

CONCURRENCE COPY

COMMERCIAL ARBITRATION BILL, 1982

EXPLANATORY NOTE

(This Explanatory Note relates to this Bill as introduced into Parliament)

The following Bills are cognate with this Bill:—

Legal Practitioners (Arbitration) Amendment Bill, 1982;

Miscellaneous Acts (Arbitration) Amendment Bill, 1982.

The object of this Bill is to repeal the Arbitration Act, 1902, and to enact new provisions dealing with the arbitration of disputes.

The Bill contains the following provisions:—

PART I.—PRELIMINARY.

Clause 1 contains provisions relating to the short title, the commencement of the Act and the arrangement of the Bill.

Clause 2 contains repeal and transitional provisions and provisions which indicate the application which the provisions of the Bill will have.

Clause 3 in subclause (1) contains definitions of “arbitration agreement”, “award”, “Court”, “District Court”, “misconduct”, “party” and “power of appointment” or “power to appoint”.

Subclause (2) sets out how the District Court might have jurisdiction in relation to an arbitration agreement.

Subclause (3) deals with the interpretation of reference to the commencement of the proposed Act.

Clause 4 provides that where the Crown is a party to an arbitration agreement, it will be bound by the provisions contained in the Bill.

PART II.—APPOINTMENT OF ARBITRATORS AND UMPIRES.

Clause 5 provides that in the absence of a contrary indication each arbitration agreement will be taken to require the appointment of only a single arbitrator.

Clause 6 provides that any arbitrator appointed is to be appointed jointly by the parties to the agreement unless a contrary intention is expressed.

Clause 7 sets out the procedures to be followed in the event that a person fails to exercise his power to appoint an arbitrator.

Clause 8 specifies that a power to appoint an arbitrator includes the power to appoint a replacement arbitrator should the original arbitrator die or cease to hold office.

Clause 9 sets out the procedures by which the Court may fill a vacancy in the office of arbitrator where neither the agreement nor the provisions of the Bill provide for such a contingency.

Clause 10 provides that, where an arbitrator is removed by the Court, it may appoint another arbitrator or order that the agreement no longer applies.

Clause 11 provides that where an agreement requires an equal number of arbitrators to be appointed, an umpire shall be appointed immediately an arbitration commences but he is not required to sit with the arbitrators while proceedings are in course.

Clause 12 states that an arbitrator appointed pursuant to the provisions of the Bill is deemed to have been appointed pursuant to the relevant agreement.

PART III.—CONDUCT OF ARBITRATION PROCEEDINGS.

Clause 13 sets out the procedures for the conduct of an arbitration.

Clause 14, while indemnifying an arbitrator acting as such against actions for negligence, makes him liable for any fraudulent act or omission.

Clause 15 sets out the circumstances in which an umpire may take over the conduct of arbitration proceedings.

Clause 16 empowers the Court to issue subpoenas requiring attendance before an arbitrator or production to an arbitrator of documents.

Clause 17 deals with the refusal or failure of a person to appear before an arbitrator or to answer questions or produce documents. Subclause (3) provides that in circumstances where the Supreme Court could continue proceedings despite lack of co-operation from a party to those proceedings, an arbitrator may proceed with an arbitration despite lack of co-operation from a party to the arbitration.

Clause 18 prescribes the manner in which evidence may be taken in an arbitration proceeding.

Clause 19 deals with the situation where an umpire has taken over the conduct of an arbitration or a new arbitrator has been appointed and provides that what has occurred to that time stands and may be acted upon by the new appointee or the parties.

Clause 20 provides that determinations made by an arbitrator in the course of an arbitration have to be in accordance with the law.

Clause 21 permits an arbitrator to make an interim award.

Clause 22 empowers arbitrators to make awards providing for specific performance on any contract save a contract relating to land or an interest in land.

Clause 23 permits an arbitrator to extend, in the course of an arbitration, the terms of that arbitration if the parties apply for that to be done providing there is no contrary intention in the agreement.

PART IV.—AWARDS AND COSTS.

Clause 24 provides for an arbitrator's award to be final, subject to the provisions of the Bill and there being no contrary intention expressed in the agreement.

Clause 25 sets out the form in which an award may be made and makes provision for a written award to be provided where it was not originally made in that manner.

Clause 26 confers on an arbitrator and the Court the power to correct an error in an award.

Clause 27 empowers, subject to there being no contrary intention in an agreement, an arbitrator to include in an award interest at a rate not exceeding the rate at which interest is payable on a judgment debt of the Supreme Court.

Clause 28 empowers, subject to there being no contrary intention in an agreement, an arbitrator to direct that interest at the same rate at which interest is payable on a judgment debt of the Supreme Court is payable on a sum of money which was awarded for so long as it is unpaid.

Clause 29 provides that an arbitration award may, with the leave of the Court, be enforced in the same manner as a judgment or order of the Court.

Clause 30 provides, subject to there being no contrary intention in an agreement, that the costs of an arbitration shall be determined by the arbitrator and sets out the manner in which an order in relation to costs may be made.

Clause 31 provides that the fees and expenses payable to or sought by an arbitrator may, on application by a party, be taxed in the Court.

Clause 32 provides, in the absence of a contrary agreement by the parties, that the Court on application by a party may make such order as to costs as it thinks just in circumstances when an arbitration has failed in that no final award was made or the award was wholly set aside by the Court.

PART V.—POWERS OF THE COURT.

Clause 33 makes provision for a case-stated procedure in relation to an arbitration.

Clause 34 provides that in the event of misconduct by an arbitrator, impropriety in the procuring of an arbitration or award or where proceedings have been misconducted, the Court on the application of a party may set aside the award either wholly or partially.

Clause 35 empowers the Court to remit, with or without directions, matters referred to arbitration to an arbitrator for reconsideration or to a new arbitrator.

