THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA

Project No 18

Commercial Arbitration
and Commercial Causes

REPORT

JANUARY 1974
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## Appendices

**WORKING PAPER**

- A.

**PROPOSED DRAFT BILL**

- B.
THE HON. T.D. EVANS, M.L.A.
ATTORNEY GENERAL

TERMS OF REFERENCE

1. The Law Reform Committee was asked -

   A. To consider the law relating to the settlement of disputes by commercial arbitration with a view to preparing a revised Arbitration Act.

   B. To examine the procedures of the Supreme Court to see whether any alteration is necessary or desirable in the trial of commercial causes.

Part A

2. The Committee issued a working paper on Part A of the terms of reference in October 1971. The Commission now submits this report.

Part B

3. The Committee did not issue a working paper on Part B of the terms of reference, which arose only as a corollary to Part A in considering whether machinery provisions existed enabling disputes which were susceptible of resolution either by an arbitrator or the court to be dealt with expeditiously by the latter.

4. Since the Committee was given the project, the Rules of the Supreme Court have been revised, and a number of changes made to expedite the trial of actions. For example, Order 29 gives the court wide powers to order an action to be set down for trial forthwith and to settle the issues to be tried, and obliges parties to give the court the information necessary to enable it to properly exercise this power. Order 20, rule 21 has been amended to empower the court to order an action to be tried without pleadings or further pleadings. Order 30 has been
rewritten to encourage admissions and save expense. All these changes could be used to facilitate trials of commercial causes.

5. The new *Rules of the Supreme Court* came into force in February 1972. The Commission is of the view that further consideration of Part B is not necessary at this time.

**WORKING PAPER AND COMMENTS THEREON**

6. The working paper contained the recommendations of a sub-committee consisting of the Hon. Mr. Justice Burt, Mr. J.L. Toohey, Q.C. and Mr. B.W. Rowland (who is a member of the Law Reform Commission). A copy of that paper is attached as Appendix A. In the course of its deliberations, the sub-committee met representatives of local business and commercial groups to ascertain their views.

7. The proposals in the working paper are in two categories. The first concerns the circumstances under which a court should be empowered to deal with a dispute, notwithstanding that the parties had agreed to refer it to arbitration, and notwithstanding that the agreement contained what is known as a *Scott v. Avery* clause (see paragraph 30 below). The second category concerns proposals for improving the procedures of the actual arbitration proceedings.

8. Comments on the working paper were received from -

   - the Australian Institute of Quantity Surveyors (W.A. Chapter)
   - the Co-ordinator of Development and Decentralisation
   - Mr. R.J. Davies of Perth, a former President of the Master Builders Association of W.A. who acts as an arbitrator
   - the Fire & Accident Underwriters Association of W.A.
   - the General Manager of the State Electricity Commission
   - Messrs. Kott Wallace & Gunning, solicitors
   - the Law Society of Western Australia
   - Mr. F.M. McCardell of Perth, an architect who acts as an arbitrator
   - the former State Crown Solicitor (Mr. G.J. Ruse)
   - the Under Secretary for Mines
   - the Under Secretary for Works
PLAN OF THE REPORT

9. Paragraphs 11 to 31 below contain a discussion of the proposals in the first category referred to in paragraph 7 above. A discussion of the proposals in the second category is contained in the remaining paragraphs.

10. A draft bill is attached to this report as appendix B. It follows the general lines of the draft bill attached to the working paper, modified in minor ways in the light of the comments received. The Commission has also taken into consideration the working papers on commercial arbitration recently issued by the Law Reform Commission of New South Wales and the Australian Capital Territory.

DISCUSSION

Stay of court proceedings

11. The effect of the present s.6 of the Arbitration Act 1895 is that where there is an agreement to arbitrate and one party, notwithstanding that agreement, commences court proceedings against the other party, that other party will usually succeed on an application for a stay of those proceedings, to enable the dispute to be resolved by arbitration.

Only if special circumstances exist, such as doubt as to the validity of the reference to arbitration, delay in applying for a stay, where charges of a personal character are made or, in some cases where the principal question is one of law, does the court consider it is justified in interfering with the method of settling the dispute by arbitration (see Russell on Arbitration, 18th ed. 153-168).

12. In its working paper the Committee, following the recommendation of the sub-committee (see paragraph 6 above), proposed to reverse the practice referred to in the previous paragraph by suggesting the enactment of a provision under which the court would not be able to stay an action “unless it is satisfied that by reason of expense, delay, the nature of the questions in issue, or any other circumstance, justice would be better served by the dispute being determined by arbitration” (cl. 8(4) of bill attached to the working paper, Appendix A).
The proposal also covered the converse case where arbitration proceedings are commenced against a party. The court would be empowered expressly to stay those proceedings, so that the party who commenced them would be obliged to take court proceedings instead (see paragraph 14 of the Committee’s working paper)

13. The arguments in favour of this proposed change are set out in paragraph 13 of the working paper as follows -

“(1) From what was said at its meeting with representatives of interested organisations, the sub-committee formed the view that, notwithstanding some reservations about court procedures, most persons would prefer their disputes to be settled by the court rather than by arbitration. This is so particularly where the matter is not simply one of assessment of value, but involves questions of law, fact or credibility of witnesses.

Some representatives pointed out that an arbitration clause is often included in a contract, not because the parties have brought their minds to the question whether arbitration is the best method of determining any dispute that might arise, but because they have merely followed a precedent. Agreements to arbitrate are often included in some “standard form” contracts, to which a customer or client has no real choice but to subscribe.

(2) The time taken in court proceedings is usually no longer than in arbitration proceedings. The court has ample power to ensure that a dilatory party is penalised.

(3) The expense is, if anything, less in court proceedings: for one thing, the parties do not pay for the services of the judge.

(4) By and large, members of the community have more confidence in a judge, whose training and qualifications fit him to try disputes, than in an arbitrator.
(5) By the time the judge has heard sufficient to enable him to decide whether or not to grant a stay, it would be simpler and quicker to allow him to complete the hearing rather than for the proceedings to start afresh before an arbitrator.”

14. Three commentators were in favour of this proposal. The Law Society of Western Australia said that it fully supported the proposals contained in the working paper. The Under Secretary for Works said that his department was in full agreement with the proposals of the Committee. The former Crown Solicitor, Mr. Ruse, said that he agreed with the Committee’s provisional views and had no comments to make.

15. On the other hand, the Fire & Accident Underwriters Association, the Australian Institute of Quantity Surveyors, Mr. Davies and Mr. McCardell disputed the validity of each at the arguments put forward by the sub-committee in favour of the proposed change. They are of the opinion that arbitration proceedings are in general speedier and more economical than court proceedings, and have the additional important advantages of finality (since there is no appeal from an arbitrators decision) and privacy (since the public has no right to attend arbitration proceedings).

16. The Fire & Accident Underwriters’ Association also said that the Committee had attempted to generalise on the complete range of commercial contracts and that there were a number of advantages in the use of arbitration clauses in insurance contracts. Such clauses avoided an excess of litigation in that a claimant could, by threatening court action with its attendant publicity, force the insurance company into an unfair settlement. The Association also said that there should be no lack of confidence in an arbitrator in insurance disputes as the standard contract provides that the arbitrator must be agreed to by both parties.

17. It is the view of Mr. McCardell that “if the parties to a contract have agreed to settle their disputes in private by arbitration, it is an imposition against their liberty to deprive them of the right to do so”.

