within thirty days of the receipt of the request and such correction or interpretation shall form part of the award.	**Mr. V. Inbavijayan** Again, in giving the Arbitral Tribunal the chance to review the award granted by it, a clear respect for party autonomy and the institution of arbitration can be appreciated. **Caymanian Bar Association Sub-Committee on Arbitration** Suggest provision of a reasonable time limit after which the arbitral tribunal can no longer make a correction.	Comment supports provision. The provision already provides a time period within which an application may be made.
PART X - POWER OF COURT IN RELATION TO AWARD		
	Caymanian Bar Association Sub-Committee on Arbitration We suggest that provisions be divided between two sections: (i) Powers of court in relation to	The Bill does contemplate a division of powers. Part VII contains provisions dealing with the power of the court in

Arbitration Bill	Consultation Comments	LRC Response
	arbitral proceedings; and (ii) Powers of the court in relation to award.	relation to arbitral proceedings and Part X contains provisions which deal with the courts power in relation to an award. Any further division would be a matter of drafting style. We find the current approach to be appropriate.
Determination of preliminary point of law 69. (1) Unless otherwise agreed by the parties, the court may, on the application of a party to the arbitration proceedings who has given notice to the other parties, determine any question of law arising in the course of the proceedings that the court is satisfied substantially affects the rights of one or more of the parties. (2) The court shall not consider an application under this section unless- (a) it is made with the agreement of all parties to the proceedings; or	**Mr. V. Inbavijayan** The Bill has defined the circumstances wherein the court can review an application by the parties most adequately under this section.	Comment supports provision.
(b) it is made with the permission of the arbitral tribunal and the court is satisfied that- (i) the determination of the question is likely to produce substantial savings in costs; and (ii) the application is made without delay. (3) The application shall identify the	**Mr. V. Inbavijayan** The need for permission of the Arbitral Tribunal, under sub-section 2(b), maintains the sanctity of the institution of Arbitration and minimizes chances of misuse of powers by courts during review of such applications.	Comment supports provision.

Arbitration Bill	Consultation Comments	LRC Response
question of law to be determined and, except where it is made with the agreement of all parties to the proceedings, state the grounds on which the court should decide the question. (4) Unless otherwise agreed by the parties, the arbitral tribunal may continue the arbitral proceedings and make an award while an application to the court under this section is pending. (5) Except with the leave of the court, no appeal shall lie from a decision of the court on whether the conditions in subsection (2) are met. (6) The decision of the court on a question of law shall be a judgment of the court for the purposes of an appeal to the Court of Appeal. (7) The court may give leave to appeal against its decision in subsection (6) only if the question of law before it is one of general importance, or is one that for some other special reason should be considered by the Court of Appeal.	**Mr. V. Inbavijayan** Sub-section (4) is extremely important in maintaining the fluid continuity of arbitral proceedings. **Caymanian Bar Association Sub-Committee on Arbitration** *We consider it appropriate to include contract out provisions (i.e. "an agreement to dispense with reasons for the Tribunal's award will be considered an agreement to exclude the court's jurisdiction")*	Comment supports provision. Recommendation accepted.
Enforcement of award 70. An award made by the arbitral tribunal pursuant to an arbitration agreement may, with leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect; and where leave of the court is granted, judgment may be entered in the terms of the award.	**Mr. V. Inbavijayan** This provision is an affirmative step in establishing a strong international arbitration centre. **Caymanian Bar Association Sub-Committee on Arbitration** It is appropriate to incorporate reference to the Foreign Arbitral Awards	Comment supports provision. Recommendation accepted.

Arbitration Bill	Consultation Comments	LRC Response
	Enforcement Law (1997 Revision) (which will need to be updated).	
No judicial review of award 71. The court shall not have jurisdiction to confirm, vary, set aside or remit an award on an arbitration agreement except where so provided in this Law.	**Caymanian Bar Association Sub-Committee on Arbitration** It is not appropriate to refer to "judicial review" as this term has a specific legal meaning. **Mr. V. Inbavijayan** This provision will serve to deter excessive judicial review of arbitral proceedings. It is vital in laying bare the intentions of the legislators with regard to the high degree of importance they wish to attach to arbitration.	Recommendation accepted. Comments support provision.
Interlocutory orders 72. (3) Section 18(5) shall not apply in relation to the power of the court to make an order under this section, but in the case of a reference to a judge-arbitrator that power shall be exercisable as in the case of any other reference to arbitration and also by the judge-arbitrator himself. (4) Anything done by a judge-arbitrator in the exercise of the power conferred by subsection (3) shall be done by him in his capacity as judge of the court and have effect as if done by that court. (6) In this section "judge-arbitrator" has the same meaning as in the Schedule which sets out the provisions of this Law which apply to a judge- arbitrator while exercising power	**Caymanian Bar Association Sub-Committee on Arbitration** See comments regarding section 18 above. The inclusion of a judge arbitrator makes the Bill especially complex.	Provisions for judge arbitrators have been deleted in final Bill.

Arbitration Bill	Consultation Comments	LRC Response
under this section.		
Power of court to give relief where arbitrator is not impartial or the dispute involves a question of fraud, etc. 73. (1) Where- (a) an agreement between the parties provides that disputes that may arise in the future between them shall be referred to an arbitrator named or designated in the agreement; and (b) after a dispute has arisen any party applies, on the ground that the arbitrator so named or designated is not or may not be impartial, for leave to revoke the authority of the arbitrator or for an injunction to restrain the other party or the arbitrator from proceeding with the arbitration, it shall not be a ground for refusing the application that the said party at the time when he made the agreement knew, or ought to have known, that the arbitrator, by reason of his relation towards any other party to the agreement or of his connection with the subject referred, might not be capable of impartiality.	**Mr. .V. Inbavijayan** In the interests of fairness and justice, this part of the Bill is necessary.	Comment supports provision.

