

COMMERCIAL ARBITRATION BILL, 1984

EXPLANATORY NOTE

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

The following Bills are cognate with this Bill:—

- Administration of Justice (Commercial Arbitration) Amendment Bill, 1984;
- District Court (Commercial Arbitration) Amendment Bill, 1984;
- Foreign Judgments (Reciprocal Enforcement) (Commercial Arbitration) Amendment Bill, 1984;
- Legal Practitioners (Commercial Arbitration) Amendment Bill, 1984;
- Oaths (Commercial Arbitration) Amendment Bill, 1984;
- Supreme Court (Commercial Arbitration) Amendment Bill, 1984;
- Miscellaneous Acts (Commercial Arbitration) Amendment Bill, 1984.

The object of this Bill is to repeal the Arbitration Act, 1902, and the Arbitration (Foreign Awards and Agreements) Act, 1973, and to enact new provisions dealing with the arbitration of disputes.

The Bill contains the following provisions:—

PART I.—PRELIMINARY.

Clause 1 specifies the short title of the proposed Act.

Clause 2 provides for commencement on a date to be proclaimed.

Clause 3 contains repeal, transitional and application provisions.

Subclause (1) provides for the repeal of the legislative provisions contained in Schedule 1.

Subclause (2) provides that subject to subclause (3) the proposed Act shall apply to an arbitration agreement whether made before or after the commencement of the proposed Act and provides further that a reference in an arbitration agreement to the Arbitration Act, 1902, shall be construed as a reference to the proposed Act.

Subclause (3) provides that where an arbitration has been commenced before the commencement of the proposed Act the previous law in force shall apply to that arbitration.

Subclause (4) provides that the proposed Act shall apply to arbitrations provided for in any other Act.

Subclause (5) states the circumstances in which an arbitration shall be deemed to have been commenced for the purposes of the clause.

Subclause (6) removes from the operation of the proposed Act arbitrations under the Supreme Court Act, 1970, the District Court Act, 1973, or the Arbitration (Civil Actions) Act, 1983, and arbitrations or any class of arbitrations that may be prescribed by regulation.

Subclause (7) removes from the effect of the proposed Act section 19 of the Insurance Act, 1902, and section 130 of the Credit Act, 1984.

Clause 4 contains definitions of "arbitration agreement", "award", "District Court", "misconduct", "party", "power of appointment", "Supreme Court" and "the Court".

Subclause (2) provides that an arbitration agreement may specifically confer jurisdiction on the District Court.

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

Clause 5 provides that where the Crown is a party to an arbitration agreement it shall be bound by the proposed Act.

PART II.—APPOINTMENT OF ARBITRATORS AND UMPIRES.

Clause 6 provides that, unless the parties agree to the contrary, where an agreement is silent as to the number of arbitrators to be appointed, then it shall be deemed to provide for appointment of a single arbitrator.

Clause 7 provides that an arbitrator shall be jointly appointed by the parties unless otherwise agreed in writing.

Clause 8 sets forth a procedure to be adopted where a person who has a power to appoint an arbitrator defaults in the exercise of that power.

Clause 9 provides that a power to appoint an arbitrator or umpire extends to the appointment of a new arbitrator or umpire in place of an arbitrator or umpire who dies or ceases to hold office.

Clause 10 empowers the Court to fill a vacancy in the office of arbitrator or umpire.

Clause 11 provides that where an arbitrator or umpire is removed by the Court the Court may appoint a replacement therefor, or order that the arbitration agreement will cease to have effect in relation to the relevant dispute.

Subclause (2) provides that the Court shall not order that the arbitration agreement shall cease to have effect unless all parties to the agreement were domiciled or ordinarily resident in Australia when the agreement was made.

Subclause (3) provides that the residency restriction contained in subclause (2) does not apply to an arbitration agreement treated as such because the proposed Act applies to arbitrations provided for in any other Act.

Clause 12 provides that, where an arbitration agreement provides for appointment of an even number of arbitrators, the arbitrators may appoint an umpire, who is not required to sit while the arbitration is being conducted.

Clause 13 deems an arbitrator or umpire appointed pursuant to Part II of the proposed Act to have been appointed pursuant to the provisions of the arbitration agreement.

PART III.—CONDUCT OF ARBITRATION PROCEEDINGS.

Clause 14 provides that, subject to the proposed Act and to the agreement, the arbitrator or umpire may conduct proceedings as thought fit.

Clause 15 provides that a majority decision may be made where 3 or more arbitrators are appointed, unless a contrary intention is expressed in the agreement.

Clause 16 establishes the circumstances in which an umpire may enter on the arbitration in place of the arbitrators as if the umpire were the sole arbitrator.

Clause 17 permits any party to an arbitration agreement to obtain a subpoena requiring a person to attend the arbitration for examination or to produce documents.

Subclause (2) provides that a person shall not be compelled to answer or produce any document which that person could not be compelled to answer or produce on the trial of an action.

Clause 18 provides that, unless the agreement expresses a contrary intention, on application to the Court by a party or the arbitrator or umpire the Court may order a person in default to comply with a subpoena to attend or with a requirement of the arbitrator or umpire and may make consequential orders as to the transmission of evidence or documents to the arbitrator or umpire.

Subclause (3) provides that an arbitration may proceed in default of appearance or compliance with a requirement of the arbitrator or umpire if in similar proceedings before the Supreme Court the Court could also proceed.

Clause 19 prescribes the manner in which evidence may be given in arbitration proceedings.

Clause 20 provides that, unless the parties agree to the contrary, a party shall appear personally or, where the party is a body of persons, by an officer, employee or agent but may, with the leave of the arbitrator or umpire, be represented by a lawyer or other person.

Clause 21 provides that, unless the parties agree to the contrary, there shall be continuity of proceedings when an umpire enters on the arbitration or when a new arbitrator or umpire is appointed.

Clause 22 provides that, unless the parties agree to the contrary, any question arising for determination in the course of proceedings shall be determined according to law.

Subclause (2) provides that the arbitrator or umpire may, if the parties agree, determine any question as *amiable compositeur* or *ex aequo et bono* (i.e., by reference to considerations of general justice and fairness). Article 33, paragraph 2, of the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL Arbitration Rules") provides as follows:—

2. The arbitral tribunal shall decide as *amiable compositeur* or *ex aequo et bono* only if the parties have expressly authorized the arbitral tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration.

Clause 23 provides that an arbitrator or umpire may make an interim award, unless the agreement expresses a contrary intention.

Clause 24 provides that an arbitrator or umpire may order specific performance of any contract if the Supreme Court would have power to do so, unless the agreement expresses a contrary intention.

Clause 25 provides that arbitration proceedings may be extended to include a further dispute between the same parties arising under the same agreement.

Clause 26 empowers the Court to order the consolidation of 2 or more arbitration proceedings.

Clause 27 provides that, unless the parties agree to the contrary, the arbitrator or umpire shall have power to order the parties to take steps to settle the dispute.

Subclause (2) provides that, where an arbitrator or umpire conducts a conference for the purposes of an attempt at settlement, and the conference fails to produce a settlement, then no objection shall be taken to that arbitrator or umpire conducting subsequent arbitration proceedings solely on the ground that he or she had previously conducted the conference.

Subclauses (3) and (4) provide that the holding of a conference does not affect any times for doing any acts or taking any proceedings in connection with the arbitration.

PART IV.—AWARDS AND COSTS.

Clause 28 provides that, subject to the proposed Act, the award of the arbitrator or umpire shall be final and binding on the parties to the agreement, unless the agreement expresses a contrary intention.

Clause 29 provides that, unless the parties agree to the contrary, the arbitrator or umpire shall make the award in writing and shall include therein a statement of the reasons for making the award.

Subclause (2) provides that where an award is made otherwise than in writing the arbitrator or umpire shall, at the request of a party, give the party a written statement of the terms of the award and the reasons for making the award.

Clause 30 provides for the correction of an error in an award.

Clause 31 provides that an interest component may be included in an award, unless the agreement expresses a contrary intention.

Clause 32 empowers the arbitrator or umpire to direct that interest at the rate payable on a judgment debt in the Supreme Court be paid on any sum ordered to be paid unless the agreement expresses a contrary intention.

Clause 33 provides for enforcement of the award, by leave of the Court, in the same manner as a judgment or order of the Court.

Clause 34 provides that the costs of the arbitration shall be in the discretion of the arbitrator or umpire, unless the agreement expresses a contrary intention, and may be taxed or settled by the arbitrator or umpire, or be taxable in the Court.

Subclause (3) declares certain provisions in relation to costs in an agreement to be void.

Subclause (4) provides that, where an award is silent as to costs, a party may apply to the arbitrator or umpire for a direction as to payment of costs.

Subclause (5) directs that an arbitrator or umpire shall take into account in exercising the discretion as to costs the fact that any money was paid into Court and the amount of that payment.

Subclauses (6) and (7) direct that an arbitrator or umpire shall take into account in exercising the discretion as to costs the fact that a party refused or failed to attend a conference under clause 27 or the fact that a party refused or failed to comply with clause 37.