Clause 36 empowers the Court on the application of a party to remove an arbitrator where the Court is satisfied the arbitrator has misconducted himself, is subject to undue influence or is incompetent or unsuitable.

Clause 37 states that a party to an agreement is not prevented from alleging partiality, unsuitability or incompetence on the part of an arbitrator by virtue of the fact that that party appointed the arbitrator.

Clause 38 confers on the Court the same power of making interlocutory orders in relation to arbitrations as it enjoys in relation to its proceedings.

Clause 39 empowers the Court on application by a party to grant extensions of time in relation to matters arising out of an arbitration.

Clause 40 empowers the Court when making an order or decision to make it subject to such terms and conditions as it thinks just.

PART VI.—GENERAL PROVISIONS AS TO ARBITRATION.

Clause 41 provides, subject to any contrary intention expressed in an agreement, the authority of an arbitrator cannot be revoked.

Clause 42 provides, subject to any enactment or rule of law to the contrary, that the death of a party shall not discharge an agreement or revoke an arbitrator's authority and that the agreement shall be enforceable by or against the deceased's personal representative.

Clause 43 empowers a party to an arbitration agreement against whom court proceedings have been taken in respect of a matter agreed to be arbitrated, to apply to the court to stay proceedings provided the application is made prior to delivery of pleadings. The court may both stay the proceedings and give such directions for the future conduct of the arbitration as it thinks fit. No action shall lie against a party to an arbitration agreement who commences court proceedings in relation to a matter agreed to be arbitrated.

Clause 44 provides that following interpleader proceedings a court may direct the issue to be determined by arbitration where the claimants are parties to an arbitration agreement related to the issue in question.

Clause 45 provides that notwithstanding a provision in an agreement that arbitration or some related happening is a condition precedent to the issuing or conduct of legal proceedings, that provision, where the condition precedent has not been fulfilled, will not prevent the bringing or conduct of legal proceedings and will be construed as an agreement to arbitrate.

PART VII.—MISCELLANEOUS.

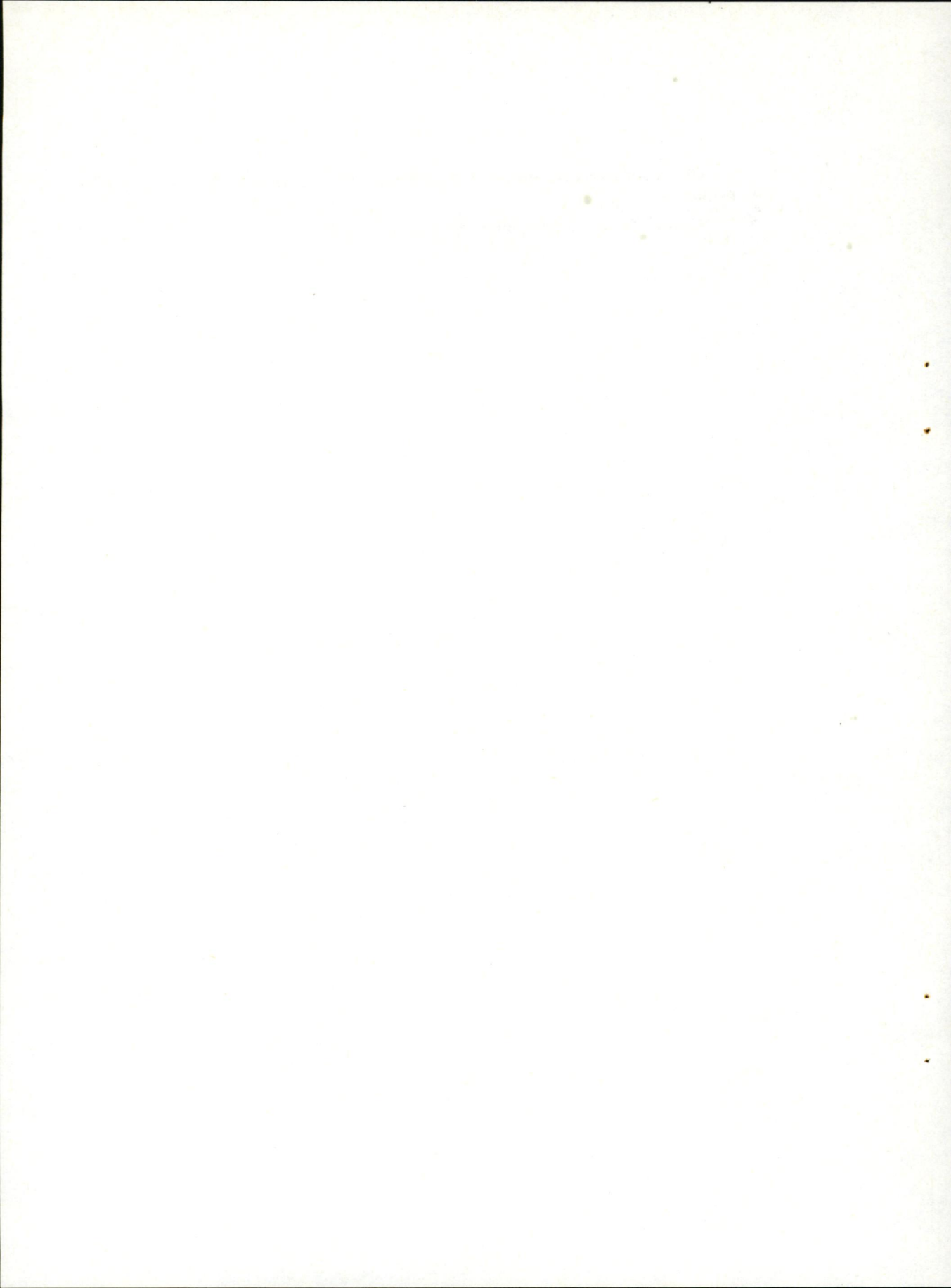
Clause 46 provides that the Supreme Court or the District Court may order proceedings before it or matters arising out of those proceedings to be determined by arbitration subject to the consent of all interested parties or certain other conditions related to the nature of the proceedings.