Arbitration Bill	Consultation Comments	LRC Response
Appeal against award 75. (1) A party to arbitration proceedings may, upon notice to the other parties and to the arbitral tribunal, appeal to the court on a question of law arising out of an award made in the proceedings. (2) Notwithstanding subsection (1), the parties may agree to exclude the jurisdiction of the court under this section and an agreement to dispense with reasons for the arbitral tribunal's award shall be treated as an agreement to exclude the jurisdiction of the court under this section. (3) An appeal shall not be brought under this section except- (a) with the agreement of all the other parties to the proceedings; or (b) with the leave of the court. (4) The right to appeal under this section shall be subject to the restrictions in section 69.	**Caymanian Bar Association Sub-Committee on Arbitration** The contracting out provision in 75(2) should apply to whole Bill. We suggest that there should be no requirement for leave of court to appeal.	There are provisions in the Bill that deal with fraud, misconduct, independence and impartiality. These go to the core of an arbitration agreement and a subsequent award. It seems appropriate to include provisions which allow access to the court in such instances. Recommendation accepted.
Supplementary provisions to appeal under section 69, 74 or 75 76. (1) This section shall apply to an application or appeal under section 69, 74 or 75. (2) An application or appeal may not be brought if the applicant or appellant has not first exhausted- (a) any available arbitral process of appeal or review; and	**Law Society Sub-Committee on Arbitration Law** We do not follow the references to section 69: these provisions do not appear to have application to the determination of preliminary points of law, so we believe that these references to section 69 should be deleted	Recommendation accepted.

Arbitration Bill	Consultation Comments	LRC Response
(b) any available recourse under section 67.		
Effect of order of Court upon appeal against award 77. (1) Where the court makes an order under section 69, 74 or 75 with respect to an award, subsections (2), (3) and (4) shall apply. (2) Where the award is varied by the court, the variation shall have effect as part of the arbitral tribunal's award. (3) Where the award is remitted to the arbitral tribunal, in whole or in part, for reconsideration, the tribunal shall make a fresh award in respect of the matters remitted within three months of the date of the order for remission or such longer or shorter period as the court may direct. (4) Where the award is set aside or declared to be of no effect, in whole or in part, the court may also order that any provision that an award is a condition precedent to the bringing of legal proceedings in respect of a matter to which the arbitration agreement applies, shall be of no effect as regards the subject-matter of the award or, as the case may be, the relevant part of the award.	**Mr. V. Inbavijayan** While the focus should be on granting similar powers to courts and arbitral tribunals, it is necessary to keep in mind that it is the courts that form the pillar of the legal system. So in situations where judicial review is a necessary procedure, the Courts need to be granted powers to do so, and through sec. 77 the courts in the Islands have been given suitable leeway to exercise their function of judicial review.	Comments support provision.
PART XI – MEDIATION		
	Caymanian Bar Association **Sub-Committee on Arbitration** It is unclear why mediation has been included within the Bill, which	The mediation provisions have been deleted.

Arbitration Bill	Consultation Comments	LRC Response
	otherwise deals only with arbitration. These provisions are not suited to Grand Cayman, which currently does not have a similar infrastructure as Singapore.	
Appointment of mediator 79. (1) Where an arbitration agreement provides for the appointment of a mediator by a person who is not one of the parties and that person- (a) refuses to make the appointment; or (b) does not make it within the time specified in the agreement or, if no time is specified, within a reasonable time not exceeding two months of being informed of the existence of the dispute, a party to the agreement may serve the person in question with a written notice to appoint a mediator, and shall forthwith serve a copy of the notice on the other party to the agreement.	**Mr. V. Inbavijayan** This provision makes a provision for mutual consensus in dispute resolution by envisaging mediation proceedings before the parties may need to go in for arbitration. This dynamic approach prescribed by taking into account various possibilities may ensure greater satisfaction of the parties through mediation.	Comments support provision.
Termination on failure to produce a settlement 80. Unless there is an intention to the contrary, an arbitration agreement that provides for the appointment of a mediator shall be deemed to contain a provision that- (a) in the event the mediation proceedings fail to produce a settlement acceptable to the parties within three months of the date of the appointment of the	**Mr. V. Inbavijayan** This section is important in that it sets a time limit on the period for which mediation can continue before arbitration proceedings may be started.	Comment supports provision.

Arbitration Bill	Consultation Comments	LRC Response
mediator, or such longer period as the parties may agree to; or (b) in the event that the mediator is appointed by name in the arbitration agreement and within three months or such longer period as the parties may agree, the mediator has not been provided with written notification of the existence of a dispute, the proceedings shall terminate.		
Effect of settlement agreement 81. If the parties to an arbitration agreement that provides for the appointment of a mediator- (a) reach an agreement in settlement of their differences; (b) sign that agreement containing the terms of settlement, hereinafter referred to as the "settlement agreement"; and (c) that settlement agreement is certified by the mediator as a binding agreement, the settlement agreement shall, for the purposes of its enforcement, be treated as an award on an arbitration agreement and may, with the leave of the court, be enforced in the same manner as a judgment or order and where leave is given, judgment may be entered in terms of the agreement.	**Mr. V. Inbavijayan** Clause 81 supports autonomy.	Comment supports provision.