Clause 35 provides for taxation of the arbitrator's or umpire's fees and expenses.

Clause 36 provides that, unless the parties agree to the contrary, where an arbitration fails the Court may on the application of a party to the agreement or the arbitrator or umpire make such order as it thinks just.

Clause 37 imposes a duty on the parties not to act in such a manner as to delay or prevent an award being made.

PART V.—POWERS OF THE COURT.

Clause 38 provides that an appeal shall lie to the Supreme Court on any question of law arising out of an award but that the Court shall not otherwise have jurisdiction to set aside or remit an award on the ground of error of fact or law on the face of the award.

Subclause (4) provides that an appeal may be brought with the consent of all the parties, or by leave of the Court.

Subclause (5) provides guidelines to the Court as to whether to grant leave to appeal, and enables the Court to grant leave upon conditions.

Clause 39 empowers the Court, in certain circumstances, to determine any question of law arising in the course of the arbitration.

Clause 40 restricts the right of appeal where the parties have entered into an agreement in writing excluding the right of appeal (an "exclusion agreement").

Clause 41 provides that an exclusion agreement shall only in certain circumstances apply to a question or claim falling within the admiralty jurisdiction of the Supreme Court or a dispute arising out of a contract of insurance or a commodity contract.

Subclause (2) defines a commodity contract.

Subclause (3) provides that the Governor in Council may make regulations in relation to the application of exclusion agreements.

Clause 42 empowers the Court to set aside an award where there has been misconduct on the part of an arbitrator or umpire or the award has been improperly procured.

Clause 43 enables the Court to remit matters to the arbitrator or umpire for reconsideration or, where a new arbitrator or umpire has been appointed, for consideration.

Clause 44 enables the Court to remove the arbitrator or umpire where it is satisfied that there has been misconduct or undue influence or where the arbitrator or umpire is incompetent or unsuitable to deal with the particular dispute.

Clause 45 provides that a party is not prevented from challenging the impartiality, suitability or competence of an arbitrator where that party appointed the arbitrator.

Clause 46 provides that, unless the agreement expresses a contrary intention, a duty shall be placed on the claimant to prosecute the claim, and that where there has been undue delay on the part of a claimant the Court may make an order terminating the arbitration proceedings and prohibiting the claimant from commencing further proceedings.

Subclause (3) provides that the Court shall not make such an order except in specified circumstances.

Clause 47 empowers the Court to make interlocutory orders in relation to arbitration proceedings as it may in relation to proceedings in the Court.

Clause 48 enables the Court to grant an extension of time for doing any act or taking any proceeding in or in relation to an arbitration.

Clause 49 empowers the Court, subject to the proposed Act, to make an order, direction or decision on such terms and conditions as the Court thinks just.

PART VI.—GENERAL PROVISIONS AS TO ARBITRATION.

Clause 50 provides that, subject to the proposed Act, the authority of an arbitrator or umpire is irrevocable unless the agreement expresses a contrary intention, or unless the parties agree to the contrary.

Clause 51 provides that an arbitrator or umpire will not be liable for negligence in respect of the performance of his or her duties but will be liable for fraud.

Clause 52 provides that after the death of a party the agreement shall be enforced by or against the personal representative of the deceased, unless the agreement expresses a contrary intention.

Subclause (2) excludes from the operation of the clause a right of action which by law is extinguished by the death of a person.

Clause 53 empowers a court to stay proceedings commenced in that court involving parties to an arbitration agreement in respect of a matter agreed to be referred to arbitration and enables that court to make consequential orders or to give directions on the future conduct of the arbitration.

Clause 54 empowers a court to refer a matter to arbitration where relief is sought by way of interpleader and it appears to the court that the claims in question are matters to which an arbitration agreement applies.

Clause 55 overrides a provision ("a Scott v. Avery clause") in an agreement requiring arbitration or the happening of some other event as a condition precedent to the bringing or defending of legal proceedings.

PART VII.—RECOGNITION AND ENFORCEMENT OF FOREIGN AWARDS AND AGREEMENTS.

Clause 56 is an interpretation section containing definitions applicable to this Part and includes a definition of "Convention" as meaning the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the English text of which is set out in Schedule 2 to the Bill.

Clause 57 provides for the enforcement of foreign arbitration agreements.

Subclause (1) provides that the proposed section shall apply to an agreement—

- (a) governed by the arbitration law of a Convention country;
- (b) governed by the arbitration law of a country other than Australia or a Convention country, where a party to the agreement is Australia, a State or Territory or a person domiciled or ordinarily resident in Australia when the agreement was made;
- (c) a party to which is the government of a Convention country or a part thereof to which the Convention extends; or
- (d) a party to which is a person who was domiciled or ordinarily resident in a Convention country when the agreement was made.

Subclause (2) provides that, where proceedings are pending in a court between parties to an arbitration agreement to which the proposed section applies, and the matter in dispute is capable of settlement by arbitration then, on application by a party to the agreement, the court shall stay the proceedings and refer the parties to arbitration upon such conditions as it thinks fit.

Clause 58 provides that a foreign award is binding upon the parties to the arbitration agreement, and may be enforced in a court as if the award had been made in New South Wales in accordance with the law of New South Wales.

Subclause (4) provides guidelines to a court in determining whether the award should be enforced.

Clause 59 specifies the documentation that must be produced to a court before an award may be enforced, and the methods of authenticating such documentation.

Subclause (3) provides that any document which is not in the English language shall be produced together with an English translation, certified to be correct.

PART VIII.—MISCELLANEOUS.

Clause 60 specifies the acceptable methods for service of notices under the proposed Act.

Clause 61 treats the giving of false evidence in connection with an arbitration as perjury.

Clause 62 empowers Supreme Court rules to be made in relation to applications to the Court under the proposed Act, costs, payments into and out of Court and other matters as required.

Clause 63 empowers District Court rules to be made in relation to applications to the Court under the proposed Act, costs, payments into and out of Court and other matters as required.

Clause 64 vests in the Governor in Council a power to make regulations under the proposed Act.

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NEW SOUTH WALES.

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COMMERCIAL ARBITRATION BILL, 1984

No. , 1984.

A BILL FOR

An Act to make provision with respect to the arbitration of certain disputes and to repeal the Arbitration Act, 1902, and the Arbitration (Foreign Awards and Agreements) Act, 1973, and for other purposes.

See also Administration of Justice (Commercial Arbitration) Amendment Bill, 1984; District Court (Commercial Arbitration) Amendment Bill, 1984; Foreign Judgments (Reciprocal Enforcement) (Commercial Arbitration) Amendment Bill, 1984; Legal Practitioners (Commercial Arbitration) Amendment Bill, 1984; Oaths (Commercial Arbitration) Amendment Bill, 1984; Supreme Court (Commercial Arbitration) Amendment Bill, 1984; Miscellaneous Acts (Commercial Arbitration) Amendment Bill, 1984.

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BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and 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.

1. This Act may be cited as the "Commercial Arbitration Act, 1984".

Commencement.

- 10 2. (1) Sections 1 and 2 shall commence on the date of assent to this Act.

(2) Except as provided by subsection (1), this Act shall commence on such day as may be appointed by the Governor in respect thereof and as may be notified by proclamation published in the Gazette.

15 **Repeal, transitional and application provisions.**

3. (1) The Acts mentioned in Schedule 1 are repealed to the extent to which they are in that Schedule expressed to be repealed.

(2) Subject to subsection (3)—

- 20 (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
- (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.

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(3) Where an arbitration was commenced before the commencement of this Act the law governing the arbitration and the arbitration agreement shall be that which would have been applicable if this Act had not been enacted.

5 (4) Subject to this section, this Act shall apply to arbitrations provided for in any other Act as if—

(a) the other Act were an arbitration agreement;

(b) the arbitration were pursuant to an arbitration agreement; and

10 (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 have been commenced if—

15 (a) a dispute to which the relevant arbitration agreement applies has arisen; and

(b) a party to the agreement—

20 (i) has served on another party to the agreement a notice requiring that other party to appoint an arbitrator or to join or concur in or approve of the appointment of an arbitrator in relation to the dispute;

(ii) has served on another party to the agreement a notice requiring that other party to refer, or to concur in the reference of, the dispute to arbitration; or

25 (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.

30 (6) Notwithstanding anything in subsection (4), nothing in this Act shall apply to an arbitration under the Supreme Court Act, 1970, the District Court Act, 1973, or the Arbitration (Civil Proceedings) Act, 1983, or to an arbitration, or class of arbitrations, under any other Act that is prescribed as an arbitration to which, or class of arbitrations to which, this Act does not apply.

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(7) Nothing in this Act shall affect the operation of section 19 of the Insurance Act, 1902, or section 130 of the Credit Act, 1984.

Interpretation.

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

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

“award” means final or interim award;

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

10 “misconduct” includes corruption, fraud, partiality, bias and a breach of the rules of natural justice;

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

15 “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;

20 “Supreme Court” means the Supreme Court of New South Wales;

“the Court” means, subject to subsection (2), the Supreme Court.

(2) Where—

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

25 (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 reference to the District Court.