Clause 47 provides that an arbitration conducted pursuant to an order of the Supreme Court or District Court made pursuant to clause 46 will be subject to the provisions of the Bill as if the arbitration were pursuant to an agreement to which the parties to the Court proceedings were parties. Clause 47 also sets out provisions in relation to procedures to be followed and fees to be paid in such an arbitration and provides that the arbitrator's determination may be accepted or rejected by the Court.

Clause 48 prescribes the mode of service required in relation to the Bill.

Clause 49 treats the giving of false evidence in connection with an arbitration as perjury.

Clauses 50 and 51 empower the making of rules of court for the purposes of the Bill.



COMMERCIAL ARBITRATION BILL, 1982

No. , 1982.

A BILL FOR

An Act to make provision with respect to the arbitration of certain disputes
and to repeal the Arbitration Act, 1902, and for other purposes.

[MR WALKER—7 April, 1982.]

See also Legal Practitioners (Arbitration) Amendment Bill, 1982; and Miscellaneous Acts (Arbitration) Amendment Bill, 1982.

Commercial Arbitration.

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and the Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same as follows:—

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PART I.

PRELIMINARY.

Short title, commencement and arrangement.

1. (1) This Act may be cited as the "Commercial Arbitration Act, 1982".

10 (2) This section shall commence on the date of assent to this Act.

(3) Except as provided in subsection (2), this Act shall commence on such day as may be appointed by the Governor in respect thereof and may be notified by the proclamation published in the Gazette.

(4) This Act is divided as follows:—

15 PART I.—PRELIMINARY—*ss.* 1–4.

PART II.—APPOINTMENT OF ARBITRATORS AND UMPIRES—*ss.* 5–12.

PART III.—CONDUCT OF ARBITRATION PROCEEDINGS—*ss.* 13–23.

PART IV.—AWARDS AND COSTS—*ss.* 24–32.

PART V.—POWERS OF THE COURT—*ss.* 33–40.

20 PART VI.—GENERAL PROVISIONS AS TO ARBITRATION—*ss.* 41–45.

PART VII.—MISCELLANEOUS—*ss.* 46–51.

Repeal, transitional and application provisions.

25 2. (1) The Arbitration Act, 1902, and so much of the Second Schedule to the Supreme Court Act, 1970, as amended the Arbitration Act, 1902, are repealed.

Commercial Arbitration.

- (2) Subject to subsection (3)—
- (a) this Act applies to an arbitration agreement (whether made before or after the commencement of this Act) and to an arbitration under such an agreement; and
 - 5 (b) a reference in an arbitration agreement to the Arbitration Act, 1902, or a provision of that Act, shall be construed as a reference to this Act or to the corresponding provision (if any) of this Act.
- (3) Where an arbitration was commenced before the commencement of this Act—
- 10 (a) the law governing the arbitration shall be that which would have been applicable if this Act had not been enacted; and
 - (b) the arbitration agreement or Act under which the arbitration is conducted, shall, in relation to the arbitration, be interpreted and its effect determined as if this Act had not been enacted.
- 15 (4) Subject to this section, this Act shall apply to arbitrations under any other Act (being arbitrations that are commenced after the commencement of this Act) as if—
- (a) the other Act were an arbitration agreement;
 - (b) the arbitration were pursuant to an arbitration agreement; and
 - 20 (c) the parties to the dispute which, by virtue of the other Act, is referred to arbitration were the parties to the arbitration agreement,
- except in so far as the other Act otherwise indicates or requires.
- (5) For the purposes of this section, an arbitration shall be deemed to
- 25 have been commenced if—
- (a) a dispute to which the relevant arbitration agreement applies has arisen; and
 - (b) a party to the agreement—
- 30 (i) has served on another party to the agreement a notice requiring him to appoint an arbitrator or to join or concur in or approve of the appointment of an arbitrator in relation to the dispute;

Commercial Arbitration.

- (ii) has served on another party to the agreement a notice requiring him to refer, or to concur in the reference of, the dispute to arbitration; or
- 5 (iii) has taken any other step contemplated by the agreement, or the law in force at the time the dispute arose, with a view to referring the dispute to arbitration or appointing, or securing the appointment of, an arbitrator in relation to the dispute.

(6) Nothing in this Act shall affect the operation of section 19 of the 10 Insurance Act, 1902, or section 134 of the Consumer Credit Act, 1981.

Interpretation.

3. (1) In this Act, except in so far as the context or subject-matter otherwise indicates or requires—

15 “arbitration agreement” means an agreement in writing to refer present or future disputes to arbitration;

“award” means final or interim award;

“Court” means, subject to subsection (2), the Supreme Court of New South Wales;

“District Court” means the District Court of New South Wales;

20 “misconduct” includes corruption, fraud, partiality and bias;

“party”, in relation to an arbitration agreement, includes any person claiming through or under a party to the arbitration agreement;

25 “power of appointment” or “power to appoint”, in relation to an arbitrator or umpire, means a power to appoint an arbitrator or umpire, to join in the appointment of an arbitrator or umpire, to concur in or approve of the appointment of an arbitrator or umpire, or to take any other step in or towards the appointment of an arbitrator or umpire.

(2) Where—

30 (a) an arbitration agreement provides that the District Court shall have jurisdiction under this Act; or

Commercial Arbitration.

(b) the parties to an arbitration agreement have agreed in writing that the District Court shall have jurisdiction under this Act and that agreement is in force,

a reference in this Act to the Court is, in relation to that agreement, a
5 reference to the District Court.

(3) A reference in this Act to the commencement of this Act is a reference to the commencement of this Act except section 1.

Crown to be bound.

4. Where the Crown (whether in right of the State of New South Wales
10 or in any other capacity) is a party to an arbitration agreement, the Crown shall be bound by this Act.