Arbitration Bill	Consultation Comments	LRC Response
Power of arbitrator to act as mediator 82. (1) If all parties to an arbitration agreement consent in writing and no party withdraws his consent in writing, an arbitrator may act as a mediator. (2) An arbitrator acting as mediator- (a) may communicate with the parties collectively or separately; and (b) shall treat information obtained by him from a party as confidential, unless that party instructs otherwise. (3) No objection shall be taken to the conduct of arbitration proceedings by an arbitrator solely on the ground that he had acted previously as a mediator in accordance with this section.	**Mr. V. Inbavijayan** Clauses 82 support autonomy	Comment supports provision. However, based on other majority stakeholder comments the provisions dealing with mediation are not included in the final Bill.
PART XII – MISCELLANEOUS		
Powers of court and Clerk of the Court 84. Rules of Court may be made for conferring on the Clerk of the Court or other officer of the court, all or any of the jurisdiction conferred by this Law on the court. **Rules of court** 85. Rules of Court may be made regulating the practice and procedure of any court in respect of any matter under this Law.	**Caymanian Bar Association Sub-Committee on Arbitration** We recommend that it is appropriate to have an administrative arbitration centre so that administrative functions are seen to be outside the court system.	The establishment of an administrative arbitration centre is a matter that is more appropriately dealt with as a matter consequential to the legislation.

Arbitration Bill	Consultation Comments	LRC Response
Proceedings to be heard otherwise than in open court 86. Proceedings under this Law in any court shall, on the application of any party to the proceedings, be heard otherwise than in open court.	**Caymanian Bar Association Sub-Committee on Arbitration** Either party can apply to have proceedings be heard in private. This only relates to court proceedings. Reference needs to be made to tribunal proceedings being heard in private similar to the Bahamas position. Appeals on a preliminary question of law may be heard in public. All other claims will be heard in private unless the court in the exercise of its discretion believes that the parties desire for privacy and confidentiality is outweighed by the public interest.	Recommendation accepted. Recommendation accepted.
Restrictions on reporting of proceedings heard otherwise than in open court 87. (1) This section shall apply to proceedings under this Law in any court heard otherwise than in open court. (2) A court hearing any proceedings to which this section applies shall, on the application of any party to the proceedings, give directions as to whether any and, if so, what information relating to the proceedings may be published. (3) A court shall not give a direction under subsection (2) permitting information to be published unless- (a) all parties to the proceedings agree that such information	**Caymanian Bar Association Sub-Committee on Arbitration** The Bill currently deals with confidentiality but only in relation to proceedings before the court and not before the tribunal. More consideration must be given to confidentiality issues. The Bahamian Law provisions should be considered as a model.	Recommendation accepted.

Arbitration Bill	Consultation Comments	LRC Response
may be published; or (b) the court is satisfied that the information, if published in accordance with such directions as it may give, would not reveal any matter, including the identity of any party to the proceedings, that any party to the proceedings reasonably wishes to remain confidential.		
Application to references under statutory powers 88. This Law shall apply in relation to every arbitration under any other written law as if the arbitration were commenced pursuant to an arbitration agreement, except in so far as this Law is inconsistent with that other written law.	**Caymanian Bar Association Sub-Committee on Arbitration** We consider these provisions not necessary.	The provisions are no longer reflected in the Bill.
Immunity of an appointing authority or arbitral institutions 89. (1) The appointing authority, an arbitral institution or person designated or requested by the parties to appoint or nominate an arbitrator, is not 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. (2) The appointing authority, an arbitral institution or person by whom an arbitrator is appointed or nominated, is not liable, by reason only of having appointed or	**Mr. V. Inbavijayan** This provision granting the appointing authority or arbitral institutions immunity from mistakes made in while acting in good faith is appropriate.	This provision has been deleted in the final Bill given that the issue of immunity has already been deal with earlier in the Bill

Arbitration Bill	Consultation Comments	LRC Response
nominated him, for anything done or omitted by the arbitrator, his employees or agents in the discharge or purported discharge of his functions as arbitrator. (3) This section applies to an employee or agent of the appointing authority, an arbitral institution or a person as it applies to the appointing authority, institution or person himself.		
Regulations 93. The Governor in Cabinet may make regulations generally as he considers necessary for giving effect to the purposes of this Law and without derogating from the generality of the foregoing, may make regulations respecting the establishment, procedures, powers and functions of an arbitral institution.	**Caymanian Bar Association Sub-Committee on Arbitration** Issues are not dealt with in the Bill which could usefully be considered in Regulations, are: (i) immigration issues, employment of local arbitrators (ii) requirement for official training of arbitrators Other laws may need to be updated i.e. Immigration Law/Regulations, Legal Practitioners Law, etc.	These are matters which can be dealt with consequentially. They should be regarded as the next step towards establishing the Islands as an option for the conduct of arbitration proceedings.
SCHEDULE (Sections 18 and 72(6))		
APPLICATION OF THIS LAW TO JUDGE-ARBITRATORS		
1. In this Schedule "judge-arbitrator" means a judge appointed as sole arbitrator by or by virtue of an arbitration agreement. 2. In section 17 in its application to a judge-arbitrator, the Court of Appeal shall be substituted for the court.	**Law Society Sub-Committee on Arbitration Law** The Schedule to the Bill illustrates a very real practical difficulty associated with the 'judge-arbitrator' concept. Given the infrequency with which the Court of Appeal sits in this jurisdiction, the determination of any challenges to or	Provisions will be deleted.

Arbitration Bill	Consultation Comments	LRC Response
	appeals against awards issued by judge-arbitrators would suffer significant delays which could seriously prejudice losing parties.	
	General Comments	
	Caymanian Bar Association Sub-Committee on Arbitration • Add a Schedule containing the UNCITRAL Arbitration Rules.	The Commission does not believe it to be appropriate to include a schedule containing the UNCITRAL Rules. The Bill as drafted incorporates several of those rules and as such it may be deemed duplicitous and indeed unacceptable drafting practice to include such rules in our Bill. As it stands, the parties are free to choose the rules they wish to apply without us having to include them in our Bill. However, in the interest of giving proper effect to the proposed Law we have vested in the Governor the power to make appropriate rules which may serve as default rules if the parties need assistance outside of what the Law provides.
	• Add a Schedule with the names of all approved persons or institutions in the Cayman Islands who are	The Commission does not view these recommendations as appropriate for inclusion in the Bill. These are consequential matters.