30 (3) A reference in this Act to the commencement of this Act is a reference to the commencement of this Act except sections 1 and 2.

Crown to be bound.

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

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PART II.**APPOINTMENT OF ARBITRATORS AND UMPIRES.****Presumption of single arbitrator.**

6. Unless otherwise agreed in writing by the parties to the arbitration agreement, an arbitration agreement that does not provide for the number of
10 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.

Presumption as to joint appointment of arbitrator.

7. Unless otherwise agreed in writing by the parties to the arbitration
15 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.

Default in the exercise of power to appoint arbitrator.

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

- (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

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(b) propose that in default of that person so doing—

(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

5 (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 arbitration.

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

(a) each party to the arbitration agreement (except the party by whom the notice is given); and

15 (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.

(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
20 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 which the power was exercisable; or

25 (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;

(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

30 (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.

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(4) The Court may, on the application of a party to an arbitration agreement, set aside an appointment or any other consequence of non-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
5 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 has arisen, that person does not exercise the power within the time fixed by the relevant arbitration agreement or, if no time is so fixed, within a
10 reasonable time.

Power to appoint new arbitrator or umpire.

9. Unless otherwise agreed in writing by the parties to the arbitration agreement, 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
15 of an arbitrator or umpire who dies or otherwise ceases to hold office.

General power of the Court to fill vacancy.

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

- 20 (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;
- (b) the method provided by the arbitration agreement or this Act (other than this section) for filling the vacancy fails or for any
25 reason cannot reasonably be followed; or
- (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,

30 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.

11. (1) Where an arbitrator or umpire is removed by the Court, the Court may, on the application of a party to the arbitration agreement—

- 5 (a) appoint a person as arbitrator or umpire in place of the person removed; or
- (b) subject to subsection (2), order that the arbitration agreement shall cease to have effect with respect to the dispute to which the arbitration relates.

10 (2) Subsection (1) (b) does not apply unless all the parties to the arbitration agreement are domiciled or ordinarily resident in Australia at the time the arbitration agreement is entered into.

(3) Subsection (2) does not apply to an arbitration agreement that is treated as an arbitration agreement for the purposes of this Act by virtue only of the operation of section 3 (4) (a).

15 Appointment of umpire.

12. (1) Unless otherwise agreed in writing by the parties to the arbitration agreement, where an arbitration agreement provides for the appointment of an even number of arbitrators, the arbitrators may appoint an umpire at any time after they are themselves appointed and shall do so forthwith if they
20 fail to determine a matter arising for determination.

(2) An umpire appointed in relation to an arbitration is not required to sit with the arbitrators while the arbitrators are conducting proceedings under the arbitration agreement.

Position of person appointed by the Court, etc.

25 13. An arbitrator or umpire appointed pursuant to a power conferred by this Part shall be deemed to have been appointed pursuant to the provisions of the arbitration agreement.

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

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

Manner in which decisions are made.

15. Unless a contrary intention is expressed in the arbitration agreement,
where an arbitration agreement provides for the appointment of 3 or more
10 arbitrators, any decision to be made in the course of proceedings under that
agreement may be made by a majority of the arbitrators and, failing a
majority, the decision of the arbitrator appointed by the arbitrators to be
chairperson shall be binding.

Circumstances in which umpires may enter on the arbitration.

15 16. (1) Unless otherwise agreed in writing by the parties to the arbitra-
tion agreement, an umpire appointed in relation to an arbitration may
forthwith enter on the arbitration in place of the arbitrators and as if the
umpire were the sole arbitrator in any case where—

20 (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 48; or

25 (b) the arbitrators fail to determine a matter arising for determination
and by reason of that failure the dispute cannot be resolved
pursuant to the arbitration agreement and at least one of the
arbitrators has served on a party to the dispute or the umpire a
notice in writing to that effect.

(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
30 anything to the contrary in that agreement or any other agreement (whether

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oral or written) 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 the umpire were the sole arbitrator.

Parties may obtain subpoenas.

5 **17. (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
10 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 that person could not be compelled to answer or produce on the trial of an action.

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

18. (1) Unless a contrary intention is expressed in an arbitration agreement, where any person (whether or not a party to the 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;
- (b) appearing as a witness before the arbitrator or umpire—
- 25 (i) refuses or fails to take an oath or to make an affirmation or affidavit when required by the arbitrator or umpire to do so;
- (ii) refuses or fails to answer a question that the witness is required by the arbitrator or umpire to answer; or
- (iii) refuses or fails to produce a document that the witness is required under a subpoena or by the arbitrator or umpire to produce; or
- 30 (c) refuses or fails to do any other thing which the arbitrator or umpire may require,

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a party to the arbitration agreement or the arbitrator or umpire may apply to the Court and the Court may 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.

5 **(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—

- (a) a record of any evidence given pursuant to an order under subsection (1);
- 10 (b) any document produced pursuant to an order under subsection (1) or a copy of any such document; or
- (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 requires) in the course of the arbitration
15 proceedings.

(3) If a party to an arbitration 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; or
- 20 (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,

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
25 before the Supreme Court the Supreme Court could in the event of such a default continue with the proceedings.

Evidence before arbitrator or umpire.

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

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

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(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 or umpire, be taxed in the Court.

5 (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 in the Court, the arbitrator or umpire shall be entitled to be paid by way of
10 fees and expenses only such sum as may be found reasonable on taxation.

Costs of abortive arbitration.

36. (1) Unless otherwise agreed in writing 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 arbitra-
15 tion 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
20 (b) an award made is wholly set aside by the Court,
an arbitration shall be deemed to have failed.

Duties of parties.

37. The parties to an arbitration agreement shall at all times do all things which the arbitrator or umpire requires to enable a just award to be
25 made and no party shall wilfully do or cause to be done any act to delay or prevent an award being made.

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(b) that the applicant would otherwise be unfairly disadvantaged, and, where such leave is granted to a party, that party is entitled, notwithstanding any contrary agreement between the parties to the arbitration agreement, to be represented before the arbitrator or umpire by a duly qualified legal practitioner or other representative.

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

21. Unless otherwise agreed in writing by the parties to an arbitration agreement, where an umpire enters on the arbitration in place of the arbitrators and as if the umpire 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 office—

- 15 (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 the umpire or arbitrator;
- 20 (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 a matter made in the course of the earlier proceedings without applying his or her own judgment to the matter.

Determination to be made according to law or as amiable compositeur. (See 25 UNCITRAL Arbitration Rules Article 33, paragraph 2.)

22. (1) Unless otherwise agreed in writing by the parties to an arbitration agreement, any question that arises for determination in the course of proceedings under the agreement shall be determined according to law.

(2) If the parties to an arbitration agreement so agree in writing, the 30 arbitrator or umpire may determine any question that arises for determination in the course of proceedings under the agreement as *amiable compositeur* or *ex aequo et bono*.

Interim awards.

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

Specific performance.

5 24. Unless a contrary intention is expressed in an arbitration agreement, 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.

Extension of ambit of arbitration proceedings.

10 25. (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
- 15 applies,

then, unless the arbitration agreement otherwise provides, the arbitrator or umpire may, upon application being made to the arbitrator or umpire 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

20 arbitration be extended so as to include that other dispute.

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

Consolidation of arbitration proceedings.

25 26. (1) Where in relation to 2 or more arbitration proceedings it appears to the Court upon the application of all the parties to those proceedings—

- (a) that some common question of law or fact arises in both or all of them;

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(b) that the rights to relief claimed in both or all of them are in respect of or arise out of the same transaction or series of transactions;
or

5 (c) that for some other reason it is desirable to make an order under this section,

the Court may order those arbitration proceedings to be consolidated on such terms as it thinks just or may order them to be heard at the same time, or one immediately after another, or may order any of them to be stayed until after the determination of any other of them.

10 (2) Where the Court orders arbitration proceedings to be consolidated under subsection (1) and all the parties to the consolidated arbitration proceedings are in agreement as to the choice of arbitrator or umpire for those proceedings, the arbitrator or umpire shall be appointed by the Court, but if all the parties cannot agree the Court shall have power to
15 appoint an arbitrator or umpire for those proceedings.

(3) Nothing in this section shall be construed as preventing the parties to 2 or more arbitration proceedings from agreeing to consolidate those proceedings and taking such steps as are necessary to effect that consolidation.

20 **Power to seek settlement of disputes otherwise than by arbitration.**

27. (1) Unless otherwise agreed in writing by the parties to an arbitration agreement, the arbitrator or umpire shall have power to order the parties to a dispute which has arisen and to which that agreement applies to take such steps as the arbitrator or umpire thinks fit to achieve a settlement of
25 the dispute (including attendance at a conference to be conducted by the arbitrator or umpire) without proceeding to arbitration or (as the case requires) continuing with the arbitration.

(2) Where—

30 (a) an arbitrator or umpire conducts a conference pursuant to subsection (1); and

(b) the conference fails to produce a settlement of the dispute acceptable to the parties to the dispute,

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no objection shall be taken to the conduct by the arbitrator or umpire of the subsequent arbitration proceedings solely on the ground that the arbitrator or umpire had previously conducted a conference in relation to the dispute.