PART II.

APPOINTMENT OF ARBITRATORS AND UMPIRES.

Presumption of single arbitrator.

15 5. Unless otherwise agreed by the parties to the arbitration agreement, an arbitration agreement that does not provide for the number of arbitrators to be appointed for the purposes of an arbitration to be conducted under that agreement shall be deemed to provide for the appointment of a single arbitrator.

20 **Presumption as to joint appointment of arbitrator.**

6. Unless otherwise agreed by the parties to the arbitration agreement, an arbitrator who is to be appointed for the purposes of an arbitration to be conducted under an arbitration agreement shall be jointly appointed by the parties to the agreement.

Commercial Arbitration.

Default in the exercise of power to appoint an arbitrator.

7. (1) Where a person who has a power to appoint an arbitrator defaults in the exercise of that power, a party to the relevant arbitration agreement may, by notice in writing—

- 5 (a) require the person in default to exercise the power within such period (not being a period of less than 7 days after service of the notice) as may be specified in the notice; and
- (b) propose that in default of his so doing—
- 10 (i) a person named in the notice (“a default nominee”) should be appointed to the office in respect of which the power is exercisable; or
- (ii) specified arbitrators (being the arbitrators who have prior to the date of the notice been appointed in relation to the arbitration) should be the sole arbitrators in relation to the
- 15 arbitration.

(2) A notice under subsection (1) (or, where appropriate, a copy of of the notice) must be served upon—

- (a) each party to the arbitration agreement (except the party by whom the notice is given); and
- 20 (b) each other person (not being a party to the arbitration agreement) who is in default in the exercise of a power of appointment in relation to the office in question,

and the notice shall be deemed to have been served when service is last effected under this subsection.

25 (3) Where a person who is in default in the exercise of a power of appointment fails to exercise the power as required by a notice under subsection (1), then—

- (a) where the notice named a default nominee—that nominee shall be deemed to have been duly appointed to the office in respect of
- 30 which the power was exercisable; or
- (b) where the notice proposed that specified arbitrators should be the sole arbitrators in relation to the arbitration—
- (i) the power to which the notice relates shall lapse;

Commercial Arbitration.

- (ii) the arbitrators specified in the notice may enter on the arbitration as if they were the sole arbitrators to be appointed in relation to the arbitration; and
- 5 (iii) the arbitration agreement shall be construed subject to such modifications (if any) as are necessary to enable those arbitrators effectively to enter on and conduct the arbitration.

(4) The Court may, on the application of a party to an arbitration agreement, set aside an appointment or any other consequence of non-
10 compliance with a notice under this section that takes effect by operation of subsection (3), and may itself make an appointment to the office in respect of which the relevant power of appointment was exercisable.

(5) For the purposes of this section, a person defaults in the exercise of a power of appointment if, after an occasion for the exercise of the power
15 has arisen, he does not exercise the power within the time fixed by the relevant arbitration agreement or, if no time is so fixed, within a reasonable time.

Power to appoint new arbitrator or umpire.

8. Unless otherwise agreed by the parties to the arbitration agreement,
20 where a person has a power to appoint an arbitrator or umpire, that power extends to the appointment of a new arbitrator or umpire in place of an arbitrator or umpire who dies or otherwise ceases to hold office.

General power of the Court to fill vacancy.

9. Where there is a vacancy in the office of arbitrator or umpire (whether
25 or not an appointment has previously been made to that office) and—

- (a) neither the provisions of the arbitration agreement nor the provisions of this Act (other than this section) provide a method for filling the vacancy;
- 30 (b) the method provided by the arbitration agreement or this Act (other than this section) for filling the vacancy fails or for any reason cannot reasonably be followed; or

Commercial Arbitration.

- (c) the parties to the arbitration agreement agree that, notwithstanding that the provisions of the arbitration agreement or of this Act (other than this section) provide a method for filling the vacancy, the vacancy should be filled by the Court,
- 5 the Court may, on the application of a party to the arbitration agreement, make an appointment to fill the vacancy.

Power of the Court where arbitrator or umpire is removed.

- 10 **10.** Where an arbitrator or umpire is removed by the Court, the Court may, on the application of a party to the arbitration agreement—
- (a) appoint a person to act as arbitrator or umpire in place of the person removed; or
- (b) order that the arbitration agreement shall cease to have effect with respect to the dispute to which the arbitration relates.

Appointment of umpire.

- 15 **11. (1)** Unless otherwise agreed by the parties to the arbitration agreement, where an arbitration agreement provides for the appointment of an even number of arbitrators, the arbitrators shall appoint an umpire immediately after they enter on the arbitration.
- 20 **(2)** An umpire appointed in relation to an arbitration is not required to sit with the arbitrator or arbitrators while the arbitrator or arbitrators are conducting proceedings under the arbitration agreement.

Position of person appointed by Court, etc.

- 12.** An arbitrator or umpire appointed pursuant to the exercise by the Court or any person of a power conferred by this Part shall be deemed to
25 have been appointed pursuant to the provisions of the arbitration agreement.
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Commercial Arbitration.

PART III.**CONDUCT OF ARBITRATION PROCEEDINGS.****Procedure of arbitrator or umpire.**

13. (1) Subject to this Act and to the arbitration agreement, the
5 arbitrator or umpire may conduct proceedings under that agreement in such
manner as he thinks fit.

(2) Unless a contrary intention is expressed in the arbitration agree-
ment, where an arbitration agreement provides for the appointment of 3 or
more arbitrators, any matter arising for determination in the course of pro-
10 ceedings under that agreement may be determined by a majority of the
arbitrators.

Liability of arbitrator or umpire.

14. An arbitrator or umpire is not liable for negligence in respect of
anything done or omitted to be done by him in his capacity as arbitrator
15 or umpire but is liable for fraud in respect of anything done or omitted to be
done in that capacity.