Arbitration Bill	Consultation Comments	LRC Response
	prepared to act as an Appointing Authority. • Make the Department of Commerce & Investment the Secretariat & centre for information on arbitrations in the Cayman Islands. • A model arbitration clause could usefully be incorporated. This could potentially distinguish the Bill from the laws of competing jurisdictions.	Recommendation accepted
	Mr. V. Inbavijayan Provisions must be made for use of video links. **Law Society Sub-committee on Arbitration Law** It might worthwhile to include a statement of the general principles of the legislation which sets out its purpose and which will provide guidance to the arbitration process.	Recommendation accepted. Recommendation accepted.

Arbitration Bill	Comments by Mr. Hew Dundas	LRC Response
PART I – PRELIMINARY		
Interpretation 2. (1) In this Law- "appointing authority" means the court or any other competent authority agreed by the parties in an arbitration agreement;	In Scotland the court was excluded at first instance.	Provision has been made for the court to serve in the role of designating an appointing authority where the parties are

Arbitration Bill	Comments by Mr. Hew Dundas	LRC Response
		unable to agree on an appointing authority.
"arbitral tribunal" means a sole arbitrator, a panel of arbitrators or an arbitral institution;	It looks very odd to define "tribunal" as including an arbitral institution since the functions of tribunal and institution are very different.	Arbitral institution is included in the definition of tribunal given that it is conceivable, as in the case of Singapore that an arbitral institution may be required to apply its resources in the conduct of arbitral proceedings. Such an institution may comprise several arbitrators.
"arbitration agreement" means an agreement between parties to submit to arbitration all or certain disputes that have arisen or that may arise between them whether or not contractual and includes agreements that involve commercial transactions;	Does an arbitration agreement have to be in writing to come under this Act?	The definition contemplates that arbitration agreements should be in writing to fall with the scope of the legislation.
"domestic arbitration agreement" means an arbitration agreement in which the place of arbitration has been designated as the Islands and to which none of the parties is- (a) an individual who is a national of, or habitually resident in a jurisdiction other than the Islands; or (b) a body corporate which is incorporated in, or whose central control and management is exercised in a jurisdiction other than	In Scotland we have no distinction between domestic/international inter alia. A distinction could open up the unnecessary possibility of litigation over whether an arbitration is domestic or international.	Recommendation accepted.

Arbitration Bill	Comments by Mr. Hew Dundas	LRC Response
the Islands. "international arbitration agreement" means an arbitration agreement where- (a) the parties expressly state, at the time of the conclusion of the agreement, that it is an international arbitration agreement; (b) at least one of the parties to an arbitration object		
"party" means a party to an arbitration agreement or, in any case where an arbitration does not involve all of the parties to the arbitration agreement, means a party to the arbitration;	Provision for third parties exercising the rights of a party should be included, for example, an insurer via subrogation or a banker under a (defaulted) loan agreement or an administrator	Recommendation accepted.
"place of the arbitration" means the juridical seat of the arbitration designated by- (a) the parties to the arbitration agreement; or (b) any arbitral tribunal or person authorised by the parties for that purpose, or, in the absence of such designation, determined by the court, having regard to the arbitration agreement and all relevant circumstances; (2) 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;	It is odd, even unhelpful for a common law country to use" place" as opposed to "seat" given the confusion between place/seat and place/venue.	Recommendation accepted. Seat will be the terminology referenced.

Arbitration Bill	Comments by Mr. Hew Dundas	LRC Response
(3) If a party does not have a place of business, reference is to be made to his habitual residence.		
PART II - ARBITRATION AGREEMENT		
Consumer arbitration agreement 8. (1) Where a contract contains an arbitration agreement and a person enters into that contract as a consumer, the arbitration agreement is enforceable against the consumer only if the consumer, by separate written agreement certifies that, having read and understood the arbitration agreement, he agrees to be bound by that agreement. (2) Subsection (1) applies to every contract containing an arbitration agreement entered into in the Islands notwithstanding a provision in the contract to the effect that the contract is governed by a law other than the law of the Islands. (3) Where a party to a consumer arbitration agreement knows that any provision of this Law from which he may derogate or any requirement under the arbitration agreement has not been complied with and that party proceeds with the arbitration without making an objection to that non-compliance without undue delay or, if a time limit is provided, within that period of time, that party shall be deemed to have waived the right to object and an arbitration agreement that would otherwise be unenforceable by reason of non-compliance shall be treated as operative.	EU law effectively requires that consumers can enter into arbitration agreements only after the dispute has arisen, otherwise the arbitration agreement is void.	The provision seeks to recognise the possibility that within the confines of the freedom of contract principle, parties may wish to insert an arbitration clause in the event of a consumer dispute.

Arbitration Bill	Comments by Mr. Hew Dundas	LRC Response
(4) In this section- "consumer" in relation to- (a) any goods, means- (i) a person who acquires or wishes to acquire goods for his own private use or consumption; and (ii) a commercial undertaking that purchases consumer goods; (b) any services or facilities, means any person who employs or wishes to be provided with the services or facilities; and (c) any accommodation, means any person who wishes to occupy the accommodation.	I note that this covers both natural and legal persons; UK law brackets them in this context but not all legislations around the world do.	The intention is to cover legal and natural persons since both have the capacity to contract.
PART V - ARBITRAL TRIBUNAL		
Number of arbitrators 17. (1) The parties to an arbitration agreement may choose any number of arbitrators. (2) Where the parties fail to determine the number of arbitrators, there shall be a single arbitrator.	I suggest that you need to specify that the arbitrator shall be a natural person i.e. an individual. An informal worldwide survey showed that relatively few jurisdictions have a clear position on the arbitrator having to be an individual; many imply that the arbitrator shall be a person but, separately (e.g. in Interpretation Acts, "person" includes both legal and natural	We do not consider it necessary to stipulate that an arbitrator be an individual. It seems self evident that the function of an arbitrator has to ultimately be performed by an individual. Like many jurisdictions, our Interpretation Law embraces both natural and legal persons. Therefore, defining an arbitrator as an individual would not impact upon the legal reality