18. The Co-ordinator of Development and Decentralisation, the General Manager of the State Electricity Commission and the Under Secretary for Mines, whose comments were made orally to a member of the Commission, regard the fundamental issue as the question whether a party who had entered into an agreement to refer disputes to arbitration should be
permitted to take court proceedings instead. In their view, a person who has freely negotiated an arbitration clause should not be entitled to go back on it because at a later stage he prefers adjudication by a court. They regard it as not in the public interest that courts should in such circumstances be empowered to intervene.

19. All the comments were studied by the original sub-committee (see paragraph 6 above). It remained convinced that its approach was correct. The sub-committee is of the view that at the time of entering into the agreement parties may not have a clear conception of the nature of disputes likely to arise under it. These usually relate to a conflict of evidence or a question of law or the interpretation of a document, matters which it considers are best determined by the court. It acknowledges that some disputes are simply as to the value of work done, the standard of workmanship, or the cost of making good defects, which do not normally involve value judgments on evidence or other judicial questions, and are thus suitable for informal determination by a person with experience in the particular industry concerned. In such latter cases, the sub-committee considers that under its proposed formula (see paragraph 12 above) the court would stay court proceedings.

20. The sub-committee is of the view that some commentators appear to have thought that the proposal would empower the court to intervene even though both parties wished the dispute to be determined by arbitration. This is not so. The sub-committee’s proposal would have no application in such a case, and could not prevent the parties proceeding to arbitration should they both wish to do so.

21. The sub-committee agrees that in cases where the parties, acting at arms length, had specially negotiated the arbitration clause, that clause should generally be given effect to. It considers that under the formula submitted, the court would in such cases stay the action. However, to overcome any doubt, it suggests that express reference to this situation be included as one of the circumstances to which the court must have regard in deciding whether or not to stay the action.

22. The Commission has given long and careful consideration to this question regarding the stay of proceedings. While the Commission is unanimous in its other recommendations, it is divided on this question.
Majority View

23. The views expressed on the question emphasise a conflict of principle. On the one hand it can be contended that the parties to a contract, having agreed to refer disputes to arbitration, should be bound by their agreement. On the other it can be contended that disputes involving questions of law and possibly those involving an evaluation of disputed evidence, should be determined by tribunals which are legally trained. If there were a sufficiently large body of legally trained and experienced arbitrators available (as there is in some of the larger jurisdictions) the conflict would be resolved. In the alternative, if it were possible to define with sufficient precision the areas of the disputes which could be left to lay arbitration and those which only the courts would be fully competent to deal with, the conflict in principle would also be resolved. But such definition would be difficult, to say the least.

24. In the face of these difficulties, two members of the Commission, Mr. Rowland (who was also a member of the sub-committee) and Professor Edwards, adopt the views of the sub-committee. In the opinion of these members the courts can be relied on, particularly given the legislative guide lines referred to in paragraphs 12 and 21 above, to ensure that each case is dealt with by the appropriate tribunal.

25. Following the recommendation of the Queensland Law Reform Commission, legislation has been enacted in that State empowering the court to order that an arbitration agreement shall cease to have effect (thus enabling the matter to be litigated in the court) in cases where it is more convenient and beneficial to have all the issues or all the parties before the court in the same action (see the Arbitration Act 1973 (Qld) s.7(2) and (3)). A similar recommendation was made by the South Australian Law Reform Committee of the Australian Capital Territory in its working paper on arbitration.

The proposal of the majority (see paragraph 24 above) gives the courts more extensive powers.

26. The New South Wales Commission does not propose that the court’s powers should be widened generally, but it distinguishes between “contracts of adhesion” and other contracts and suggests a number of provisions for the regulation of arbitration proceedings arising out of contracts of adhesion. It described contracts of adhesion in its working paper (paragraph
4) as “standard form contracts common in business today, dictated by one party to another and not open to change by negotiation.”  (But cf. the definition in clause 7 of the New South Wales Commission’s draft bill appended to its working paper).

The New South Wales Commission also suggests that a Scott v Avery clause should have no effect in a contract of adhesion unless the clause has been confirmed by the parties after the dispute arose.

Mr. Rowland and Professor Edwards doubt whether contracts of adhesion as defined in the New South Wales Commission’s draft bill cover the area of concern in Western Australia, or whether the nature and degree of regulation of arbitration proceedings arising out of such contracts proposed will provide a sufficient answer to the problem in this State. In their view a greater degree of flexibility is required and clause 8(3) of the proposed bill attached to this report (Appendix B) provides this. In particular the requirement that the court shall not grant a stay of court proceedings unless it is satisfied that the agreement to arbitrate was specially negotiated, will enable the courts in appropriate cases to ensure that parties are not forced unwillingly into arbitration under contracts of adhesion.

Minority view

27. The other member, Mr. Freeman, believes that the approach suggested by the sub-committee and recommended by the majority of the Commission goes too far and would tend to encourage a party to repudiate his promise to arbitrate. In his view a person who has freely negotiated an arbitration clause should not be entitled to go back on it because at a later stage he prefers adjudication by a court (see paragraph 18 above). The approach by the majority of the Commission, which appears to be without precedent, was subject to criticism by Professor Nygh of the University of Sydney who delivered a paper on “International Commercial Arbitration in Australia and New Zealand” at the Lawasia Conference in Jakarta in July 1973.

28. Section 6 of the existing Act in effect imposes a prima facie duty on the courts to act upon and give effect to an agreement to arbitrate by staying the proceedings in the absence of sufficient reason to the contrary. Mr. Freeman considers that the fact that the courts have exercised the right to interfere sparingly (see paragraph 11 above) does not warrant the introduction of provisions (see clause 8 of the draft bill) which, in his view, would require the
party applying for a stay of the court proceedings to show good cause why the court should not itself settle the dispute. As is stated in paragraph 114 of the working paper of the New South Wales Law Reform Commission -

“It is right that, where there is an agreement that differences will be arbitrated, a party proceeding in court in breach of the agreement should at least bear the onus of showing why the court proceedings should be allowed to continue. It is right too that the onus should not be a light one”.

29. Mr. Freeman recognises that problems do exist in respect of contracts of adhesion in so far as such contracts are not freely negotiated and contain an arbitration clause in standard form which is not open to change. Circumstances may well arise in which it would be inequitable to compel a weaker party in a contract of adhesion to go to arbitration and the courts should, it is submitted, be empowered to take those circumstances into account in determining whether to grant a stay of proceedings.

In his view the provisions of subclauses (1), (3) and (4) of clause 8 of the draft bill should be deleted and replaced by a provision similar to section 6 of the existing Act with the addition of a new subsection along the following lines -

“The court in considering whether to stay the action shall take into account -
(a) the nature of the questions in issue;
(b) questions of expense or delay involved in the proceedings;
(c) whether or not the agreement to arbitrate was freely and specially negotiated;
(d) such other matters as the court thinks fit”.

This approach would avoid the difficulty of defining precisely the concept of a contract of adhesion (see the working paper of the New South Wales Law Reform Commission paragraph 74, and clause 7 of that Commission’s draft bill). The courts would be encouraged by such a provision to adopt a more flexible approach, particularly in respect of contracts of adhesion, without derogating from what should be an objective of the law, namely, to give effect to an arbitration agreement freely negotiated.
Scott v Avery clauses

30. A Scott v Avery clause in agreements to arbitrate provides that there is no right of action under the agreement except upon an award of an arbitrator. If such a clause is included in an agreement therefore, there would be no question of commencing court proceedings in relation to a dispute covered by the agreement (see Scott v Avery (1856) 5 H.L. Cas. 811, followed by the Full Court of Western Australia in Fryer v Plucis [1967] W.A.R. 161). If the proposal of the sub-committee is to have practical effect it would be necessary to enact also a provision limiting the effect of such a clause.