Circumstances in which umpires may enter on the arbitration.

15. (1) Unless otherwise agreed by the parties to the arbitration agree-
ment, an umpire appointed in relation to an arbitration may forthwith enter
20 on the arbitration in place of the arbitrators and as if he were the sole
arbitrator in any case where—

- 25 (a) the arbitration agreement fixes a time within which an award
is to be made and the arbitrators fail to make the award within
that time or any extension of that time granted by the Court
under section 39; or
- 30 (b) the arbitrators cannot agree on a matter arising for determination
and by reason of that disagreement the dispute cannot be resolved
pursuant to the arbitration agreement and at least one of the
arbitrators has served on a party to the agreement or the umpire
a notice in writing to that effect.

Commercial Arbitration.

(2) At any time after the appointment of an umpire, the Court may, on the application of a party to the arbitration agreement and notwithstanding anything to the contrary in that agreement or any other agreement made between the parties to the arbitration agreement, order that the umpire shall enter on the arbitration in place of the arbitrators and as if he were the sole arbitrator.

Parties may obtain summons.

16. (1) The Court may, on the application of any party to an arbitration agreement, and subject to and in accordance with rules of court, issue a subpoena requiring a person to attend for examination before the arbitrator or umpire or requiring a person to attend for examination before the arbitrator or umpire and to produce to the arbitrator or umpire the document or documents specified in the subpoena.

(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 he could not be compelled to answer or produce on the trial of an action.

Refusal or failure to attend before arbitrator or umpire, etc.

17. (1) Unless a contrary intention is expressed in an 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 requested under a subpoena or by the arbitrator or umpire to do so;

(b) appearing as a witness before the arbitrator or umpire—

(i) refuses or fails to take an oath or to make an affidavit when required by the arbitrator or umpire to do so;

(ii) refuses or fails to answer a question that he is required by the arbitrator or umpire to answer; or

(iii) refuses or fails to produce a document that he is required under a subpoena or by the arbitrator or umpire to produce; or

Commercial Arbitration.

- (c) refuses or fails to do any other thing which the arbitrator or umpire may require,

5 a party to the arbitration agreement or the arbitrator or umpire may apply to the Court and the Court may, unless satisfied that there was a reasonable excuse for the refusal or failure, order the person so in default to attend before the Court for examination or to produce to the Court the relevant document or to do the relevant thing.

(2) Where the Court makes an order under subsection (1), it may in addition make orders for the transmission to the arbitrator or umpire of—

- 10 (a) a record of any evidence given pursuant to an order under subsection (1);
- (b) any document produced pursuant to an order under subsection (1) or a copy of any such document; or
- 15 (c) particulars of any thing done pursuant to an order under subsection (1),

and any such evidence, document or thing shall be deemed to have been given, produced or done (as the case may be) in the course of the arbitration proceedings.

(3) If a party to an arbitration agreement—

- 20 (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; or
- (b) fails within the time specified by the arbitrator or umpire or, if no time is so specified, within a reasonable time to comply with a requirement of the arbitrator or umpire,
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the arbitrator or umpire may continue with the arbitration proceedings in default of appearance or of any other act by the party if in similar proceedings before the Supreme Court the Supreme Court could in the event of such a default continue with the proceedings.

Commercial Arbitration.

Evidence before arbitrator or umpire.

18. (1) Unless a contrary intention is expressed in the arbitration agreement, evidence before the arbitrator or umpire—

- (a) may be given orally or in writing; and
- 5 (b) shall, if the arbitrator or umpire so requires, be given on oath or by affidavit.

(2) Unless a contrary intention is expressed in the arbitration agreement, an arbitrator or umpire may administer an oath or take an affidavit for the purposes of proceedings under that agreement.

- 10 (3) Unless otherwise agreed by the parties to an arbitration agreement, an arbitrator or umpire in conducting proceedings under an arbitration agreement is not bound by rules of evidence but may inform himself in relation to any matter in such manner as he thinks fit.

15 **Effect of appointment of new arbitrator or umpire on evidence previously given and awards and determinations previously made.**

19. Unless otherwise agreed by the parties to an arbitration agreement, where an umpire enters on the arbitration in place of the arbitrators and as if he were the sole arbitrator or a new arbitrator or umpire is appointed in place of an arbitrator or umpire who dies or otherwise ceases to hold
20 office—

- (a) the umpire or arbitrator shall treat any evidence given, document produced or thing done in the course of the earlier proceedings in the same manner in all respects as if it had been given, produced or done in the course of the proceedings conducted by him;
- 25 (b) any interim award made in the course of the earlier proceedings shall be deemed to have been made by the umpire or arbitrator; and
- (c) the umpire or arbitrator may adopt and act on any determination of
30 a matter made in the course of the earlier proceedings without applying his own judgment to the matter.

Commercial Arbitration.

Duty of arbitrator to decide according to law.

20. Subject to section 18 (3) and unless otherwise agreed by the parties to the arbitration agreement, any question that arises for determination in the course of proceedings under that agreement shall be determined according to law.

Interim awards.

21. Unless a contrary intention is expressed in an arbitration agreement, the arbitrator or umpire may make an interim award.

Specific performance.

22. (1) Unless a contrary intention is expressed in an arbitration agreement, but subject to subsection (2), the arbitrator or umpire shall have power to make an award ordering specific performance of any contract if the Supreme Court would have power to order specific performance of that contract.

(2) An arbitrator or umpire does not have power to order specific performance of any contract relating to land or an interest in land.

Extension of ambit of arbitration proceedings.

23. (1) Where—

- (a) pursuant to an arbitration agreement a dispute between the parties to the agreement is referred to arbitration; and
- (b) there is some other dispute between those same parties (whenever the dispute arose), being a dispute to which the same agreement applies,

then, unless the arbitration agreement otherwise provides, the arbitrator or umpire may, upon application being made to him by the parties to the arbitration agreement at any time before a final award is made in relation to the firstmentioned dispute, make an order directing that the arbitration be extended so as to include that other dispute.