Arbitration Bill	Comments by Mr. Hew Dundas	LRC Response
	persons. In some US states, a law firm (ie an LLP or similar) is appointed arbitrator even if it delegates responsibility to one individual	that while a body may be appointed as arbitrator, it is an individual or group of individuals who would execute the functions.
Appointment of arbitrators 18. (1) The parties shall agree to a procedure for appointing the arbitral tribunal. (2**)** Where the parties fail to agree on a procedure for appointing the arbitral tribunal- (a) in an arbitration with a sole arbitrator, the arbitrator shall be appointed, upon the request of a party to the agreement, by the appointing authority; and (b) in an arbitration with more than two arbitrators, the parties shall appoint an odd number of arbitrators either by- (i) each party appointing an arbitrator and agreeing to the appointment of a subsequent arbitrator; or (ii) two or more parties	The parties *may* agree to a procedure for appointing the arbitral tribunal. I suggest that this is more accurate. Replace "more that two" with "two or more".	Recommendation accepted. Recommendation accepted.

Arbitration Bill	Comments by Mr. Hew Dundas	LRC Response
agreeing to the appointment of the required number of arbitrators.		
Grounds for challenge 20. (1) Where a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstance likely to compromise his impartiality or independence.	Who determines that likelihood? I suggest that this should be made clear, particularly that this is not the arbitrator ("no man can be a judge ..."). The following provision is commended: An individual to whom this rule applies must, without delay, disclose to the parties, and in the case of an individual not yet appointed as an arbitrator, to any arbitral appointments referee, other third party or court considering whether to appoint the individual as an arbitrator, any circumstances known to the individual (or which become known to the individual before the arbitration ends) which might reasonably be considered relevant when considering whether the individual is impartial and independent.	The provision suggested is similar in import to the LRC proposal. No change other than to insert disclosure to the appointing authority is necessary.
Challenge procedure 21. (1) Subject to subsection (3), the parties may agree on a procedure for challenging an arbitrator. (2) If the parties have not agreed on a procedure for challenge, a party who intends to challenge an arbitrator shall- (a) within fifteen days after		

Arbitration Bill	Comments by Mr. Hew Dundas	LRC Response
becoming aware of the constitution of the arbitral tribunal; or (b) after becoming aware of any circumstance referred to in section 20(3), send a written statement of the grounds for the challenge to the arbitral tribunal. (3) The arbitral tribunal shall, unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, decide on the challenge. (4) If a challenge before the arbitral tribunal is unsuccessful, the aggrieved party may, within thirty days after receiving notice of the decision rejecting the challenge, apply to the court to decide on the challenge and the court may make such order as it thinks fit. (5) An appeal shall not lie against the decision of the court under subsection (4). (6) While an application to the court under subsection (4) is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitration proceedings and make an award.	If this is an institutional arbitration, sending to the institution is also necessary. What if the tribunal is a sole arbitrator?	The definition of arbitral tribunal contemplates arbitral institution. This provision applies despite the number of arbitrators responsible for the proceedings.
Power of court where arbitrator is removed or authority of arbitrator is revoked 23. (1) Where an arbitrator, not being a sole arbitrator, or two or more arbitrators, not being all of the arbitrators constituting an arbitral tribunal, is or are removed by the court, the court may, on the application of any party	I suggest better that the appointing authority deal with the issue of removal.	Recommendation accepted.

Arbitration Bill	Comments by Mr. Hew Dundas	LRC Response
to the arbitration agreement, appoint a person to act as arbitrator in place of any person so removed. (2) Where the authority of an arbitral tribunal is revoked by the court or a member thereof is removed by the court, the court may, on the application of any party to the arbitration agreement, either appoint a person to act as arbitrator in place of the person removed or order that the arbitration agreement shall cease to have effect with respect to the dispute referred.		
Decision by panel of arbitrators 26. (1) In arbitration proceedings with more than one arbitrator, a decision of the arbitral tribunal shall be made by all or a majority of its members, unless otherwise agreed by the parties. (2) In the event that no majority decision can be agreed, the parties may agree on the process to be followed in order to arrive at a final binding decision. (3) A presiding arbitrator, if so authorised by the parties or all members of the arbitral tribunal may decide any question of procedure.	What if the parties cannot agree? There must be a deadlock-breaker such as the presiding arbitrator making the decision.	Recommendation accepted.
Liability of arbitrator 27. (1) An arbitrator is not liable - (a) negligence in respect of anything done or omitted to be done by him in his capacity as arbitrator; or	I suggest that you might wish to clarify how far the arbitrator's immunity stretches in light of an unreported UK case in which the court indicated that the arbitrator's immunity did not extend to costs. I believe	Recommendation accepted.