31. Section 25(4) of the English Arbitration Act deals with the problem of Scott v Avery clauses by giving the court a discretion to order that such a clause shall cease to have effect. But it would seem preferable to make the clause void absolutely. Clause 9 of the draft bill (Appendix B) is designed to give effect to this recommendation.

Other matters of contention

32. The sub-committee recommended that the legislation should require the arbitrator to make his award in writing and to give reasons for his decision unless the parties, after the dispute has arisen, waive the requirements. This recommendation follows a similar suggestion of the Queensland Law Reform Commission which has now been enacted (the Arbitration Act 1971 (Qld) s.24). Mr. Davies and Mr. McCardell disagreed with the proposal in its particular form. Although they agreed that arbitrators should give reasons, they did not wish for these reasons to be deemed part of the award, because to do so would make more effective the court’s power to set aside an award for error of law on the face of the award and would thus impair the concept of finality which they think is desirable in arbitration. In the Commission’s view this is precisely why the reasons should be declared part of the award. The Commission considers that the court should have wide powers of reviewing the decision of an arbitrator to ensure that his decisions do not contain mistakes of law. Clause 22 of the draft bill attached (Appendix B) is designed to give effect to this recommendation.

33. The sub-committee recommended that legislation along the lines of s.18(3) of the English Arbitration Act should also be adopted in this State. That provision makes void any agreement that the parties shall bear their own costs of any arbitration proceedings, unless the
parties have agreed after the dispute has arisen, to bear their own costs. The provision was introduced in England so that a party is not inhibited from taking proceedings under the arbitration agreement notwithstanding that he had a good case. The Commission adopts the recommendation of the sub-committee. Clause 24(3) of the attached draft bill (Appendix B) is designed to give effect to the recommendation.

34. The sub-committee recommended that legislation similar to s.27 of the English Arbitration Act should be enacted in this State. That section empowers the court to extend the time within which a party must commence proceedings under the agreement if otherwise undue hardship would be caused. The clause appears to have worked well in England and the Commission recommends its adoption here. No commentator disagreed.

35. The sub-committee proposed that the new Arbitration Act should bind the Crown. Under the existing Act (s.24) the court has no power to stay court proceedings to which the Crown is a party notwithstanding that the Crown has bound itself to arbitrate (R. v. Colonial Mutual Insurance Co. (1903) 5 W.A.L.R. 46). The Commission agrees with the sub-committee that in this area the Crown should not be in a different position from a subject. The English Arbitration Act binds the Crown, as does the Queensland Arbitration Act 1973. The South Australian Law Reform Committee has also recommended that its Act bind the Crown (Fifth Report, clause 5 of proposed bill).

**Machinery and procedures of arbitration**

36. The following paragraphs make reference to changes which the sub-committee proposed and which the Commission agrees should be included in the legislation. They are largely self-explanatory and, in the main, are aimed at improving the machinery and procedures of arbitration. They are not dependant on the proposals discussed above and could be introduced whether or not those changes are accepted. The clause references refer to the clauses in the draft bill attached (Appendix B).

37. (a) The draft bill covers oral as well as written agreements to arbitrate. There seems no reason why oral agreements should be excluded. The New South Wales Law Reform Commission and the Law Reform Commission of the
Australian Capital Territory have also suggested that oral arbitration agreements should be included.

(b) An agreement to arbitrate and the authority of the arbitrator is not to be affected by the death of a party - cl. 12.

(c) An uneven number of arbitrators may decide by a majority vote - cl.13(b).

(d) The umpire may enter upon the reference in lieu of the arbitrators if they have given notice that they cannot agree - cl.14(l)(b).

(e) To replace an arbitrator who has already entered on the reference, the leave of the court must be obtained - cl.15(l)(a). Mr. McCardell does not agree that leave should be required. The sub-committee’s reason for recommending this change was that the question of the costs of the abortive proceedings could arise, which should be subject to a direction of the court.

(f) The procedure for the issue and service of writs of subpoena are prescribed - cl.18(2), (3) and (4).

(g) Parties are required not to obstruct arbitration proceedings and power is expressly given the arbitrator to proceed ex parte (this is already the law - *Benedetti v Sasvary* (1967) 2 N.S.W.R. 792) - cl.20.

(h) Unless otherwise agreed an arbitrator is empowered to make an interim award and to order specific performance - cl.23(a) and (b).

(i) Unless the award otherwise directs, the sum awarded to be paid carries interest - cl.26.

38. The Supreme Court is given the following express powers -

(a) To direct the issue in interpleader proceedings to be determined in accordance with the arbitration agreement - cl.11.
(b) To order security for costs, discovery of documents and the like - cl.19. Under the existing law the court has no power to order security for costs (*R.J. Davies Ltd. v. C.R. Keath Earth Moving Co. Ltd* [1965] W.A.R. 189).

(c) To remove a dilatory arbitrator and appoint a fresh arbitrator - cl.21(3).

(d) To authorise an application for an amendment to an award to provide for costs - cl.24(4).

(e) To resolve disputes about an arbitrator’s fees - cl.25.

(f) To correct obvious mistakes in an award - cl.30.

(g) On an application to set aside an award, to order money payable under the award to be secured - cl.31(4).

(h) To appoint a fresh arbitrator in the place of an arbitrator removed by it and, in cases where the authority of an arbitrator is revoked or a sole arbitrator is removed by it, to order that the agreement to arbitrate shall cease to have effect in respect to that dispute - cl.32(1) and (2).

(i) To set aside an award for “jurisdictional error” and “misconduct” - cl.31. Under the present law the court can set aside an award for “misconduct” by an arbitrator. This term is misleading since it covers mistakes by the arbitrator in relation to the proceedings as well as misconduct in the narrow sense. As a drafting convenience the term “jurisdictional error” is used in the draft bill to include mistakes both of jurisdiction and within jurisdiction which are grounds for setting aside the award. The meaning of the term “misconduct” is correspondingly restricted to improper behaviour.

39. Messrs. Kott Wallace & Gunning suggested that the powers given the Supreme Court under the legislation should also be exercisable by the District Court where the amount in issue is within that court’s jurisdiction. This question was considered by the sub-committee,
which decided that the present law, which gives exclusive jurisdiction to the Supreme Court, should continue. The Commission agrees with the sub-committee. Most of the powers given the Supreme Court under the Arbitration Act are similar to those it traditionally exercises in relation to inferior judicial tribunals. The jurisdiction of the District Court does not include appellate or supervisory powers, and an extension in this limited area would not be justified.

RECOMMENDATIONS

40. The Commission, by a majority, recommends that the power of a court to determine a dispute, notwithstanding an agreement to refer that dispute to arbitration, should be widened in accordance with clause 8 of the draft bill attached (Appendix B).

41. The Commission unanimously recommends that provisions along the lines of the other clauses of the draft bill be enacted.

42. It is to be noted that the recommendations do not relate to legislation to give effect to the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The Commission has assumed that this matter lies outside its terms of reference.

CHAIRMAN

MEMBER

MEMBER

18 January 1974
INTRODUCTION

The Law Reform Committee has been asked to consider the law relating to the settlement of disputes by commercial arbitration with a view to preparing a revised *Arbitration Act*.

The Committee has now completed its first consideration of the matter and issues this working paper. The paper does not necessarily represent the final views of the Committee.

Comments and criticisms are invited. The Committee requests that they be submitted by the 24th December 1971.