Commercial Arbitration.

(2) An arbitrator or umpire may make an order under subsection (1) on such terms and conditions (if any) as he thinks fit.

PART IV.**AWARDS AND COSTS.****5 Awards to be final.**

24. Unless a contrary intention is expressed in an arbitration agreement, the award made by the arbitrator or umpire shall, subject to this Act, be final and binding on the parties to the agreement.

Form of award.

10 25. (1) Unless otherwise agreed by the parties to an arbitration agreement, the arbitrator or umpire shall—

(a) make the award in writing;

(b) sign the award; and

15 (c) include in the award a statement of the reasons for making the award.

(2) Where an arbitrator or umpire makes an award otherwise than in writing, the arbitrator or umpire shall, upon request by a party within 7 days after the making of the award, give to the party a statement in writing signed by the arbitrator or umpire of the date, the terms of the award and the
20 reasons for making the award.

Power to correct award.

26. Where an award made under an arbitration agreement contains—

(a) a clerical mistake;

(b) an error arising from an accidental slip or omission;

Commercial Arbitration.

- (c) a material miscalculation of figures or a material mistake in the description of any person, thing or matter referred to in the award; or
 - (d) a defect of form,
- 5 the arbitrator or umpire may correct the award or the Court, on the application of a party to the agreement, may make an order correcting the award.

Interest up to making of award.

10 **27. (1)** Unless a contrary intention is expressed in an arbitration agreement, but subject to subsection (2), where the arbitrator or umpire determines to make an award for the payment of money (whether on a claim for a liquidated or an unliquidated amount), he shall have power to include in the sum for which the award is made interest at such rate as he may direct (being a rate not exceeding the rate at which interest is payable on a
15 judgment debt of the Supreme Court) on the whole or any part of the money for the whole or any part of the period between the date on which the cause of the dispute arose and the date on which the award is made.

(2) Subsection (1) does not—

- (a) authorise the awarding of interest upon interest;
- 20 (b) apply in relation to any amount upon which interest is payable as of right whether by virtue of an agreement or otherwise; or
- (c) affect the damages recoverable for the dishonour of a bill of exchange.

Interest on debt under award.

25 **28.** Unless a contrary intention is expressed in an arbitration agreement, where the arbitrator or umpire makes an award for the payment of money, he shall have power to direct that interest at the same rate as that at which interest is payable on a judgment debt of the Supreme Court shall be payable from the date of making of the award or such later date as the
30 arbitrator or umpire may specify on so much of the money as is from time to time unpaid and any interest that so accrues shall be deemed to form part of the award.

Commercial Arbitration.

Enforcement of award.

29. (1) An award made under an arbitration agreement may, by 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 is so given, judgment may be
5 entered in terms of the award.

(2) A direction as to the payment of interest by an arbitrator or umpire under section 28 shall cease to have effect on and from the date of the entry of judgment with respect to the award under subsection (1).

Costs.

10 30. (1) Unless a contrary intention is expressed in the arbitration agreement, the costs of the arbitration (including the fees and expenses of the arbitrator or umpire) shall be in the discretion of the arbitrator or umpire, who may—

15 (a) direct to and by whom and in what manner the whole or any part of those costs shall be paid;

(b) tax or settle the amount of costs to be so paid or any part of those costs; and

(c) award costs to be taxed or settled as between party and party or as between solicitor and client.

20 (2) Any costs of the arbitration (other than the fees or expenses of the arbitrator or umpire) that are directed to be paid by an award shall, except so far as taxed or settled by the arbitrator or umpire, be taxable in the Court.

25 (3) A provision in an arbitration agreement (being an arbitration agreement that provides for the reference of future disputes to arbitration) to the effect that the parties or a particular party to the agreement shall in any event pay their or his own costs of the arbitration or any part of those costs shall be void.

Commercial Arbitration.

(4) If no provision is made by an award with respect to the costs of the arbitration, a party to the arbitration agreement may, within 14 days of the publication of the award, apply to the arbitrator or umpire for directions as to the payment of those costs, and thereupon the arbitrator or
5 umpire shall, after hearing any party who wishes to be heard, amend his award by adding to it such directions as he may think proper with respect to the payment of the costs of the arbitration.

(5) Where a sum of money has been paid into the Court in accordance with rules made for the purposes of this Act, in satisfaction of a claim
10 to which an arbitration agreement applies, the arbitrator or umpire shall, in exercising his discretion as to costs, take into account both the fact that money was paid into the Court and the amount of that payment.

Taxation of arbitrator's or umpire's fees and expenses.

31. (1) If an arbitrator or umpire refuses to deliver his award except on
15 payment of the fees and expenses demanded by him, the Court may, on application made by a party to the arbitration agreement, order that—

- (a) the arbitrator or umpire deliver the award to the applicant on such terms as to the payment of his fees and expenses as the Court considers appropriate; and
- 20 (b) the fees and expenses demanded by the arbitrator or umpire be taxed in the Court.

(2) Notwithstanding that the amount of the fees or expenses of the arbitrator or umpire may be fixed by the award, those fees or expenses may, on the application of a party to the arbitration agreement or of the arbitrator
25 or umpire, be taxed in the Court.

(3) The arbitrator or umpire and any party to the arbitration agreement shall be entitled to appear and be heard on any taxation under this section.

(4) Where the fees and expenses of an arbitrator or umpire are taxed
30 in the Court, the arbitrator or umpire shall be entitled to be paid by way of fees and expenses only such sum as may be found reasonable on taxation.

Commercial Arbitration.

Costs of abortive arbitration.

5 **32. (1)** Unless otherwise agreed by the parties to the arbitration agreement, where an arbitration is commenced but for any reason the arbitration fails, the Court may, on the application of a party to the arbitration agreement or the arbitrator or umpire, make such orders in relation to the costs of the arbitration as it thinks just.