(3) The time appointed by or under this Act or fixed by an arbitration agreement or by an order under section 48 for doing any act or taking any proceeding in or in relation to an arbitration shall not be affected by a conference conducted by an arbitrator or umpire pursuant to subsection (1).

(4) Nothing in subsection (3) shall be construed as preventing the making of an application to the Court for the making of an order under section 48.

PART IV.**AWARDS AND COSTS.****Award to be final.**

28. 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.

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

- 20 (a) make the award in writing;
- (b) sign the award; and
- (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 reasons for making the award.

Power to correct award.

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

- (a) a clerical mistake;
- (b) an error arising from an accidental slip or omission;
- 5 (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,

the arbitrator or umpire may correct the award or the Court, on the applica-
10 tion of a party to the agreement, may make an order correcting the award.

Interest up to making of award.

31. (1) Unless a contrary intention is expressed in an arbitration agree-
ment, but subject to subsection (4), where the arbitrator or umpire determines
to make an award for the payment of money (whether on a claim for a
15 liquidated or an unliquidated amount), the arbitrator or umpire shall have
power to include in the sum for which the award is made interest at such
rate as the arbitrator or umpire may direct (being a rate not exceeding the
rate at which interest is prescribed for the purposes of section 95 of the
Supreme Court Act, 1970) on the whole or any part of the money for the
20 whole or any part of the period between the date on which the cause of
action arose and the date on which the award is made.

(2) Unless a contrary intention is expressed in an arbitration agree-
ment, but subject to subsection (4), where—

- 25 (a) arbitration proceedings have been commenced for the recovery of a debt or liquidated damages; and
- (b) payment of the whole or a part of the debt or damages is made during the currency of the proceedings and prior to or without an award being made in respect of the debt or damages,

the arbitrator or umpire may order that interest be paid at such rate as the
30 arbitrator or umpire may direct (being a rate not exceeding the rate at which
interest is prescribed for the purposes of section 95 of the Supreme Court
Act, 1970) on the whole or any part of the money paid for the whole or
any part of the period between the date when the cause of action arose and
the date of the payment.

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(3) Without limiting subsection (2), arbitration proceedings shall, for the purposes of that subsection, be deemed to have been commenced if—

(a) a dispute to which the relevant arbitration agreement applies has arisen; and

5 (b) a party to the agreement—

(i) has served on another party to the agreement a notice requiring that other party to appoint an arbitrator or to join or concur in or approve of the appointment of an arbitrator in relation to the dispute;

10 (ii) has served on another party to the agreement a notice requiring the other party to refer, or to concur in the reference of, the dispute to arbitration; or

15 (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.

(4) This section 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 **32.** Unless a contrary intention is expressed in an arbitration agreement, where the arbitrator or umpire makes an award for the payment of money, the arbitrator or umpire shall have power to direct that interest at the same rate as that at which interest is prescribed for the purposes of section 95 of the Supreme Court Act, 1970, shall be payable on and from the date of
30 the making of the award or such later date as the 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.

Enforcement of award.

33. (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 32 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 34. (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, on application made by a party to the arbitration agreement.

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 own costs of the arbitration or any part of those costs shall be void.

30 (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

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directions as to the payment of those costs, and thereupon the arbitrator or umpire shall, after hearing any party who wishes to be heard, amend the award by adding to it such directions as the arbitrator or umpire may think proper with respect to the payment of the costs of the arbitration.

5 (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 to which an arbitration agreement applies, the arbitrator or umpire shall, in exercising the discretion as to costs conferred on the arbitrator or umpire by subsection (1), take into account both the fact that money was paid into the
10 Court and the amount of that payment.

(6) Where—

(a) an arbitrator or umpire has under section 27 (1) ordered the parties to a dispute to attend at a conference to be conducted by the arbitrator or umpire; and

15 (b) there is a refusal or failure by one or more than one of those parties to attend at the conference,

the arbitrator or umpire shall, in exercising the discretion as to costs conferred on the arbitrator or umpire by subsection (1), take that refusal or failure into account.

20 (7) An arbitrator or umpire shall, in exercising the discretion as to costs conferred on the arbitrator or umpire by subsection (1), take into account any refusal or failure by a party to the arbitration agreement to comply with the provisions of section 37.

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

25 **35. (1)** If an arbitrator or umpire refuses to deliver an award except on payment of the fees and expenses demanded by the arbitrator or umpire, the Court may, on application made by a party to the arbitration agreement, order that—

30 (a) the arbitrator or umpire deliver the award to the applicant on such terms as to the payment of the fees and expenses of the arbitrator or umpire as the Court considers appropriate; and

(b) the fees and expenses demanded by the arbitrator or umpire be taxed in the Court.

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- (b) may make any leave which it grants under subsection (4) (b) conditional upon the applicant for that leave complying with such conditions as it considers appropriate.

(6) Where the award of an arbitrator or umpire is varied on an appeal under subsection (2), the award as varied shall have effect (except for the purposes of this section) as if it were the award of the arbitrator or umpire.

Determination of preliminary point of law by Supreme Court.

39. (1) Subject to subsection (2) and section 40, on an application to the Supreme Court made by any of the parties to an arbitration agreement—

- (a) with the consent of an arbitrator who has entered on the reference or, if an umpire has entered on the reference, with the consent of the umpire; or

- (b) with the consent of all the other parties,

the Supreme Court shall have jurisdiction to determine any question of law arising in the course of the arbitration.

(2) The Supreme Court shall not entertain an application under subsection (1) (a) with respect to any question of law unless it is satisfied that—

- (a) the determination of the application might produce substantial savings in costs to the parties; and
- (b) the question of law is one in respect of which leave to appeal would be likely to be granted under section 38 (4) (b).

Exclusion agreements affecting rights under sections 38 and 39.

40. (1) Subject to the following provisions of this section and section 41—

- (a) the Supreme Court shall not, under section 38 (4) (b), grant leave to appeal with respect to a question of law arising out of an award; and

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(b) no application may be made under section 39 (1) (a) with respect to a question of law,

if there is in force an agreement in writing (in this section and section 41 referred to as an "exclusion agreement") between the parties to the arbitration agreement which excludes the right of appeal under section 38 (2) in relation to the award or, in a case falling within paragraph (b), in relation to an award to which the determination of the question of law is material.

(2) An exclusion agreement may be expressed so as to relate to a particular award, to awards under a particular arbitration agreement or to any other description of awards, whether arising out of the same arbitration agreement or not.

(3) An agreement may be an exclusion agreement for the purposes of this section whether it is entered into before or after the commencement of this Act and whether or not it forms part of an arbitration agreement.

(4) Except as provided by subsection (1), sections 38 and 39 shall have effect notwithstanding anything in any agreement purporting—

(a) to prohibit or restrict access to the Supreme Court; or

(b) to restrict the jurisdiction of the Supreme Court.

(5) An exclusion agreement shall be of no effect in relation to an award made on, or a question of law arising in the course of, an arbitration being an arbitration under any other Act.

(6) An exclusion agreement shall be of no effect in relation to an award made on, or a question of law arising in the course of, an arbitration under an arbitration agreement which is a domestic arbitration agreement unless the exclusion agreement is entered into after the commencement of the arbitration in which the award is made or, as the case requires, in which the question of law arises.

(7) In this section, "domestic arbitration agreement" means an arbitration agreement which does not provide, expressly or by implication, for arbitration in a country other than Australia and to which neither—

(a) an individual who is a national of, or habitually resident in, any country other than Australia; nor

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- (b) a body corporate which is incorporated in, or whose central management and control is exercised in, any country other than Australia,

is a party at the time the arbitration agreement is entered into.

5 Exclusion agreements not to apply in certain cases.

41. (1) Subject to subsection (3), if an award or a question of law arising in the course of an arbitration relates, in whole or in part, to—

- (a) a question or claim falling within the Admiralty jurisdiction of the Supreme Court;
- 10 (b) a dispute arising out of a contract of insurance; or
- (c) a dispute arising out of a commodity contract,

an exclusion agreement shall have no effect in relation to the award or question unless either—

- 15 (d) the exclusion agreement is entered into after the commencement of the arbitration in which the award is made or, as the case requires, in which the question of law arises; or
- (e) the award or question relates to a contract which is expressed to be governed by a law other than the law of New South Wales.

(2) In subsection (1) (c), “commodity contract” means a
20 contract—

- (a) for the sale of goods regularly dealt with on a commodity market or exchange in New South Wales which is specified for the purposes of this section by a regulation made by the Governor; and
- 25 (b) of a description specified for the purposes of this section by a regulation made by the Governor.

(3) The Governor may by regulation provide that subsection (1)—

- (a) shall cease to have effect; or
- 30 (b) subject to such conditions as may be specified in the regulation, shall not apply to any exclusion agreement made in relation to an award of a description specified in the regulation,

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and a regulation made under this subsection may contain such supplementary, incidental and transitional provisions as appear to the Governor to be necessary.

Power to set aside award.