Copies of the paper are being forwarded to -

- The Chief Justice and Judges of the Supreme Court
- The Judges of the District Court
- The Law Society
- The Magistrates Institute
- The Law School
- The Crown Law Department
- The Public Works Department
- The State Government Insurance Office
- The Fire and Accident Underwriters Association
- The Australian Insurance Association
- The organisations which attended meetings of the sub-committee
- Other Law Reform Commissions and Committees with which this Committee is in correspondence.

A notice has been inserted in *The West Australian* stating that persons interested will on application be sent copies of the paper.

The research material on which this paper is based is at the offices of the Committee and may be made available on request.
TERMS OF REFERENCE

1. “To consider the law relating to settlements of disputes by commercial arbitration with a view to preparing a revised Arbitration Act”.

PRESENT LAW IN WESTERN AUSTRALIA

2. The law in Western Australia is contained in the Arbitration Act 1895-1970 which is basically a reproduction of the English Arbitration Act 1889.

THE LAW ELSEWHERE

3. The law in England is contained in the Arbitration Act 1950, which is substantially a consolidation of the Arbitration Act of 1899 and three amending Acts.

4. With the exception of Queensland (the Interdict Act of 1867 (Q) being derived from much earlier English legislation), the legislation in other Australian States is also based on the English Act of 1889, though some States have also made certain amendments.

5. Many States of the United States of America have adopted the Uniform Arbitration Act drafted by the National Conference of Commissioners on Uniform State Laws. The California Law Revision Commission has proposed certain amendments to the Californian legislation, which was enacted in 1927.

MOVEMENT FOR REFORM

6. At the Western Australian Law Society’s Summer School in 1969, Mr. H. E. Zelling, Q.C. (now Mr. Justice Zelling) drew attention to a number of aspects of the present arbitral procedures which he regarded as unsatisfactory. He emphasised that the time was ripe for change. It was apparent from the discussion which followed that many members of the legal and business communities shared Mr. Justice Zelling’s views.

7. The South Australian Law Reform Committee, whose chairman is Mr. Justice Zelling, and the Queensland Law Reform Commission have produced reports recommending that the arbitration legislation of their States be brought up to date (see the 5th Report of the South
Australian Law Reform Committee and the Report of the Queensland Law Reform Commission (Q.L.R. C. 4)).

COMMITTEE’S PROVISIONAL VIEWS

8. At the request of the Western Australian Law Reform Committee, a sub-committee consisting of the Hon. Mr. Justice Burt, Mr. J. L. Toohey, Q.C. and Mr. B. W. Rowland (who is also a member of the Committee) has considered the matter and made concrete proposals for reform. In addition to its own discussions, the sub-committee met representatives of legal, business and commercial groups to ascertain their views.

9. The proposals of the sub-committee have been accepted by the Committee. Because of the technical nature of the subject, the proposals are in the form of a draft bill to amend and consolidate the Arbitration Act. The draft bill is attached to this paper. It is emphasised however that, as with all the Committee’s working papers, the proposals are at this stage tentative only. They will be reviewed in the light of the comments received.

10. Under existing law a party to an agreement to refer a dispute to arbitration may, notwithstanding that agreement, bring an action in respect of that dispute and any provision in the agreement to the contrary would be void as attempting to oust the jurisdiction of the court (Russell on Arbitration, 18th ed., p.137). However the other party may apply to the court for an order staying the proceedings, and the court “if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the [agreement]” may make the order (s.6 of the Arbitration Act (W.A.)).

11. The policy of the court is generally to grant a stay except in special cases. Grounds which the court has taken into account in refusing to stay the court action are -

   (1) doubt as to the validity of the reference to arbitration;

   (2) delay in applying for a stay;

   (3) relief claimed beyond the arbitrator’s powers (in some cases);
(4) where charges of a personal character are made;

(5) where the principal question is one of law;

(6) interest, misconduct or bias on the part of the arbitrator;

(7) where arbitration is appropriate for a minor part only of the dispute.

12. Clause 8 (l) or the attached draft bill gives express statutory recognition to the common law right referred to in paragraph 10 above to bring an action notwithstanding an agreement to arbitrate. The clause then goes further by providing in subclause (3) that the court is not to stay the action unless it is satisfied that “by reason of expense, delay, the nature of the questions in issue, or any other circumstance, justice would be better served by the dispute being determined by arbitration”. In other words the party applying for a stay of the action must in effect show good cause why the court is not the appropriate tribunal to determine the dispute.

13. The proposal that the court is not to stay the action unless satisfied that the justice of the case demands it, is based on the following grounds -

(1) From what was said at its meetings with representatives of interested organisations, the sub-committee formed the view that, notwithstanding some reservations about court procedures, most persons would prefer their disputes to be settled by the court rather than by arbitration. This is so particularly where the matter is not simply one of assessment of value, but involves questions of law, fact or credibility of witnesses. Some representatives pointed out that an arbitration clause is often included in a contract, not because the parties have brought their minds to the question whether arbitration is the best method of determining any dispute that might arise, but because they have merely followed a precedent. Agreements to arbitrate are often included in some “standard form” contracts, to which a customer or client has no real choice but to subscribe.
(2) The time taken in court proceedings is usually no longer than in arbitration proceedings. The court has ample power to ensure that a dilatory party is penalised.

(3) The expense is, if anything, less in court proceedings - for one thing, the parties do not pay for the services of the judge.

(4) By and large, members of the community have more confidence in a judge whose training and qualifications fit him to try disputes, than in an arbitrator.

(5) By the time the judge has heard sufficient to enable him to decide whether or not to grant a stay, it would be simpler and quicker to allow him to complete the hearing rather than for the proceedings to start afresh before an arbitrator.

14. Clause 8(4) of the draft bill deals with the case where arbitration proceedings are commenced against a party to an agreement to arbitrate. If that party does not wish the dispute to be determined by arbitration, the subclause enables him to apply to the appropriate court for an order staying the arbitration proceedings. If the arbitration proceedings are stayed, the party who commenced them may of course instead bring an action in the court under clause 8(1).

15. Clause 8(5) is taken from s.24(l) of the English Arbitration Act 1950. One reason for staying arbitration proceedings under subclause (4) is that the arbitrator may not be impartial. Subclause (5) ensures that the question of an arbitrator’s impartiality can be decided on its merits, without any question of estoppel arising.

16. Clause 9 of the draft bill is ancillary to clause 8. It is derived from s.25(4) of the English Arbitration Act 1950, and makes void any clause of the Scott v Avery type in an arbitration agreement. A Scott v Avery clause provides that there is no right of action under the agreement except upon an award of an arbitrator. In effect it ousts the jurisdiction of the court in the first instance (see Scott v Avery (1856) 5 H.L.Cas. 811, followed by the Full Court of Western Australia in the recent case of Fryer v Plucis (1967) W.A.R.161) The English provision, although apparently effective in countering a Scott v Avery clause, seems unnecessarily cumbersome.
It seems preferable to make such a clause void absolutely. If the court grants a stay of proceedings, the agreement to arbitrate would have full effect and the presence of a \textit{Scott v Avery} clause would add nothing to its effectiveness.

The Western Australian \textit{Hire Purchase Act 1959} has a somewhat similar provision applicable to contracts of insurance in hire purchase agreements (see s.22(2)).