(2) For the purposes of this section, where—

 (a) a final award is not made by the arbitrator or umpire before the arbitration terminates; or

10 (b) an award made is wholly set aside by the Court,

an arbitration shall be deemed to have failed.

PART V.**POWERS OF THE COURT.****Statement of case.**

15 **33. (1)** An arbitrator or umpire may, and shall if so directed by the Court, state—

 (a) any question of law arising in the course of the arbitration; or

 (b) an award or a part of an award,

in the form of a case for the decision of the Supreme Court.

20 **(2)** The Supreme Court may remit any case under subsection (1) together with any directions it thinks proper to the arbitrator or umpire for reconsideration or, where a new arbitrator or umpire has been appointed, to that arbitrator or umpire for consideration.

Commercial Arbitration.

Power to set aside award.

34. (1) Where—

- (a) there has been misconduct on the part of an arbitrator or umpire himself or in his conduct of the proceedings; or
 - 5 (b) the arbitration or award has been improperly procured,
- the Court may, on the application of a party to the arbitration agreement, set the award aside either wholly or in part.

(2) Where the arbitrator or umpire has misconducted the proceedings by making an award partly in respect of a matter not referred to arbitration pursuant to the arbitration agreement, the Court may set aside that
10 part of the award if it can do so without materially affecting the remaining part of the award.

(3) Where an application is made under this section to set aside an award, the Court may order that any money made payable by the award shall
15 be paid into court or otherwise secured pending the determination of the application.

Court may remit matter for reconsideration.

35. The Court may, on the application of a party to an arbitration agreement, remit any matter referred to arbitration by the agreement and not
20 dealt with in the arbitration together with any directions it thinks proper to the arbitrator or umpire for reconsideration or, where a new arbitrator or umpire has been appointed, to that arbitrator or umpire for consideration.

Removal of arbitrator or umpire.

36. Where the Court is satisfied that—

- 25 (a) there has been misconduct on the part of an arbitrator or umpire himself or in his conduct of the proceedings;
- (b) undue influence has been exercised in relation to an arbitrator or umpire; or

Commercial Arbitration.

(c) an arbitrator or umpire is incompetent or unsuitable to deal with the particular dispute,

the Court may, on the application of a party to the arbitration agreement, remove the arbitrator or umpire.

5 **Party not prevented from alleging that arbitrator appointed by him is not impartial, or suitable or competent.**

37. (1) A party to an arbitration agreement is not prevented from alleging in any legal proceedings with respect to the agreement that an arbitrator is not or may not be impartial, suitable or competent by reason of his having exercised a power of appointment in relation to the appointment of that arbitrator or by reason of facts or circumstances that he knew or ought to have known when he exercised that power.

(2) For the purposes of this section, where an arbitrator is named or designated in an arbitration agreement, a party to the agreement shall be deemed—

- 15
- (a) to have exercised a power of appointment in relation to the appointment of that arbitrator; and
 - (b) to have exercised that power at the time when he entered into the arbitration agreement.

20 **General power of the Court to make interlocutory orders.**

38. The Court shall have the same power of making interlocutory orders for the purposes of and in relation to arbitration proceedings as it has for the purposes of and in relation to proceedings in the Court.

Extension of time.

25 39. (1) Subject to subsection (3), the Court shall have power on the application of a party to an arbitration agreement or an arbitrator or umpire to extend the time appointed by or under this Act or fixed by the agreement or by an order under this section for doing any act or taking any proceeding in or in relation to an arbitration.

Commercial Arbitration.

(2) The Court may make an order under this section although an application for the making of the order was not made until after the expiration of the time appointed or fixed for doing the act or taking the proceeding.

(3) An order shall not be made under this section extending the time
5 within which arbitration proceedings might be commenced unless—

(a) the Court is satisfied that in the circumstances of the case undue hardship would otherwise be caused; and

(b) the making of the order would not contravene the provision of any
10 enactment limiting the time for the commencement of arbitration proceedings.

Power to impose terms on orders, etc.

40. Subject to this Act, an order, direction or decision made under this Act by the Supreme Court or the District Court may be made on such terms and conditions (including terms and conditions as to costs) as the Supreme
15 Court or the District Court thinks just.

PART VI.**GENERAL PROVISIONS AS TO ARBITRATION.****Authority of arbitrator or umpire.**

41. Subject to this Act, the authority of an arbitrator or umpire is, unless
20 a contrary intention is expressed in the arbitration agreement or the parties to the agreement otherwise agree, irrevocable.

Death of party.

42. (1) Unless a contrary intention is expressed in the arbitration agree-
25 ment, an arbitration agreement shall not be discharged (either as respects the deceased or any other party) and the authority of an arbitrator or umpire shall not be revoked by the death of a party to the agreement but the agreement shall be enforceable by or against the personal representative of the deceased.

Commercial Arbitration.

(2) Nothing in subsection (1) shall be taken to affect the operation of any enactment or rule of law by virtue of which a right of action is extinguished by the death of a person.

Power to stay court proceedings.

5 **43. (1)** If a party to an arbitration agreement commences proceedings in a court against another party to the arbitration agreement in respect of a matter agreed to be referred to arbitration by the agreement, that other party may, subject to subsection (2), apply to that court to stay the proceedings and that court, if satisfied—

10 (a) that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the agreement; and

(b) that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary for the proper conduct of the arbitration,

15 may make an order staying the proceedings and may further give such directions with respect to the future conduct of the arbitration as it thinks fit.

(2) An application under subsection (1) shall not, except with the leave of the court in which the proceedings have been commenced, be made after the applicant has delivered pleadings or taken any other step in the
20 proceedings.

(3) Notwithstanding any rule of law to the contrary, a party to an arbitration agreement shall not be entitled to recover damages in any court from another party to the agreement by reason that that other party takes proceedings in a court in respect of the matter agreed to be referred to
25 arbitration by the arbitration agreement.