5 **42. (1)** Where—

- (a) there has been misconduct on the part of an arbitrator or umpire or an arbitrator or umpire has misconducted the proceedings; or
- (b) the arbitration or award has been improperly procured,

the Court may, on the application of a party to the arbitration agreement,
10 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 part of the award if it can do so without materially affecting the
15 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 be paid into court or otherwise secured pending the determination of the application.

20 Court may remit matter for reconsideration.

43. Subject to section 38 (1), the Court may remit any matter referred to arbitration by an arbitration agreement 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
25 consideration.

Removal of arbitrator or umpire.

44. Where the Court is satisfied that—

- (a) there has been misconduct on the part of an arbitrator or umpire or an arbitrator or umpire has misconducted the proceedings;

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(b) undue influence has been exercised in relation to an arbitrator or umpire; or

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

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

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

10 **45. (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 a power of appointment having been exercised by that party in relation to the appointment of that arbitrator or by reason of facts or circumstances that that party knew or ought to have known when exercising that power.

15 **(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—

(a) to have exercised a power of appointment in relation to the appointment of that arbitrator; and

20 (b) to have exercised that power at the time when the party entered into the arbitration agreement.

Delay in prosecuting claims.

25 **46. (1)** Unless a contrary intention is expressed in an arbitration agreement, it is an implied term of the agreement that in the event of a dispute arising to which the agreement applies it shall be the duty of the claimant to exercise due diligence in the prosecution of the claim.

30 **(2)** Where there has been undue delay by a claimant in instituting or prosecuting a claim pursuant to an arbitration agreement, then, on the application of the arbitrator or umpire or of any party to the dispute, the Court may make an order terminating the arbitration proceedings and prohibiting the claimant from commencing further arbitration proceedings in respect of any matter which was the subject of the terminated proceedings.

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(3) The Court shall not make an order under subsection (2) unless it is satisfied—

(a) that the delay has been intentional and contumelious; or

(b) that—

- 5 (i) there has been inordinate and inexcusable delay on the part of the claimant or the claimant's advisers; and
- (ii) the delay will give rise to a substantial risk of it not being possible to have a fair trial of the issues in the arbitration proceedings or is such as is likely to cause or to have
- 10 caused serious prejudice to the other parties to the arbitration proceedings either as between themselves and the claimant or between each other or between them and a third party.

General power of the Court to make interlocutory orders.

15 47. 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.

20 48. (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.

25 (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 within which arbitration proceedings might be commenced unless—

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

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NEW SOUTH WALES.



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COMMERCIAL ARBITRATION ACT, 1984, No. 160

New South Wales



ANNO TRICESIMO TERTIO

ELIZABETHÆ II REGINÆ

Act No. 160, 1984.

An Act to make provision with respect to the arbitration of certain disputes and to repeal the Arbitration Act, 1902, and the Arbitration (Foreign Awards and Agreements) Act, 1973, and for other purposes. [Assented to, 14th December, 1984.]

See also Administration of Justice (Commercial Arbitration) Amendment Act, 1984; District Court (Commercial Arbitration) Amendment Act, 1984; Foreign Judgments (Reciprocal Enforcement) Commercial Arbitration) Amendment Act, 1984; Legal Practitioners (Commercial Arbitration) Amendment Act, 1984; Oaths (Commercial Arbitration) Amendment Act, 1984; Supreme Court (Commercial Arbitration) Amendment Act, 1984; Miscellaneous Acts (Commercial Arbitration) Amendment Act, 1984.

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

PART I.

PRELIMINARY.

Short title.

1. This Act may be cited as the "Commercial Arbitration Act, 1984".

Commencement.

2. (1) Sections 1 and 2 shall commence on the date of assent to this Act.

- (2) Except as provided by subsection (1), this Act shall commence on such day as may be appointed by the Governor in respect thereof and as may be notified by proclamation published in the Gazette.

Repeal, transitional and application provisions.

3. (1) The Acts mentioned in Schedule 1 are repealed to the extent to which they are in that Schedule expressed to be repealed.

- (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
 - (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.

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(3) Where an arbitration was commenced before the commencement of this Act the law governing the arbitration and the arbitration agreement shall be that which would have been applicable if this Act had not been enacted.

(4) Subject to this section, this Act shall apply to arbitrations provided for in any other Act as if—

- (a) the other Act were an arbitration agreement;
- (b) the arbitration were pursuant to an arbitration agreement; and
- (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 have been commenced if—

- (a) a dispute to which the relevant arbitration agreement applies has arisen; and
- (b) a party to the agreement—
 - (i) has served on another party to the agreement a notice requiring that other party to appoint an arbitrator or to join or concur in or approve of the appointment of an arbitrator in relation to the dispute;
 - (ii) has served on another party to the agreement a notice requiring that other party to refer, or to concur in the reference of, the dispute to arbitration; or
 - (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) Notwithstanding anything in subsection (4), nothing in this Act shall apply to an arbitration under the Supreme Court Act, 1970, the District Court Act, 1973, or the Arbitration (Civil Proceedings) Act, 1983, or to an arbitration, or class of arbitrations, under any other Act that is prescribed as an arbitration to which, or class of arbitrations to which, this Act does not apply.

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(7) Nothing in this Act shall affect the operation of section 19 of the Insurance Act, 1902, or section 130 of the Credit Act, 1984.

Interpretation.

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

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

“award” means final or interim award;

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

“misconduct” includes corruption, fraud, partiality, bias and a breach of the rules of natural justice;

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

“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;

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

“the Court” means, subject to subsection (2), the Supreme Court.

(2) Where—

- (a) an arbitration agreement provides that the District Court shall have jurisdiction under this Act; or
- (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 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 sections 1 and 2.

Crown to be bound.

5. Where the Crown (whether in right of the State of New South Wales 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.**

6. Unless otherwise agreed in writing 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.

Presumption as to joint appointment of arbitrator.

7. Unless otherwise agreed in writing 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.

Default in the exercise of power to appoint arbitrator.

8. (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—

- (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

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- (b) propose that in default of that person so doing—
- (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 arbitration.

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

- (a) each party to the arbitration agreement (except the party by whom the notice is given); and
- (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.

(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 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;
 - (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
 - (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.

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(4) The Court may, on the application of a party to an arbitration agreement, set aside an appointment or any other consequence of non-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 has arisen, that person 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.

9. Unless otherwise agreed in writing by the parties to the arbitration agreement, 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.

10. Where there is a vacancy in the office of arbitrator or umpire (whether 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;
- (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
- (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,

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.

11. (1) 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 as arbitrator or umpire in place of the person removed; or
- (b) subject to subsection (2), order that the arbitration agreement shall cease to have effect with respect to the dispute to which the arbitration relates.

(2) Subsection (1) (b) does not apply unless all the parties to the arbitration agreement are domiciled or ordinarily resident in Australia at the time the arbitration agreement is entered into.

(3) Subsection (2) does not apply to an arbitration agreement that is treated as an arbitration agreement for the purposes of this Act by virtue only of the operation of section 3 (4) (a).

Appointment of umpire.

12. (1) Unless otherwise agreed in writing by the parties to the arbitration agreement, where an arbitration agreement provides for the appointment of an even number of arbitrators, the arbitrators may appoint an umpire at any time after they are themselves appointed and shall do so forthwith if they fail to determine a matter arising for determination.

(2) An umpire appointed in relation to an arbitration is not required to sit with the arbitrators while the arbitrators are conducting proceedings under the arbitration agreement.

Position of person appointed by the Court, etc.

13. An arbitrator or umpire appointed pursuant to a power conferred by this Part shall be deemed to have been appointed pursuant to the provisions of the arbitration agreement.

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

14. Subject to this Act and to the arbitration agreement, the arbitrator or umpire may conduct proceedings under that agreement in such manner as the arbitrator or umpire thinks fit.

Manner in which decisions are made.

15. Unless a contrary intention is expressed in the arbitration agreement, where an arbitration agreement provides for the appointment of 3 or more arbitrators, any decision to be made in the course of proceedings under that agreement may be made by a majority of the arbitrators and, failing a majority, the decision of the arbitrator appointed by the arbitrators to be chairperson shall be binding.

Circumstances in which umpires may enter on the arbitration.

16. (1) Unless otherwise agreed in writing by the parties to the arbitration agreement, an umpire appointed in relation to an arbitration may forthwith enter on the arbitration in place of the arbitrators and as if the umpire were the sole arbitrator in any case where—

- (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 48; or
- (b) the arbitrators fail to determine a matter arising for determination and by reason of that failure the dispute cannot be resolved pursuant to the arbitration agreement and at least one of the arbitrators has served on a party to the dispute or the umpire a notice in writing to that effect.

(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 (whether

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oral or written) 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 the umpire were the sole arbitrator.

Parties may obtain subpoenas.

17. (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 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.

18. (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 required 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 affirmation or affidavit when required by the arbitrator or umpire to do so;
 - (ii) refuses or fails to answer a question that the witness is required by the arbitrator or umpire to answer; or
 - (iii) refuses or fails to produce a document that the witness is required under a subpoena or by the arbitrator or umpire to produce; or
- (c) refuses or fails to do any other thing which the arbitrator or umpire may require,

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a party to the arbitration agreement or the arbitrator or umpire may apply to the Court and the Court may 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—

- (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
- (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 requires) in the course of the arbitration proceedings.