17. The following is a reference to other important changes proposed. They are not dependent on clauses 8 and 9 and could be introduced whether or not the Committee’s proposals discussed above are accepted.

\begin{itemize}
\item[(a)] \textbf{Power to extend time - Clause 10} - This is derived from s.27 of the English \textit{Arbitration Act}. It empowers the court to extend the time within which a party must commence proceedings under the agreement, if otherwise undue hardship would be caused.
\item[(b)] \textbf{Arbitrator to give written reasons - Clause 23} - It seems a basic requirement of justice that a judicial tribunal should give reasons for its decision. Accordingly this clause requires the arbitrator to give written reasons for his award unless the parties, after the dispute has arisen, agree otherwise. The giving of reasons would also facilitate the exercise of the Supreme Court’s supervisory powers over the arbitration.
\item[(c)] \textbf{Costs of the arbitration proceedings - Clause 25(3)} - This is derived from s.18(3) of the English \textit{Arbitration Act} and makes void any agreement that the parties shall bear their own costs, unless such an agreement is entered into after the dispute has arisen. A provision in an arbitration agreement requiring each party to bear his own costs could inhibit a party from taking proceedings, notwithstanding that he has a genuine cause of action.
\end{itemize}

18. This paragraph and the next following make brief reference to incidental matters in respect to which express provision is made in the draft bill. The clauses concerned are largely self-explanatory and, in the main, are aimed at improving the machinery and procedures of arbitration.
(a) Agreement to arbitrate and authority of arbitrator not affected by death of a party - Cl. 12

(b) An uneven number of arbitrators may decide by majority vote - Cl. 13(b)

(c) Procedures for issue and service of writs of subpoena are prescribed - Cl. 18(2), (3) & (4)

(d) Parties must not obstruct arbitration proceedings - Cl. 20

(e) Unless otherwise agreed arbitrator may make an interim award and order specific performance - Cl. 24(a) & (h)

(f) Unless award otherwise directs the sum directed to be paid carries interest - Cl. 27

19. The Supreme Court is given the following express powers -

(a) To direct the issue in interpleader proceedings to be determined in accordance with the arbitration agreement - Cl. 11

(b) To order an umpire to enter on a reference - Cl. 14(3)

(c) To order security for costs, discovery of documents, etc. - Cl. 19 (see R. J. Davies Ltd. v C. R. Heath Earthmoving Co. Ltd. [1965] W.A.R.189).

(d) To remove a dilatory arbitrator and appoint a fresh arbitrator - Cl. 22(3) & 33

(e) To extend time to apply for an amendment to an award to provide for costs - Cl. 25(4)

(f) To make certain orders in case of a dispute about an arbitrator’s fees - Cl. 26

(g) To correct obvious mistakes in an award - Cl. 31
(h) To give the arbitrator directions for the correction of jurisdictional errors - Cl. 32(2)

(i) On an application to set aside an award, to order money payable under the award to be secured - Cl. 32(4).
A BILL

FOR

AN ACT to amend and consolidate the law relating to arbitration.

BE IT enacted etc. …

PART I – PRELIMINARY

Short title. 1. This Act may be cited as the Arbitration Act 197-

Commencement. 2. This Act shall come into operation six months after it is assented to.


(2) Any agreement to arbitrate in force at the coming into operation of this Act shall have effect subject to this Act, but any reference to arbitration entered on prior to the coming into operation of this Act may be continued and completed under the Arbitration Act 1895-1970 as if this Act had not been passed.

(3) With the exception of the provisions specified in subsection (4) of this section, this Act shall apply to every arbitration under any other Act, whether passed before or after the commencement of this Act, as if the arbitration were pursuant to an agreement to arbitrate, except insofar as this Act is inconsistent with that other Act or with any rules or procedure authorised or recognised thereby.

(4) The provisions referred to in subsection (3) of this section are section eight, section nine, section ten, section eleven, subsection (1) of section twelve, subsection (3) of section twenty-five and section thirty-three.

Arrangement of Act. 4. This Act is arranged as follows -

PART I  -  PRELIMINARY, ss. 1-6

PART II  -  GENERAL PROVISIONS AS TO ARBITRATION, ss.7-12

PART III  -  ARBITRATORS AND UMPIRES, ss. 13-16

PART IV  -  CONDUCT OF PROCEEDINGS, ss. 17-21

PART V  -  AWARDS, ss. 22-27
PART VI - SPECIAL CASES, POWERS OF COURT IN RELATION TO AWARDS, ss. 28-34.

5. In this Act, unless the contrary intention appears -

“Action” includes a matter or proceeding in a court.

“Agreement to arbitrate” means an agreement to submit present or future differences to arbitration whether an arbitrator is named therein or not.

“Court” means the Supreme Court and includes a Judge thereof.

“Party” includes a personal representative or assign of a party.

6. This Act binds the Crown.

PART II - GENERAL PROVISIONS AS TO ARBITRATION

7. The authority of an arbitrator or umpire appointed by or by virtue of an agreement to arbitrate shall, unless a contrary intention is expressed therein or unless otherwise agreed by all parties concerned, be irrevocable except by leave of the court.

8. (1) Notwithstanding anything to the contrary contained in an agreement to arbitrate, any party thereto may commence proceedings in a court having jurisdiction to hear and determine those proceedings against any other party to that agreement in respect of any matter agreed to be so referred.

(2) Any other party to the agreement to arbitrate may -

(a) where the proceedings have been commenced in the Supreme Court or District Court, after entering an appearance and before delivering any pleadings;

(b) where the proceedings have been commenced in a Local Court or a Warden’s Court, after giving or lodging a notice of defence and before the hearing of the proceedings.

apply to the court in which the proceedings have been commenced to stay those proceedings.

(3) No stay of proceedings in a court shall be granted unless the court is satisfied that by reason of expense, delay, the nature of the questions in issue, or any other circumstance, justice would be better
served by the dispute being determined by arbitration.

(4) Any party to an agreement to arbitrate may, if proceedings by way of arbitration are commenced against him and before taking any step in the arbitration, apply to any court in which the dispute could be determined for an order staying those proceedings and that court shall by order and subject to such conditions (if any) as the court may think fit to impose, stay those proceedings unless it is satisfied that by reason of expense, delay, the nature of the questions in issue, or any other circumstance, justice would be better served by the dispute being determined by arbitration.

(5) Where a party to an agreement to arbitrate makes an application to stay arbitration proceedings upon the ground that the arbitrator so named or designated is not or may not be impartial, it shall not be a ground for refusing the application that the party at the time when he made the agreement knew or ought to have known that the arbitrator, by reason of his relation towards any other party to the agreement or by reason of his connection with the subject referred, might not be capable of impartiality.

9. A provision in an agreement that no action may be brought with respect to any matter to which the agreement applies, unless the matter has been referred to arbitration or unless an award pursuant to the reference has been obtained, is void.

10. Where an agreement to refer future disputes to arbitration provides that the right to take arbitration proceedings or any proceedings in a court in relation to a dispute to which the agreement applies shall be barred unless some step is taken within a time fixed by the agreement and a dispute arises to which the agreement applies, the court, if it is of the opinion that in the circumstances of the case undue hardship would otherwise be caused and notwithstanding that the time so fixed has expired, may on such terms (if any) as it thinks fit, but without prejudice to the provisions of any enactment limiting the time for the commencement of arbitration proceedings or proceedings in a court as the case may be, extend the time for such period as it thinks fit.

11. Where relief by way of interpleader is granted and it appears to the court in which the proceedings are pending that the claims in question are matters to which an agreement to arbitrate, to which the claimants are parties, applies, the court may if it is satisfied that by reason of expense, delay, the nature of the questions in issue or any other circumstance, justice would be better served thereby, direct the issue between the claimants to be determined in accordance with the agreement to arbitrate.