Arbitration Bill	Comments by Mr. Hew Dundas	LRC Response
(b) any mistake of law, fact or procedure made by him in the course of arbitration proceedings or in the making of an arbitral award. (2) Notwithstanding subsection (1), an arbitrator is liable for any act or omission done by him in his capacity as arbitrator, where such an act or omission is shown to be done in bad faith.	that "not liable" should mean not liable for anything resulting provided the arbitrator acted in good faith.	
PART VI - JURISDICTION OF ARBITRAL TRIBUNAL		
Arbitration of disputes 28. (1) Any dispute that the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless the arbitration agreement is contrary to public policy or, under any other law, such a dispute is not capable of determination by arbitration. (2) The fact that any other law confers jurisdiction in respect of any matter on the court but does not refer to the determination of that matter by arbitration, does not indicate that a dispute about that matter is incapable of determination by arbitration.	I suggest that it should be clarified that (i) "any other law" means any other Cayman Islands law but not any other foreign law since (eg) Indian and Pakistani laws have odd features about what is non-arbitral and you cannot want to import those. (ii) "public policy" must mean the public policy of the Cayman Islands.	It is implied that unless expressly stated otherwise, references to law or public policy relate to those laws and public policy issues which relate to the Islands.
PART VII - ARBITRAL PROCEEDINGS		
General duties of arbitral tribunal 30. The arbitral tribunal shall act fairly and impartially and shall allow each party a reasonable opportunity to present his case.	I suggest that this provision needs to be extended to stipulate that treating the parties fairly includes giving each party a	Recommendation accepted.

Arbitration Bill	Comments by Mr. Hew Dundas	LRC Response
	reasonable opportunity to put its case and to deal with the other party's case.	
Place of arbitration 32. (1) The parties to an arbitration agreement are free to agree on the place of arbitration. (2) Where there is no agreement as to a place of arbitration, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties. (3) Notwithstanding the provisions of sub-section (1) the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.	It is odd for a common law jurisdiction to use "place" as opposed to "seat" given the confusion between place/seat and place/venue.	Recommendation accepted.
Statements of claim and defence 34. (1) Within the period of time agreed by the parties or, failing such agreement, as determined by the arbitral tribunal, a claimant shall state- (a) the facts supporting his claim; (b) the points in issue; and (c) the relief or remedy sought, and the respondent shall state his defence in respect of the particulars set out in this subsection, unless the parties have otherwise	I suggest that it should be made clear that the Statements of Claim/Defence should be complete in the sense of including ALL materials in which the applicable parties' reply. S.34(1) resembles (to me) more of a Notice of Arbitration, ie a skeletal/summary submission. The provision as worded is a recipe or delay. It is better to use the following wording- 22.1 Unless the parties at any time	The provision as formulated is in our view specific enough to remove any notion that all that is required is a summary version of facts supporting a claim. The provision as formulated captures the thoughts expressed. We therefore do not see a need to further refine the language.

Arbitration Bill	Comments by Mr. Hew Dundas	LRC Response
agreed to the required elements of such statements. (2) The parties may submit to the arbitral tribunal their statements, all documents they consider to be relevant or any other document that refer to such documents, or other evidence. (3) Except as otherwise agreed by the parties, any party may amend or supplement his claim or defence during the course of the arbitration proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment, having regard to the delay in making the amendment or the views of the parties.	agree otherwise in writing, the Arbitral Tribunal shall have the power, on the application of any party or of its own motion, but in either case only after giving the parties a reasonable opportunity to state their views: (a) to allow any party, upon such terms (as to costs and otherwise) as it shall determine, to amend any claim, counterclaim, defence and reply.	
Representation 36. A party to an arbitration agreement may be represented in proceedings before the arbitral tribunal by a legal practitioner or by a person who, though not a legal practitioner, has such qualifications or experience in law, whether acquired in the Islands or in any place other than the Islands, as, in the opinion of the arbitral tribunal, would be likely to assist in the conduct of the proceedings.	This is too restrictive? The great majority of arbitrations in the UK are property-related ones where the Surveyor representatives probably fail this test; my suggested deletion removes that risk.	Recommendation accepted.
Consolidation of proceedings 38. (1) Where arbitration proceedings involve the same arbitral tribunal- (a) the arbitral tribunal may, on the application of a party in each of the arbitration proceedings,	This clause is open to serious question. If we have two arbitrations A vs B and C vs D, this appears to give (for example) A and D the right to seek an order but with neither B nor C having any right to be heard on the matter; this cannot be correct	Point accepted. The clause has been reformulated to require agreement of the parties before proceedings are consolidated by the tribunal.

Arbitration Bill	Comments by Mr. Hew Dundas	LRC Response
order- (i) those proceedings to be consolidated on such terms as the arbitral tribunal thinks just; (ii) those proceedings to be heard at the same time, or one immediately after the other; or (iii) any of those proceedings to be stayed until after the determination of any of them, (b) if the arbitral tribunal refuses or fails to make an order under paragraph (a), the court may, on application by a party in any of the proceedings, make such an order as could have been made by the arbitral tribunal.	being (prima facie) a breach of natural justice. The 2006 amendments to the UML envisage, in certain circumstances, parties making ex parte applications; this concept has been overwhelmingly rejected around the world in both common and civil law jurisdictions	
Powers to appoint experts 39. (1) Unless otherwise agreed by the parties, the arbitral tribunal may- (a) appoint one or more experts to report to it on specific issues to be	Consultation with experts should not take place after the close of the hearing or otherwise in the absence of the parties as this deprives the parties of their right to comment.	The provision has been refined to permit the parties the right to question an expert.

Arbitration Bill	Comments by Mr. Hew Dundas	LRC Response
determined by the tribunal; and (b) require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection. (2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present other expert witnesses in order to testify on the points at issue.		
Perjury 43. A person who wilfully or corruptly gives false evidence before an arbitral tribunal is guilty of perjury, as if the evidence had been given in open court, and may be dealt with, prosecuted, and punished accordingly.	How will this work in practice? Who will report the alleged perjury to the appropriate authorities? In what form?	Provisions dealing with perjury are recognized in the United States. Perjury in arbitration is punishable in the same manner as it would be punishable in judicial proceedings under the Federal Criminal Code. The Federal Arbitration Act stipulates that one ground for vacating an arbitration award is fraud. In this regard, perjured testimony amounts to fraud.
Court's powers exercisable in support of arbitration proceedings 44. (1) In relation to an arbitration a	Provision should be reflect that the section	Recommendation accepted.