Interpleader.

44. Where relief by way of interpleader is granted in any court and it appears to that court that the claims in question are matters to which an arbitration agreement (to which the claimants are parties) applies, the court
30 may, unless it is satisfied that there is sufficient reason why the matters should

Commercial Arbitration.

not be referred to arbitration in accordance with the agreement, make an order directing the issue between the claimants to be determined in accordance with the agreement.

Effect of Scott v. Avery clauses.

5 **45.** Where it is provided (whether in an arbitration agreement or some other agreement) that arbitration or an award pursuant to arbitration proceedings or the happening of some other event in or in relation to arbitration is a condition precedent to the bringing or maintenance of legal proceedings in respect of a matter or the establishing of a defence to legal
10 proceedings brought in respect of a matter, that provision, notwithstanding that the condition contained in it has not been satisfied—

(a) shall not operate to prevent—

(i) legal proceedings being brought or maintained in respect of that matter; or

15 (ii) a defence being established to legal proceedings brought in respect of that matter; and

(b) shall, where no arbitration agreement relating to that matter is subsisting between the parties to the provision, be construed as an agreement to refer that matter to arbitration.

20

PART VII.**MISCELLANEOUS.****Reference of matters to arbitration by the Supreme Court or District Court.**

46. In any proceedings (other than criminal proceedings) in the Supreme Court or the District Court—

25 (a) if all parties interested in those proceedings consent;

Commercial Arbitration.

- (b) if the proceedings require any prolonged examination of documents or any scientific or local investigation which cannot, in the opinion of the Supreme Court or the District Court, conveniently be conducted by that Court; or
- 5 (c) if the question in dispute consists wholly or in part of matters of account,

the Supreme Court or the District Court may at any time order the proceedings, or any question or issue of fact arising in the proceedings, to be referred for determination to an arbitrator appointed jointly by the parties to those
10 proceedings or, where the parties cannot agree on the making of that appointment, to an arbitrator appointed by the Supreme Court or the District Court.

Provisions as to arbitrations under s. 46.

47. (1) Except so far as rules of court otherwise provide, this Act shall
15 apply to every arbitration under an order of the Supreme Court or the District Court made pursuant to section 46 as if—

- (a) that arbitration were pursuant to an arbitration agreement to which the parties to the proceedings in the Supreme Court or the District Court were parties; and
- 20 (b) the order of the Supreme Court or the District Court were an arbitration agreement.

(2) An arbitrator appointed pursuant to section 46 shall be deemed to be an officer of the Supreme Court or the District Court (as the case may be) and shall have such powers, and shall conduct the proceedings before
25 him in such manner—

- (a) as may be prescribed by rules of court; and
- (b) except so far as is inconsistent with those rules, as provided by this Act.

Commercial Arbitration.

(3) The fees to be paid to an arbitrator appointed pursuant to section 46 shall be determined by the Supreme Court or the District Court (as the case may be) which shall also determine by whom the whole or any part of those fees shall be paid.

- 5 (4) For the purposes of the proceedings in the Supreme Court or the District Court, the Supreme Court or the District Court may accept or reject any determination made by an arbitrator appointed pursuant to section 46.

Service of notices.

- 10 48. Where under this Act a notice is required or permitted to be served on any person, the notice may be served in or out of New South Wales—
- (a) by delivering it personally to the person to be served;
 - (b) by leaving it at the usual or last known place of residence or
15 business of the person to be served with a person apparently over the age of 16 years and apparently residing thereat or (in the case of a place of business) apparently in charge of or employed at that place;
 - (c) by sending it by post addressed to the person to be served at his usual or last known place of residence or business; or
 - 20 (d) by serving it in such other manner as the Court may, on application made to it in that behalf, direct.

Perjury.

49. (1) Any person who wilfully and corruptly gives false evidence before any arbitrator, umpire or other person authorised to administer an
25 oath for the purposes of an arbitration shall be guilty of perjury, as if the evidence had been given in the Supreme Court in open court, and may be dealt with, prosecuted and punished accordingly.

Commercial Arbitration.

(2) Subsection (1) applies where evidence is given in New South Wales before any arbitrator, umpire or other person authorised by the law of New South Wales to administer an oath for the purposes of an arbitration, whether the law governing the arbitration agreement or the proceedings in the arbitration, or any other relevant law, is or is not the law of New South Wales.

Supreme Court rules.

50. (1) Rules of court may be made under the Supreme Court Act, 1970, for carrying the purposes of this Act into effect and, in particular, for or
10 with respect to—

- (a) applications to the Supreme Court under this Act and the costs of such applications;
- 15 (b) the payment of money into and out of the Supreme Court in satisfaction of claims to which arbitration agreements apply and the investment of such money;
- (c) arbitrations conducted pursuant to an order of the Supreme Court made under section 46;
- 20 (d) the examination of witnesses before the Supreme Court or before any other person and the issue of commissions or requests for the examination of witnesses outside New South Wales, for the purposes of an arbitration; and
- (e) any other matter or thing for or with respect to which rules are by this Act authorised or required to be made by the Supreme Court.

(2) Subsection (1) does not limit the rule-making powers conferred
25 by the Supreme Court Act, 1970.

District Court rules.

51. (1) Rules of court may be made under the District Court Act, 1973, for or with respect to—

- 30 (a) applications to the District Court under this Act and the costs of such applications;

Commercial Arbitration.

- 5
- (b) the payment of money into and out of the District Court in satisfaction of claims to which arbitration agreements apply and the investment of such money;
 - (c) arbitrations conducted pursuant to an order of the District Court made under section 46; and
 - (d) any other matter or thing for or with respect to which rules are by this Act authorised or required to be made by the District Court.

(2) Subsection (1) does not limit the rule-making powers conferred by the District Court Act, 1973.