12. (1) An agreement to arbitrate shall not be discharged by the death of any party thereto, either as respects the deceased or any other party, but shall in such event be enforceable by or against the personal

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Agreement requiring arbitration before court action to be void.
U. K. 25(4)

Power to extend time.
U. K. 27

Interpleader
U.K.5

Death of a party
U.K.2
representative of the deceased.

(2) The authority of an arbitrator shall not be revoked by the death of any party.

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

PART III - ARBITRATORS AND UMPIRES

13. Unless a contrary intention is expressed therein every agreement to arbitrate shall -

(a) if no other mode of reference is provided, be deemed to include a provision that the reference shall be to a single arbitrator;

(b) where the reference is to an uneven number of arbitrators, be deemed to include a provision that the arbitrators may act by a majority decision.

14. (1) Unless a contrary intention is expressed therein every agreement to arbitrate shall, where the reference is to an even number of arbitrators, be deemed to include a provision that the arbitrators shall appoint an umpire immediately after they themselves are appointed.

(2) Unless a contrary intention is expressed therein every agreement to arbitrate shall, where such a provision is applicable to the reference, be deemed to include a provision that, if the arbitrators have delivered to any party to the agreement or to the umpire a notice in writing stating that they cannot agree, the umpire may forthwith enter upon the reference in lieu of the arbitrators.

(3) At any time after the appointment of an umpire, however appointed, the court may, on the application of any party to the reference and notwithstanding anything to the contrary in the agreement to arbitrate, order that the umpire shall enter upon the reference in lieu of the arbitrators and as if he were a sole arbitrator.

15. Where an agreement to arbitrate provides that the reference shall be to two or more arbitrators, then, unless a contrary intention is expressed therein -

(a) if any of the nominated or appointed arbitrators refuses to act, or is incapable of acting, or dies, the party who nominated or appointed him as the case may be may appoint a new arbitrator in his place: provided that, where the arbitrator to be replaced had entered on the reference, no appointment by way of substitution shall be made except by leave of the court and subject to such terms and directions as
the court may impose;

(b) if on such a reference a party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, for seven clear days after any other party has served the party making default with notice to make the appointment, the other party or parties as the case may be may appoint his or their arbitrators to be the only arbitrator or arbitrators in the reference, and any award shall be binding on all parties: provided that the court may set aside any appointment made pursuant to this paragraph.

<table>
<thead>
<tr>
<th>Power of court to appoint an arbitrator or umpire.</th>
<th>16. In any of the following cases -</th>
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<tbody>
<tr>
<td>U.K.10</td>
<td>(a) where an agreement to arbitrate provides that the reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator;</td>
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<tr>
<td>W.A.7</td>
<td>(b) if an appointed single arbitrator refuses to act, or is incapable of acting, or dies, and the agreement to arbitrate does not show that it was intended that the vacancy should not be filled and the parties do not fill the vacancy;</td>
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<td>(c) where the parties or the arbitrators or any other person may appoint an umpire or an additional arbitrator and no appointment is made, or where an even number of arbitrators are required to appoint an umpire and do not appoint him;</td>
</tr>
<tr>
<td></td>
<td>(d) where an appointed umpire or an appointed additional arbitrator refuses to act, or is incapable of acting, or dies, and the agreement to arbitrate does not show that it was intended that the vacancy should not be filled, and the parties or arbitrators do not fill the vacancy;</td>
</tr>
<tr>
<td></td>
<td>(e) where in any other case it is necessary to appoint, either originally or by way of substitution, an arbitrator or arbitrators, or an umpire, and any difficulty arises in connection with such appointment,</td>
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</table>

any party may serve the other party or parties or the arbitrators or other person, as the case may be, with a written notice to appoint or concur in appointing an arbitrator or umpire or additional arbitrator, and if the appointment is not made within seven clear days after the service of the notice the court may, on application by the party who gave the notice, appoint an arbitrator or umpire or additional arbitrator who shall have the like power to act in the reference and make an award as if he had been appointed in accordance with the terms of the agreement to arbitrate.
PART IV - CONDUCT OF PROCEEDINGS

17. (1) Unless a contrary intention is expressed therein every agreement to arbitrate shall, where such a provision is applicable to the reference, be deemed to contain a provision that the parties to a reference and all persons claiming through them respectively shall, if required to do so by another party to the reference and subject to any legal objection, submit to be examined before the arbitrator or umpire on oath or affirmation in relation to the matters in dispute and shall, subject as aforesaid, produce before the arbitrator or umpire all documents within their possession or power which may be required or called for.

(2) Unless a contrary intention is expressed therein every agreement to arbitrate shall, where such a provision is applicable to the reference, be deemed to contain a provision that the witnesses called on a reference shall, if the arbitrator or umpire thinks fit, be examined on oath or affirmation.

(3) An arbitrator or umpire shall, unless a contrary intention is expressed in the agreement to arbitrate, have power to administer oaths to or take the affirmations of the parties to and witnesses called on a reference under the agreement.

(4) No person shall be compelled in any arbitration to answer any question he would not be compelled to answer at the trial of an action.

18. (1) Any party to a reference under an agreement to arbitrate may sue out in aid of that reference a writ of subpoena ad testificandum or a writ of subpoena duces tecum, and no order of the court for the issue of such a writ shall be necessary; but no person shall be compelled under any such writ to produce any document which he could not be compelled to produce on the trial of an action.

(2) Such a writ of subpoena -

(a) shall be issued in accordance with the practice and forms of the court, with such variations as circumstances may require;

(b) continues to have effect until the disposal of proceedings at which the attendance of the witness is required;

(c) must be served personally, unless the court otherwise directs.

(3) No person to whom a writ of subpoena is directed under the provisions of this section shall be liable to any penalty for failure to obey the writ unless it is served on him not less than four days or such other period as the court may fix before the day on which his attendance is
Every person whose attendance is required pursuant to a writ of subpoena issued in accordance with this section shall be entitled to the like conduct money or payment of expenses as upon a trial in the court.

The court may order that a writ of habeas corpus ad testificandum shall issue to bring up a prisoner for examination before an arbitrator or umpire.

The court shall have for the purpose of and in relation to a reference the power of making orders in respect of -

(a) security for costs;

(b) discovery of documents and interrogatories;

(c) the giving of evidence by affidavit;

(d) examination on oath of any witness before an officer of the court or any other person and the issue of a commission or request for the examination of a witness out of the jurisdiction;

(e) the preservation, interim custody or sale of any goods which are the subject matter of the reference;

(f) securing the amount in dispute in the reference;

(g) the detention, preservation or inspection of any property or thing which is the subject of the reference or as to which any question may arise therein, and authorising for any of these purposes any persons to enter upon or into any land or building in the possession of any party to the reference, or authorising any samples to be taken or any observation to be made or experiment to be tried which may be necessary or expedient for the purpose of obtaining full information or evidence;

(h) interim injunctions or the appointment of a receiver; and

(i) delivery of pleadings -

as it has for the purpose of and in relation to an action or matter in the court.

If any party to a reference who has been given reasonable notice of the hearing of such reference shall at any time neglect or refuse to attend on the hearing, it shall be lawful for the hearing on the reference to proceed ex parte and for an award thereon to be made in the same
manner as if the party had attended: provided that the court, if the
defaulting party shows good and sufficient cause for not attending the
hearing, may set aside or vary the award upon such terms as the court may
think fit.

(2) The parties to any reference shall at all times do all things
which the person conducting the arbitration may require to enable a just
award to be made, and no party shall wilfully or wrongfully do or cause to
be done any act to delay or prevent an award being made.