(3) If a party to an arbitration 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; 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,

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.

Evidence before arbitrator or umpire.

19. (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
- (b) shall, if the arbitrator or umpire so requires, be given on oath or affirmation or by affidavit.

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

(3) Unless otherwise agreed in writing 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 or herself in relation to any matter in such manner as the arbitrator or umpire thinks fit.

Representation.

20. (1) Unless otherwise agreed in writing by the parties to the arbitration agreement, a party to an arbitration agreement—

- (a) shall appear before the arbitrator or umpire personally or, where the party is a body of persons, whether corporate or unincorporate, by an officer, employee or agent of the body; and
- (b) may, with the leave of the arbitrator or umpire, be represented by a duly qualified legal practitioner or other representative.

(2) Where by virtue of subsection (1) (b) an arbitrator or umpire has power to grant leave for a party to the arbitration agreement to be represented by a duly qualified legal practitioner or other representative then, without limiting the power of the arbitrator or umpire to grant such leave in any circumstances, the arbitrator or umpire shall grant such leave where the arbitrator or umpire is satisfied—

- (a) that the granting of leave is likely to shorten the length of the arbitration proceedings and reduce the costs of the arbitration; or
- (b) that the applicant would otherwise be unfairly disadvantaged.

(3) Where but for this subsection an arbitrator or umpire would not have power to grant leave for a party to the arbitration agreement to be represented by a duly qualified legal practitioner or other representative, the arbitrator or umpire may, on the application of that party, grant such leave where the arbitrator or umpire is satisfied—

- (a) that the granting of leave is likely to shorten the length of the arbitration proceedings and reduce the costs of the arbitration; or

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(b) that the applicant would otherwise be unfairly disadvantaged, and, where such leave is granted to a party, that party is entitled, notwithstanding any contrary agreement between the parties to the arbitration agreement, to be represented before the arbitrator or umpire by a duly qualified legal practitioner or other representative.

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

21. Unless otherwise agreed in writing by the parties to an arbitration agreement, where an umpire enters on the arbitration in place of the arbitrators and as if the umpire 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 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 the umpire or arbitrator;
- (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 a matter made in the course of the earlier proceedings without applying his or her own judgment to the matter.

Determination to be made according to law or as amiable compositeur. (See UNCITRAL Arbitration Rules Article 33, paragraph 2.)

22. (1) Unless otherwise agreed in writing by the parties to an arbitration agreement, any question that arises for determination in the course of proceedings under the agreement shall be determined according to law.

(2) If the parties to an arbitration agreement so agree in writing, the arbitrator or umpire may determine any question that arises for determination in the course of proceedings under the agreement as *amiable compositeur* or *ex aequo et bono*.

Interim awards.

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

Specific performance.

24. Unless a contrary intention is expressed in an arbitration agreement, 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.

Extension of ambit of arbitration proceedings.

25. (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 the arbitrator or umpire 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.

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

Consolidation of arbitration proceedings.

26. (1) Where in relation to 2 or more arbitration proceedings it appears to the Court upon the application of all the parties to those proceedings—

- (a) that some common question of law or fact arises in both or all of them;

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- (b) that the rights to relief claimed in both or all of them 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 an order under this section,

the Court may order those arbitration proceedings to be consolidated on such terms as it thinks just or may order them to be heard at the same time, or one immediately after another, or may order any of them to be stayed until after the determination of any other of them.

(2) Where the Court orders arbitration proceedings to be consolidated under subsection (1) and all the parties to the consolidated arbitration proceedings are in agreement as to the choice of arbitrator or umpire for those proceedings, the arbitrator or umpire shall be appointed by the Court, but if all the parties cannot agree the Court shall have power to appoint an arbitrator or umpire for those proceedings.

(3) Nothing in this section shall be construed as preventing the parties to 2 or more arbitration proceedings from agreeing to consolidate those proceedings and taking such steps as are necessary to effect that consolidation.

Power to seek settlement of disputes otherwise than by arbitration.

27. (1) Unless otherwise agreed in writing by the parties to an arbitration agreement, the arbitrator or umpire shall have power to order the parties to a dispute which has arisen and to which that agreement applies to take such steps as the arbitrator or umpire thinks fit to achieve a settlement of the dispute (including attendance at a conference to be conducted by the arbitrator or umpire) without proceeding to arbitration or (as the case requires) continuing with the arbitration.

(2) Where—

- (a) an arbitrator or umpire conducts a conference pursuant to subsection (1); and
- (b) the conference fails to produce a settlement of the dispute acceptable to the parties to the dispute,

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no objection shall be taken to the conduct by the arbitrator or umpire of the subsequent arbitration proceedings solely on the ground that the arbitrator or umpire had previously conducted a conference in relation to the dispute.

(3) The time appointed by or under this Act or fixed by an arbitration agreement or by an order under section 48 for doing any act or taking any proceeding in or in relation to an arbitration shall not be affected by a conference conducted by an arbitrator or umpire pursuant to subsection (1).

(4) Nothing in subsection (3) shall be construed as preventing the making of an application to the Court for the making of an order under section 48.

PART IV.

AWARDS AND COSTS.

Award to be final.

28. 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.

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

- (a) make the award in writing;
- (b) sign the award; and
- (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 reasons for making the award.

Power to correct award.

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

- (a) a clerical mistake;
- (b) an error arising from an accidental slip or omission;
- (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,

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.

31. (1) Unless a contrary intention is expressed in an arbitration agreement, but subject to subsection (4), 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), the arbitrator or umpire shall have power to include in the sum for which the award is made interest at such rate as the arbitrator or umpire may direct (being a rate not exceeding the rate at which interest is prescribed for the purposes of section 95 of the Supreme Court Act, 1970) 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 action arose and the date on which the award is made.

(2) Unless a contrary intention is expressed in an arbitration agreement, but subject to subsection (4), where—

- (a) arbitration proceedings have been commenced for the recovery of a debt or liquidated damages; and
- (b) payment of the whole or a part of the debt or damages is made during the currency of the proceedings and prior to or without an award being made in respect of the debt or damages,

the arbitrator or umpire may order that interest be paid at such rate as the arbitrator or umpire may direct (being a rate not exceeding the rate at which interest is prescribed for the purposes of section 95 of the Supreme Court Act, 1970) on the whole or any part of the money paid for the whole or any part of the period between the date when the cause of action arose and the date of the payment.

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(3) Without limiting subsection (2), arbitration proceedings shall, for the purposes of that subsection, be deemed to have been commenced if—

- (a) a dispute to which the relevant arbitration agreement applies has arisen; and
- (b) a party to the agreement—
 - (i) has served on another party to the agreement a notice requiring that other party to appoint an arbitrator or to join or concur in or approve of the appointment of an arbitrator in relation to the dispute;
 - (ii) has served on another party to the agreement a notice requiring the other party to refer, or to concur in the reference of, the dispute to arbitration; or
 - (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.

(4) This section does not—

- (a) authorise the awarding of interest upon interest;
- (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.

32. Unless a contrary intention is expressed in an arbitration agreement, where the arbitrator or umpire makes an award for the payment of money, the arbitrator or umpire shall have power to direct that interest at the same rate as that at which interest is prescribed for the purposes of section 95 of the Supreme Court Act, 1970, shall be payable on and from the date of the making of the award or such later date as the 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.

Enforcement of award.

33. (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 entered in terms of the award.

(2) A direction as to the payment of interest by an arbitrator or umpire under section 32 shall cease to have effect on and from the date of the entry of judgment with respect to the award under subsection (1).

Costs.

34. (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—

- (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.

(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, on application made by a party to the arbitration agreement.

(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 own costs of the arbitration or any part of those costs shall be void.

(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

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directions as to the payment of those costs, and thereupon the arbitrator or umpire shall, after hearing any party who wishes to be heard, amend the award by adding to it such directions as the arbitrator or umpire 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 to which an arbitration agreement applies, the arbitrator or umpire shall, in exercising the discretion as to costs conferred on the arbitrator or umpire by subsection (1), take into account both the fact that money was paid into the Court and the amount of that payment.

(6) Where—

- (a) an arbitrator or umpire has under section 27 (1) ordered the parties to a dispute to attend at a conference to be conducted by the arbitrator or umpire; and
- (b) there is a refusal or failure by one or more than one of those parties to attend at the conference,

the arbitrator or umpire shall, in exercising the discretion as to costs conferred on the arbitrator or umpire by subsection (1), take that refusal or failure into account.

(7) An arbitrator or umpire shall, in exercising the discretion as to costs conferred on the arbitrator or umpire by subsection (1), take into account any refusal or failure by a party to the arbitration agreement to comply with the provisions of section 37.

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

35. (1) If an arbitrator or umpire refuses to deliver an award except on payment of the fees and expenses demanded by the arbitrator or umpire, 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 the fees and expenses of the arbitrator or umpire as the Court considers appropriate; and
- (b) the fees and expenses demanded by the arbitrator or umpire be taxed in the Court.