Arbitration Bill	Comments by Mr. Hew Dundas	LRC Response
court- (a) may make such orders in respect of any of the matters set out in section 40 as it would in relation to an action or matter in the court; (b) may secure the amount in dispute; (c) shall ensure that any award that may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party; and (d) may grant an interim injunction or any other interim measure. (2) An order of the court under this section shall cease to have effect in whole or in part if the arbitral tribunal or any such arbitral tribunal or person having power to act in relation to the subject matter of the order makes an order to which the order of the court relates. (3) If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets. (4) If the case is not one of urgency, the court shall act only on the application of a	applies to arbitrations which have begun and where the court is satisfied— (i) that a dispute has arisen or might arise, and (ii) that an arbitration agreement provides that such a dispute is to be resolved by arbitration.	

Arbitration Bill	Comments by Mr. Hew Dundas	LRC Response
party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties. (5) In any case the court shall act only if or to the extent that the arbitral tribunal vested by the parties with power in that regard has no power or is unable for the time being to act effectively.		
PART IX - AWARD		
Law applicable to substance of dispute 56. (1) The arbitral tribunal shall decide a dispute in accordance with the law chosen by the parties as applicable to the substance of the dispute. (2) If or to the extent that the parties have not chosen the law applicable to the substance of their dispute, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable. (3) The arbitral tribunal may decide the dispute, if the parties agree, in accordance with such other considerations as are agreed by them or determined by the tribunal.	I suggest that the formulation in R47(1)(b) ASA10 is to be preferred: (1) The tribunal must decide the dispute in accordance with— (a) the law chosen by the parties as applicable to the substance of the dispute, or (b) if no such choice is made (or where a purported choice is unlawful), the law determined by the conflict of law rules which the tribunal considers applicable. 47 (3) When deciding the dispute, the tribunal must have regard to—	The provision as formulated addresses the issues contemplated, however reference has been to the unlawful nature of a law chosen. Recommendation accepted.

Arbitration Bill	Comments by Mr. Hew Dundas	LRC Response
	(a) the provisions of any contract relating to the substance of the dispute, (b) the normal commercial or trade usage of any undefined terms in the provisions of any such contract, (c) any established commercial or trade customs or practices relevant to the substance of the dispute, and (d) any other matter which the parties agree is relevant in the circumstances.	
Awards made on different issues 57. (1) Unless otherwise agreed by the parties, the arbitral tribunal may make more than one award at different points in time during the proceedings on different aspects of the matters to be determined. (2) The arbitral tribunal may, in particular, make an award relating to- (a) an issue affecting the whole claim; (b) a part only of the claim, counter-claim or cross-claim, that is submitted		

Arbitration Bill	Comments by Mr. Hew Dundas	LRC Response
to the tribunal for decision; (c) the determination as to a particular fact or set of facts; (d) the existence or non-existence of a particular condition or set of conditions; or (e) compliance or non-compliance with a particular rule, standard or quality. (3) If the arbitral tribunal makes an award under this section, it shall specify in its award, the issue, or claim or part of a claim, that is the subject matter of the award. (4) In making an award, the arbitral tribunal may rely on the advice of an expert appointed under section 39.	I think use of "rely on" is dangerous since it carries with it more than a hint of delegation. It is suggested that in making an award, the arbitral tribunal may take into consideration the advice of an expert.	This clause has been deleted on the grounds that the tribunal is at liberty to rely on any advice or opinions in arriving at an award.
Remedies 58. (1) The parties may agree on the powers exercisable by the arbitral tribunal in relation to remedies. (2) Unless otherwise agreed by the parties, the arbitral tribunal may award any remedy or relief that could have been ordered by the court if the dispute had been the subject of civil proceedings in that court.	Suggestion that the provision reflect the following- The tribunal's award may: (a) be of a declaratory nature, (b) order a party to do or refrain from doing something (including ordering the performance of a contractual	Outside of the interim measures and injunctive relief available in the Bill, this provision is intended to allow the tribunal flexibility to apply other appropriate court remedies in accordance with the agreement of the parties.

Arbitration Bill	Comments by Mr. Hew Dundas	LRC Response
	obligation), or (c) order the rectification or reduction of any deed or other document (other than a decree of court) (to the extent permitted by the law governing the deed or document).	
Interest 59. (1) The arbitral tribunal may award interest, including interest on a compound basis, on the whole or any part of any sum that- (a) is awarded to any party; or (b) is in issue in the arbitral proceedings but is paid before the date of the award, for the whole or any part of the period up to the date of the award or payment, whichever is applicable. (2) An award made by the arbitral tribunal shall, unless the award otherwise directs, carry interest as from the date of the award and at the same rate as a judgment debt in accordance with the Rules of Court.	Suggests that this is not the best approach and that the interest rate should be decided by the tribunal, particularly since interest should be compensatory; for example, if company A in arbitration 1 has been paying overdraft interest at base + 2% and Company B in (a wholly unrelated) arbitration 2 base + 8%, why should they be compensated at the same rate? Certainly B and possibly also A will not recover what they have paid out in interest so the basic principle is infringed. I commend to your attention R50 ASA10 as being full and complete and giving the tribunal maximum flexibility to deal with the particular circumstances under consideration	Recommendation accepted.
Interim awards 62. Unless a contrary intention is expressed therein, every arbitration agreement shall, where such a provision is applicable to the	What about provisional awards?	Within the context of the provision interim awards can also be treated as provisional awards.