21. Nothing in section nineteen shall be taken to prejudice any power
which may be vested in an arbitrator or umpire of making orders with
respect to any of the matters referred to in that section.

PART V - AWARDS

22. (1) Subject to subsection (2) of section thirty of this Act and
anything to the contrary in the agreement to arbitrate, an arbitrator or
umpire shall have power to make an award at any time.

(2) The time, if any, limited for making an award whether
under this Act or otherwise may from time to time be enlarged by the
agreement of the parties or by order of the court, whether that time has
expired or not.

(3) The court may, on the application of any party to a
reference, remove an arbitrator or umpire who fails to use all reasonable
dispatch in entering on and proceeding with the reference and making an
award, and an arbitrator or umpire who is removed by the court under this
subsection shall not be entitled to any remuneration in respect of his
services.

For the purposes of this subsection the expression “proceeding with the
reference” includes, in a case where the arbitrators are unable to reach a
decision, giving notice of that fact to the parties and to the umpire.

23. (1) Notwithstanding anything to the contrary contained in an
agreement to arbitrate but subject to subsection (2) of this section, every
such agreement shall be deemed to include a provision that the arbitrator
or umpire shall -

(a) make his award in writing; and

(b) contemporaneously with his award furnish to the parties a
written statement of his reasons for his award.

(2) The parties to an agreement to arbitrate may, at any time
after a dispute has arisen thereunder and before an award is made, notify
the arbitrator or umpire as the case may be in writing that they do not
require that he furnish to them a written statement of his reasons for his award.

(3) Such written statement shall, when furnished in accordance with the requirements of this section, be taken to form part of the award of the arbitrator or umpire as the case may be.

24. Unless a contrary intention is expressed therein every agreement to arbitrate shall, where such a provision is applicable to the reference, be deemed to contain a provision that -

<table>
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<tr>
<th>Implied provisions.</th>
<th>24.</th>
<th>Unless a contrary intention is expressed therein every agreement to arbitrate shall, where such a provision is applicable to the reference, be deemed to contain a provision that -</th>
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<tbody>
<tr>
<td>Interim awards</td>
<td>(a)</td>
<td>The arbitrator or umpire may, if he thinks fit, make an interim award and any reference in this Act to an award includes a reference to an interim award;</td>
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<tr>
<td>U.K.14</td>
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<tr>
<td>Specific performance.</td>
<td>(b)</td>
<td>the arbitrator or umpire shall have the same power as the court to order specific performance of any contract;</td>
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<td>U.K. 15</td>
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<tr>
<td>Awards to be final.</td>
<td>(c)</td>
<td>the award to be made by the arbitrator or umpire shall be final and binding on the parties and the persons claiming under them respectively;</td>
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<td>U.K. 16</td>
<td></td>
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<tr>
<td>W.A.Sched. (8)</td>
<td>(d)</td>
<td>the arbitrator or umpire shall have power to correct in an award any clerical mistake or error arising from any accidental slip or omission.</td>
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<tr>
<td>Power to correct slips.</td>
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<tr>
<td>U.K. 17</td>
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<tr>
<td>W.A.9 (c)</td>
<td></td>
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<tr>
<td>Costs under an award.</td>
<td>(1)</td>
<td>Unless a contrary intention is expressed therein every agreement to arbitrate shall be deemed to include a provision that the costs of the reference and award shall be in the discretion of the arbitrator or umpire who may direct to and by whom and in what manner those costs or any part thereof shall be paid and may tax or settle the amount of costs to be so paid or any part thereof.</td>
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<td>U.K. 18</td>
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<td>W.A.</td>
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<tr>
<td>Sched. (9)</td>
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<tr>
<td>25. (1)</td>
<td></td>
<td>Unless a contrary intention is expressed therein every agreement to arbitrate shall be deemed to include a provision that the costs of the reference and award shall be in the discretion of the arbitrator or umpire who may direct to and by whom and in what manner those costs or any part thereof shall be paid and may tax or settle the amount of costs to be so paid or any part thereof.</td>
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<tr>
<td>(2)</td>
<td></td>
<td>Any costs directed to be paid by an award shall, when the award so directs, be taxable under a scale appropriate to the Supreme Court, the District Court or the Local Court, as the arbitrator or umpire may direct, and in that event shall be taxed in the appropriate court.</td>
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<tr>
<td>(3)</td>
<td></td>
<td>Any provision in an agreement to refer future disputes to arbitration, to the effect that the parties or any party thereto shall in any event pay their or his own costs of the reference or award or any part thereof, shall be void.</td>
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<tr>
<td>(4)</td>
<td></td>
<td>If no provision is made by an award with respect to the costs of the reference, any party to the reference may, within fourteen days of the publication of the award or such further time as the court may direct, apply to the arbitrator or umpire for an order directing by and to</td>
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whom those costs shall be paid, and thereupon the arbitrator or umpire shall, after hearing any party who may desire to be heard, amend his award by adding thereto such directions as he may think proper with respect to the payment of the costs of the reference.

Taxation of arbitrator’s or umpire’s fees. U.K.19 W.A.15

26. (1) If in any case an arbitrator or umpire refuses to deliver his award except on payment of the fees demanded by him, the court may on an application for the purpose order that the arbitrator or umpire shall deliver the award to the applicant on payment into court by the applicant of the fees demanded, and further that the fees demanded shall be taxed by the taxing officer and that out of the money paid into court there shall be paid out to the arbitrator or umpire by way of fees such sum as may be found reasonable on taxation; and that the balance of the money (if any) shall be paid out to the applicant.

(2) An application for the purpose of this section may be made by any party to the reference unless the fees demanded have been fixed by a written agreement between him and the arbitrator or umpire.

(3) A taxation of fees under this section may be reviewed in the same manner as a taxation of costs.

(4) The arbitrator or umpire shall be entitled to appear and be heard on any taxation or review of taxation under this section.

Interest. U.K.20

27. A sum directed to be paid by an award shall, unless the award otherwise directs, carry interest as from the date of the award and at the same rate as a judgment debt.

PART VI - SPECIAL CASES, POWERS OF COURT IN RELATION TO AWARDS.

Enforcement of award. U.K.26 W.A. 14

28. An award on an agreement to arbitrate may by leave of the court be enforced in the same manner as a judgment or order to the same effect and, where leave is so given, judgment may be entered in terms of the award.

Case stated. U.K.21 W.A. 9(b) & 21

29. (1) An arbitrator or umpire may, and shall if so directed by the court, state in the form of a special case for the decision of the court -

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

(b) an award or any part of an award.

(2) A special case with respect to an interim award or with respect to a question of law arising in the course of a reference may be stated or may be directed by the court to be stated notwithstanding that proceedings under the reference are still pending.

(3) A decision of the court under this section shall, for the purpose of an appeal, be deemed to be an order or judgment of the court.
30. (1) In all cases of reference to arbitration the court may from time to time remit the matters referred or any of them to the consideration or further consideration of the arbitrator or umpire.

(2) Where any such matter is remitted the arbitrator or umpire shall unless the order otherwise directs make his award within three months after the date of the order.

31. The court may make an order modifying or correcting the award upon the application of any party to the agreement to arbitrate -

(a) where there is an evident material miscalculation of figures or an evident material mistake in the description of any person, thing or property referred to in the award;

(b) where an arbitrator or umpire has made an award upon a matter not submitted to him, if it is a matter not affecting the merits of the decision upon the matter submitted;

(c) where the award is imperfect in matter of form not affecting the merits of the controversy.