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(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 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 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.

Costs of abortive arbitration.

36. (1) Unless otherwise agreed in writing 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

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

an arbitration shall be deemed to have failed.

Duties of parties.

37. The parties to an arbitration agreement shall at all times do all things which the arbitrator or umpire requires to enable a just award to be made and no party shall wilfully do or cause to be done any act to delay or prevent an award being made.

PART V.

POWERS OF THE COURT.

Judicial review of awards.

38. (1) Without prejudice to the right of appeal conferred by subsection (2), the Court shall not have jurisdiction to set aside or remit an award on the ground of error of fact or law on the face of the award.

(2) Subject to subsection (4), an appeal shall lie to the Supreme Court on any question of law arising out of an award.

(3) On the determination of an appeal under subsection (2) the Supreme Court may by order—

- (a) confirm, vary or set aside the award; or
- (b) remit the award, together with the Supreme Court's opinion on the question of law which was the subject of the appeal, to the arbitrator or umpire for reconsideration or, where a new arbitrator or umpire has been appointed, to that arbitrator or umpire for consideration,

and where the award is remitted under paragraph (b) the arbitrator or umpire shall, unless the order otherwise directs, make the award within 3 months after the date of the order.

(4) An appeal under subsection (2) may be brought by any of the parties to the arbitration agreement—

- (a) with the consent of all the other parties to the arbitration agreement; or
- (b) subject to section 40, with the leave of the Supreme Court.

(5) The Supreme Court—

- (a) shall not grant leave under subsection (4) (b) unless it considers that, having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more of the parties to the arbitration agreement; and

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- (b) may make any leave which it grants under subsection (4) (b) conditional upon the applicant for that leave complying with such conditions as it considers appropriate.

(6) Where the award of an arbitrator or umpire is varied on an appeal under subsection (2), the award as varied shall have effect (except for the purposes of this section) as if it were the award of the arbitrator or umpire.

Determination of preliminary point of law by Supreme Court.

39. (1) Subject to subsection (2) and section 40, on an application to the Supreme Court made by any of the parties to an arbitration agreement—

- (a) with the consent of an arbitrator who has entered on the reference or, if an umpire has entered on the reference, with the consent of the umpire; or
- (b) with the consent of all the other parties,

the Supreme Court shall have jurisdiction to determine any question of law arising in the course of the arbitration.

(2) The Supreme Court shall not entertain an application under subsection (1) (a) with respect to any question of law unless it is satisfied that—

- (a) the determination of the application might produce substantial savings in costs to the parties; and
- (b) the question of law is one in respect of which leave to appeal would be likely to be granted under section 38 (4) (b).

Exclusion agreements affecting rights under sections 38 and 39.

40. (1) Subject to the following provisions of this section and section 41—

- (a) the Supreme Court shall not, under section 38 (4) (b), grant leave to appeal with respect to a question of law arising out of an award; and

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- (b) no application may be made under section 39 (1) (a) with respect to a question of law,

if there is in force an agreement in writing (in this section and section 41 referred to as an "exclusion agreement") between the parties to the arbitration agreement which excludes the right of appeal under section 38 (2) in relation to the award or, in a case falling within paragraph (b), in relation to an award to which the determination of the question of law is material.

(2) An exclusion agreement may be expressed so as to relate to a particular award, to awards under a particular arbitration agreement or to any other description of awards, whether arising out of the same arbitration agreement or not.

(3) An agreement may be an exclusion agreement for the purposes of this section whether it is entered into before or after the commencement of this Act and whether or not it forms part of an arbitration agreement.

(4) Except as provided by subsection (1), sections 38 and 39 shall have effect notwithstanding anything in any agreement purporting—

- (a) to prohibit or restrict access to the Supreme Court; or
- (b) to restrict the jurisdiction of the Supreme Court.

(5) An exclusion agreement shall be of no effect in relation to an award made on, or a question of law arising in the course of, an arbitration being an arbitration under any other Act.

(6) An exclusion agreement shall be of no effect in relation to an award made on, or a question of law arising in the course of, an arbitration under an arbitration agreement which is a domestic arbitration agreement unless the exclusion agreement is entered into after the commencement of the arbitration in which the award is made or, as the case requires, in which the question of law arises.

(7) In this section, "domestic arbitration agreement" means an arbitration agreement which does not provide, expressly or by implication, for arbitration in a country other than Australia and to which neither—

- (a) an individual who is a national of, or habitually resident in, any country other than Australia; nor

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- (b) a body corporate which is incorporated in, or whose central management and control is exercised in, any country other than Australia,

is a party at the time the arbitration agreement is entered into.

Exclusion agreements not to apply in certain cases.

41. (1) Subject to subsection (3), if an award or a question of law arising in the course of an arbitration relates, in whole or in part, to—

- (a) a question or claim falling within the Admiralty jurisdiction of the Supreme Court;
- (b) a dispute arising out of a contract of insurance; or
- (c) a dispute arising out of a commodity contract,

an exclusion agreement shall have no effect in relation to the award or question unless either—

- (d) the exclusion agreement is entered into after the commencement of the arbitration in which the award is made or, as the case requires, in which the question of law arises; or
- (e) the award or question relates to a contract which is expressed to be governed by a law other than the law of New South Wales.

(2) In subsection (1) (c), “commodity contract” means a contract—

- (a) for the sale of goods regularly dealt with on a commodity market or exchange in New South Wales which is specified for the purposes of this section by a regulation made by the Governor; and
- (b) of a description specified for the purposes of this section by a regulation made by the Governor.

(3) The Governor may by regulation provide that subsection (1)—

- (a) shall cease to have effect; or
- (b) subject to such conditions as may be specified in the regulation, shall not apply to any exclusion agreement made in relation to an award of a description specified in the regulation,

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and a regulation made under this subsection may contain such supplementary, incidental and transitional provisions as appear to the Governor to be necessary.

Power to set aside award.**42. (1) Where—**

- (a) there has been misconduct on the part of an arbitrator or umpire or an arbitrator or umpire has misconducted the proceedings; or
- (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 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 be paid into court or otherwise secured pending the determination of the application.

Court may remit matter for reconsideration.

43. Subject to section 38 (1), the Court may remit any matter referred to arbitration by an arbitration agreement 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.**44. Where the Court is satisfied that—**

- (a) there has been misconduct on the part of an arbitrator or umpire or an arbitrator or umpire has misconducted the proceedings;

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- (b) undue influence has been exercised in relation to an arbitrator or umpire; or
- (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.

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

45. (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 a power of appointment having been exercised by that party in relation to the appointment of that arbitrator or by reason of facts or circumstances that that party knew or ought to have known when exercising 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—

- (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 the party entered into the arbitration agreement.

Delay in prosecuting claims.

46. (1) Unless a contrary intention is expressed in an arbitration agreement, it is an implied term of the agreement that in the event of a dispute arising to which the agreement applies it shall be the duty of the claimant to exercise due diligence in the prosecution of the claim.

(2) Where there has been undue delay by a claimant in instituting or prosecuting a claim pursuant to an arbitration agreement, then, on the application of the arbitrator or umpire or of any party to the dispute, the Court may make an order terminating the arbitration proceedings and prohibiting the claimant from commencing further arbitration proceedings in respect of any matter which was the subject of the terminated proceedings.

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(3) The Court shall not make an order under subsection (2) unless it is satisfied—

- (a) that the delay has been intentional and contumelious; or
- (b) that—
 - (i) there has been inordinate and inexcusable delay on the part of the claimant or the claimant's advisers; and
 - (ii) the delay will give rise to a substantial risk of it not being possible to have a fair trial of the issues in the arbitration proceedings or is such as is likely to cause or to have caused serious prejudice to the other parties to the arbitration proceedings either as between themselves and the claimant or between each other or between them and a third party.

General power of the Court to make interlocutory orders.

47. 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.

48. (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.

(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 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

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

Power to impose terms on orders, etc.

49. 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 Court or the District Court thinks just.

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

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

Liability of arbitrator or umpire.

51. An arbitrator or umpire is not liable for negligence in respect of anything done or omitted to be done by the arbitrator or umpire in the capacity of arbitrator or umpire but is liable for fraud in respect of anything done or omitted to be done in that capacity.

Death of party.

52. (1) Unless a contrary intention is expressed in the arbitration agreement, where a party to an arbitration agreement dies the 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 that party but the agreement shall be enforceable by or against the personal representative of the deceased.

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(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.

53. (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—

- (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,

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 proceedings other than the entry of an appearance.

(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 arbitration by the arbitration agreement.

Interpleader.

54. 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 may, unless it is satisfied that there is sufficient reason why the matters should

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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.

55. (1) Where it is provided (whether in an arbitration agreement or some other agreement, whether oral or written) 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 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
- (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.

(2) Subsection (1) does not apply to an arbitration agreement unless all the parties to the agreement are domiciled or ordinarily resident in Australia at the time the arbitration agreement is entered into.