Arbitration Bill	Comments by Mr. Hew Dundas	LRC Response
reference, be deemed to contain a provision that an arbitral tribunal may, if it thinks fit, make an interim award.		
Court may charge property with payment of legal practitioner's costs in arbitration 69. Unless otherwise agreed by the parties, the court may, where a legal practitioner or expert witness has rendered services during arbitration proceedings, order that property be charged for payment of the costs of that legal practitioner or expert witness which were awarded by the arbitral tribunal, as if those arbitration proceedings were a proceeding in the court, and the court may make declarations and orders accordingly.	This seems odd in that it appears to assume direct liability by one party for the costs of the of the other party; such cannot occur in England or Scotland or anywhere else of which I am aware. The normal position is that (a) as a matter of contract law, each party is responsible for paying its own costs and (b) party A becomes liable to party B (and not to any other person) for the latter's costs, whatever they might be, to the extent awarded by the tribunal.	The rules of court stipulate that the unsuccessful party in court proceedings is liable for the costs of the party. This provision seeks to give accord to that rule.
Correction or interpretation of award and additional award 70. (1) A party may, within thirty days of the receipt of an award, unless another period of time has been agreed upon by the parties- (a) upon notice to the other parties, request the arbitral tribunal to correct in the award any error in computation, any clerical or typographical error, or other error of similar nature; and (b) upon notice to the other parties, request the	All such periods are 28 days in England and Scotland to prevent key dates, such as may require action, falling on a weekend.	The Interpretation Law deals with the computation of time in these circumstances. Further for consistency with other periods stipulated in the Bill we have opted to leave the period at thirty days.

Arbitration Bill	Comments by Mr. Hew Dundas	LRC Response
arbitral tribunal to give an interpretation of a specific point or part of the award, if such request is also agreed to by the other parties. (6) The arbitral tribunal may, if necessary, extend the period of time within which it shall make a correction, interpretation or an additional award under this section.	I do not consider that the tribunal is the appropriate decision-maker here, otherwise a tribunal might grant itself a 10-year extension with no interference.	
(7) Section 64 shall apply to an award in respect of which a correction or interpretation has been made under this section and to an additional award.	There is a lacuna here, as revealed in the English case *Gannet v Eastrade* where the arbitrator, on a s.57 application by a party, corrected a computational error and then, based on the revised principal award, revised his costs award from 100/0 to 50/50 ie not a correction of an error but a significant change in the underlying basis of the costs award. There is no express power in s.57 AA96 (or in your cl.70) to do this but the judge OK-ed it anyway on general principles. In Scotland we added R58(7) to cure this 58 (7) Where a correction affects— (a) another part of the corrected award, or (b) any other award made by the tribunal (relating	Point accepted. A time limit of thirty days within which the tribunal may correct an award has been stipulated. Recommendation accepted.

Arbitration Bill	Comments by Mr. Hew Dundas	LRC Response
	to the substance of the dispute, expenses, interest or any other matter), the tribunal may make such consequential correction of that other part or award as it considers appropriate.	
PART X - POWER OF COURT IN RELATION TO AWARD		
Interlocutory orders 75. (1) If a party to a reference under an arbitration agreement fails within the time specified in the order or, if no time is so specified, within a reasonable time to comply with an order made by the arbitral tribunal in the course of the reference, then, on the application of the arbitral tribunal or of any party to the reference, the court may make an order extending the powers of the arbitral tribunal as mentioned in subsection (2). (2) If an order is made by the court under this section, the arbitral tribunal may, to the extent and subject to any conditions specified in that order, continue with the reference in default of appearance or of any other act by one of the parties in like manner as a judge of the court might continue with proceedings in that court where a party fails to comply with an order of that court or a requirement of Rules of Court. (3) Subsections (1) and (2) have effect notwithstanding anything in any agreement but do not derogate from any	I am not persuaded that anything additional to cl.41 is necessary; no such addition has ever been shown to be necessary in England. I am also uncomfortable with yet another involvement of the court.	Recommendation accepted.

Arbitration Bill	Comments by Mr. Hew Dundas	LRC Response
powers conferred on an arbitral tribunal, whether by an arbitration agreement or otherwise.		
PART XII - MISCELLANEOUS		
Arbitral proceedings shall be private 83. An arbitral tribunal shall conduct the arbitral proceedings in private.	There was an overwhelming consensus in Scotland for a confidentiality provision.	Recommendation accepted.
Immunity of an appointing authority or arbitral tribunal 87. (1) The appointing authority, an arbitral tribunal or person designated or requested by the parties to appoint or nominate an arbitrator, is not 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.	This appears to attempt to define "appointing authority" but that is already a defined term.	The intent of this provision is not to define appointing authority but rather to indicate the immunities attached to such an authority.
Service of notices 88. (1) Parties may agree on the manner of service of any notice or other document required or authorised to be given or served in pursuance of the arbitration agreement or for the purposes of the arbitration proceedings. (2) If or to the extent that there is no such agreement as is referred to in subsection (1), subsections (3) and (4) applies. (3) A notice or other document may be served on a person by any method which is likely to bring it to the attention of the	Should you not expressly cover electronic communications here?	Clause 85(6) contemplates any form of communication including electronic communication. Further the parties may agree on the form of communication that is acceptable.

Arbitration Bill	Comments by Mr. Hew Dundas	LRC Response
recipient. (4) If a notice or other document is addressed, prepaid and delivered by post- (a) to the addressee's usual or last known place of residence or, if he is or has been carrying on a trade, profession or business, his usual or last known place of business; or (b) if the addressee is a body corporate, to the registered office of the body corporate, it shall be treated as effectively served. (5) This section does not apply to the service of documents for the purposes of legal proceedings, for which provision is made by Rules of Court. (6) References in this Part to a notice or other document include any form of communication in writing and references to giving or serving a notice or other document shall be construed accordingly.		
Repeal and transitional provisions 92. (3) Nothing in this Law shall apply to any arbitration agreement made or entered into before the commencement of this Law.	This is, I believe, wrong in principle, principally because it guarantees that the 2001 law will continue in force almost indefinitely and the Islands will have dual legislation running in parallel.	Recommendation accepted.

Appendix II

Arbitration Bill, 2012