(3) Subsection (2) does not apply to an arbitration agreement that is treated as an arbitration agreement for the purposes of this Act by virtue only of the operation of section 3 (4) (a).

PART VII.

RECOGNITION AND ENFORCEMENT OF FOREIGN AWARDS
AND AGREEMENTS.**Interpretation.**

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

“agreement in writing” has the same meaning as in the Convention;

“arbitral award” has the same meaning as in the Convention;

“arbitration agreement” means an agreement in writing of the kind referred to in sub-article 1 of article II of the Convention;

“Convention” means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in 1958 by the United Nations Conference on International Commercial Arbitration at its twenty-fourth meeting, a copy of the English text of which is set out in Schedule 2;

“Convention country” means a country (other than Australia) that is a Contracting State within the meaning of the Convention;

“foreign award” means an arbitral award made, in pursuance of an arbitration agreement, in a country other than Australia, being an arbitral award in relation to which the Convention applies.

(2) In this Part, where the context so admits, “enforcement”, in relation to a foreign award, includes the recognition of the award as binding for any purpose.

(3) For the purposes of this Part, a body corporate shall be taken to be ordinarily resident in a country if, and only if, it is incorporated or has its principal place of business in that country.

(4) Nothing in this Part affects the right of any person to the enforcement of a foreign award otherwise than in pursuance of this Part.

Enforcement of foreign arbitration agreements.**57. (1) Where—**

- (a) the procedure in relation to arbitration under an arbitration agreement is governed, whether by virtue of the express terms of the agreement or otherwise, by the law of a Convention country;
- (b) the procedure in relation to arbitration under an arbitration agreement is governed, whether by virtue of the express terms of the agreement or otherwise, by the law of a country not being Australia or a Convention country, and a party to the agreement is Australia or a State or Territory or a person who was, at the time when the agreement was made, domiciled or ordinarily resident in Australia;
- (c) a party to an arbitration agreement is the Government of a Convention country or of part of a Convention country or the Government of a State or Territory of a Convention country, being a State or Territory to which the Convention extends; or
- (d) a party to an arbitration agreement is a person who was, at the time when the agreement was made, domiciled or ordinarily resident in a country that is a Convention country,

this section applies to the agreement.

(2) Subject to this Part, where—

- (a) proceedings instituted by a party to an arbitration agreement to which this section applies against another party to the agreement are pending in a court; and
- (b) the proceedings involve the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration,

on the application of a party to the agreement, the court shall, by order, upon such conditions (if any) as it thinks fit, stay the proceedings or so much of the proceedings as involves the determination of that matter, as the case requires, and refer the parties to arbitration in respect of that matter.

(3) Where a court makes an order under subsection (2), it may, for the purpose of preserving the rights of the parties, make such interim or supplementary orders as it thinks fit in relation to any property that is the subject of the matter to which the first-mentioned order relates.

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(4) For the purposes of subsections (2) and (3), a reference to a party includes a reference to a person claiming through or under a party.

(5) The court shall not make an order under subsection (2) if a court finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

Recognition of foreign awards.

58. (1) Subject to this Part, a foreign award is binding by virtue of this Part for all purposes on the parties to the arbitration agreement in pursuance of which it was made.

(2) Subject to this Part, a foreign award may be enforced in a court as if the award had been made in New South Wales in accordance with the law of New South Wales.

(3) Where—

- (a) at any time, a person seeks the enforcement of a foreign award by virtue of this Part; and
- (b) the country in which the award was made is not, at that time, a Convention country,

subsections (1) and (2) do not have effect in relation to the award unless that person is, at that time, domiciled or ordinarily resident in Australia or in a Convention country.

(4) Subject to subsection (5), in any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may, at the request of the party against whom the award is invoked, refuse to enforce the award if that party proves to the satisfaction of the court that—

- (a) that party, being a party to the arbitration agreement in pursuance of which the award was made, was, under the law applicable to that party, under some incapacity at the time when the agreement was made;
- (b) the arbitration agreement is not valid under the law expressed in the agreement to be applicable to it or, where no law is so expressed to be applicable, under the law of the country where the award was made;

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- (c) that party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present the case of that party in the arbitration proceedings;
- (d) the award deals with a difference not contemplated by, or not falling within the terms of, the submission to arbitration, or contains a decision on a matter beyond the scope of the submission to arbitration;
- (e) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- (f) the award has not yet become binding on the parties to the arbitration agreement or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.

(5) Where an award to which subsection (4) (d) applies contains decisions on matters submitted to arbitration and those decisions can be separated from decisions on matters not so submitted, that part of the award which contains decisions on matters so submitted may be enforced.

(6) In any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may refuse to enforce the award if it finds that—

- (a) the subject-matter of the difference between the parties to the award is not capable of settlement by arbitration under the laws in force in New South Wales; or
- (b) to enforce the award would be contrary to public policy.

(7) Where, in any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court is satisfied that an application for the setting aside or suspension of the award has been made to a competent authority of the country in which, or under the law of which, the award was made, the court may, if it considers it proper to do so, adjourn the proceedings, or so much of the proceedings as relates to the award, as the case requires, and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Evidence of awards and arbitration agreements.

59. (1) In any proceedings in which a person seeks the enforcement of a foreign award by virtue of this Part, that person shall produce to the court—

- (a) the duly authenticated original award or a duly certified copy; and
- (b) the original arbitration agreement under which the award purports to have been made or a duly certified copy.

(2) For the purposes of subsection (1), an award shall be deemed to have been duly authenticated, and a copy of an award or agreement shall be deemed to have been duly certified, if—

- (a) it purports to have been authenticated or certified, as the case requires, by the arbitrator or, where the arbitrator is a tribunal, by an officer of that tribunal, and it has not been shown to the court that it was not in fact so authenticated or certified; or
- (b) it has been otherwise authenticated or certified to the satisfaction of the court.

(3) If a document or part of a document produced under subsection (1) is written in a language other than English, there shall be produced with the document a translation, in the English language, of the document or that part, as the case requires, certified to be a correct translation.

(4) For the purposes of subsection (3), a translation shall be certified by a diplomatic or consular agent in Australia of the country in which the award was made or otherwise to the satisfaction of the court.

(5) A document produced to a court in accordance with this section is, upon its production, receivable by the court as prima facie evidence of the matters to which it relates.

PART VIII.

MISCELLANEOUS.

Service of notices.

60. 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 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 the usual or last known place of residence or business of that person;
or
- (d) by serving it in such other manner as the Court may, on application made to it in that behalf, direct.

Perjury.

61. (1) Any person who wilfully and corruptly gives false evidence before any arbitrator, umpire or other person authorised to administer an 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.

(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.

62. (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 with respect to—

- (a) applications to the Supreme Court under this Act and the costs of such applications;
- (b) the payment or bringing 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) 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
- (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 Supreme Court.

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

District Court rules.

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

- (a) applications to the District Court under this Act and the costs of such applications;
- (b) the payment or bringing of money into and out of the District Court in satisfaction of claims to which arbitration agreements apply and the investment of such money; and
- (c) 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.

*Commercial Arbitration 1984***Regulations.**

64. The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

SCHEDULE 1.

(Sec. 3 (1).)

REPEALS.

Arbitration Act, 1902, No. 29—the whole Act.

Supreme Court Act, 1970, No. 52—so much of the Second Schedule as amends the Arbitration Act, 1902.

Arbitration (Foreign Awards and Agreements) Act, 1973, No. 36—the whole Act.

SCHEDULE 2.

(Sec. 56 (1).)

**UNITED NATIONS CONFERENCE ON INTERNATIONAL COMMERCIAL ARBITRATION.
CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS.**

ARTICLE I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extensions under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

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SCHEDULE 2—*continued.*

ARTICLE II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

ARTICLE III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

ARTICLE IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

- (a) The duly authenticated original award or a duly certified copy thereof;
- (b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

*Commercial Arbitration 1984*SCHEDULE 2—*continued.*

ARTICLE V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

- (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
- (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
- (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
- (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

- (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
- (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

ARTICLE VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V (1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

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SCHEDULE 2—*continued.*

ARTICLE VII

1. The provisions of the present Convention shall not affect the validity of multi-lateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this convention.

ARTICLE VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

ARTICLE IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

ARTICLE X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extensions shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

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SCHEDULE 2—*continued.*

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

ARTICLE XI

In the case of a federal or non-unitary State, the following provisions shall apply:

- (a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;
- (b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;
- (c) A federal State party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

ARTICLE XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

ARTICLE XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

*Commercial Arbitration 1984*SCHEDULE 2—*continued.*

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

ARTICLE XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

ARTICLE XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

- (a) Signatures and ratifications in accordance with article VIII;
- (b) Accessions in accordance with article IX;
- (c) Declarations and notifications under articles I, X and XI;
- (d) The date upon which this Convention enters into force in accordance with article XII;
- (e) Denunciations and notifications in accordance with article XIII.

ARTICLE XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

In the name and on behalf of Her Majesty, I assent to this Act.

J. A. ROWLAND,
Governor.

*Government House,
Sydney, 14th December, 1984.*