32. (1) Where an arbitrator or umpire has been guilty of error misconduct, the court may remove him.

(2) Where an arbitrator or umpire has committed a jurisdictional error in relation to the proceedings, the court may give him such directions as it considers will enable him to correct the error.

(3) Where an arbitrator or umpire has been guilty of misconduct or has committed a jurisdictional error in relation to the proceedings, or where an arbitration or award has been improperly procured, the court may set the award aside.

(4) Where an application is made to set aside an award, the court may order that any money made payable by the award shall be brought into court or otherwise secured pending the determination of the application.

(5) In this section -

“Jurisdictional error” includes -

(a) any excess of power or imperfect execution of power, including a failure to comply with the requirements of section twenty-three of this Act; or

(b) failure to make a final and definite award upon the subject matter.
“Misconduct” includes corruption, fraud, evident partiality or bias.

33. (1) Where an arbitrator (not being a sole arbitrator) or two or more arbitrators (not being all the arbitrators) or an umpire who has not entered on the reference is or are removed by the court, the court may, on the application of any party to the agreement to arbitrate, appoint a person or persons to act as arbitrator or arbitrators or umpire in place of the person or persons so removed.

(2) Where the authority of an arbitrator or arbitrators or umpire is revoked by leave of the court, or a sole arbitrator or all the arbitrators or an umpire who has entered on the reference is or are removed by the court, the court may, on the application of any party to the agreement to arbitrate, either -

(a) appoint a person to act as sole arbitrator in place of the person or persons removed; or

(b) order that the agreement to arbitrate shall cease to have effect with respect to the dispute referred.

(3) A person appointed under this section by the court as an arbitrator or umpire shall have the like power to act in the reference and to make an award as if he had been appointed in accordance with the terms of the agreement to arbitrate.

34. Any order made by a court under this Act may be made on such terms as to costs or otherwise as the court thinks just. The order may direct that the costs shall be taxable under a scale appropriate to the Supreme Court, the District Court or the Local Court.
APPENDIX B

A B I L L

FOR

AN ACT to amend and consolidate the law relating to arbitration.

BE IT enacted etc…..

PART 1 – PRELIMINARY

1. This Act say be cited as the Arbitration Act 197-.

2. This Act shall came into operation on a day to be fixed by proclamation.


(2) Any agreement to arbitrate in force at the coming into operation of this Act shall have effect subject to this Act, but any arbitration entered on prior to the coming into operation of this Act may be continued and completed under the Arbitration Act 1895-1970 as if this Act had not been passed.

(3) With the exception of the provisions specified in subsection (4) of this section, this Act shall apply to every arbitration under any other Act, whether passed before or after the commencement of this Act, as if the arbitration were pursuant to an agreement to arbitrate, except insofar as this Act is inconsistent with that other Act or with any rules or procedure authorised or recognised thereby.

(4) The provisions referred to in subsection (3) of this section are section eight, section nine, section ten, section eleven, subsection (1) of section twelve, subsection (3) of section twenty-four and section thirty-two.

4. This Act is arranged as follows -

PART I - Preliminary, ss. 1 - 6
PART II - General Provisions as to Arbitration, ss. 7 - 12
PART III - Arbitrators and Umpires, ss. 13 - 16
PART IV - Conduct of Arbitration Proceedings, ss. 17 - 20
PART V - Awards, ss. 21 - 26
PART VI - Special Cases, Powers of Court in Relation to Awards, ss. 27 - 33.
5. In this Act, unless the contrary intention appears -

“Action” includes a matter or proceeding in a court.

“Agreement to arbitrate” means an agreement to submit present or future differences to arbitration whether an arbitrator is named therein or not.

“Court” means the Supreme Court and includes a Judge thereof.

“Party” includes a personal representative or assign of a party.

6. This Act binds the Crown.

**PART II - GENERAL PROVISIONS AS TO ARBITRATION**

7. The authority of an arbitrator or umpire appointed by or by virtue of an agreement to arbitrate shall, unless a contrary intention is expressed therein or unless otherwise agreed by all parties concerned, be irrevocable except by leave of the court.

8. (1) Notwithstanding anything to the contrary contained in an agreement to arbitrate, any party thereto may commence an action in a court having jurisdiction to try the action against any other party to that agreement in respect of any matter agreed to be so referred.

   (2) The party against whom that action has been brought may -

   (a) where the action has been commenced in the Supreme Court or District Court, after entering an appearance and before delivering any pleadings;

   (b) where the action has been commenced in a Local Court or a Warden’s Court, after giving or lodging a notice of defence and before the commencement of the hearing,

apply to the court in which the action has been commenced to stay the action.

(3) The court shall not grant a stay of proceedings unless it is satisfied that by reason of expense, delay, the nature of the questions in issue, the fact that the agreement to arbitrate was specially negotiated, or any other circumstance, justice would be better served by the dispute being determined by arbitration.

(4) Any party to an agreement to arbitrate may, if proceedings by way of arbitration are commenced against him and before taking any step in the arbitration, apply to any court in which the dispute could be
determined for an order staying those proceedings and that court shall by order and subject to such conditions (if any) as the court thinks fit to impose, stay those proceedings unless it is satisfied that by reason of expense, delay, the nature of the questions in issue, the fact that the agreement to arbitrate was specially negotiated, or any other circumstance, justice would be better served by the dispute being determined by arbitration.

(5) Where a party to an agreement to arbitrate makes an application to stay arbitration proceedings or to revoke the authority of the arbitrator upon the ground that the arbitrator is not or may not be impartial, it shall not be a ground for refusing the application that the party at the time when he made the agreement knew or ought to have known that the arbitrator, by reason of his relation towards any other party to the agreement or by reason of his connection with the subject referred, might not be capable of impartiality.

9. A provision in an agreement that no action may be brought with respect to any matter to which the agreement applies, unless the matter has been referred to arbitration or unless an award pursuant to the reference has been obtained, is void.

10. Where an agreement to refer future disputes to arbitration provides that the right to take arbitration proceedings or to bring an action shall be barred unless some step is taken within a time fixed by the agreement and a dispute arises to which the agreement applies, the court, if it is of the opinion that in the circumstances of the case undue hardship would otherwise be caused and notwithstanding that the time so fixed has expired, may on such terms (if any) as it thinks fit, but without prejudice to the provisions of any enactment limiting the time for the commencement of arbitration proceedings or an action as the case may be, extend the time for such period as it thinks fit.

11. Where relief by way of interpleader is granted and it appears to the court which granted the relief that the claims in question are matters to which an agreement to arbitrate, to which the claimants are parties, applies, that court may if it is satisfied that by reason of expense, delay, the nature of the questions in issue, the fact that the agreement to arbitrate was specially negotiated, or any other circumstance, justice would be better served thereby, direct the issue between the claimants to be determined in accordance with the agreement to arbitrate.

12. (1) An agreement to arbitrate shall not be discharged by the death of any party thereto, either as respects the deceased or any other party, but shall in such event be enforceable by or against the personal representative of the deceased.

(2) The authority of an arbitrator or umpire shall not be revoked by the death of any party.
(3) Nothing in this section shall affect the operation of any enactment or rule of law by virtue of which any right of action is extinguished by the death of a person.

PART III - ARBITRATORS AND UMPIRES

Presumption as to arbitrators and umpire
U.K. 6 & 9(2) W.A. 1st Sched. (1)

13. Unless a contrary intention is expressed therein every agreement to arbitrate shall -

(a) if no other mode of reference is provided, be deemed to include a provision that the reference shall be to a single arbitrator;

(b) where the reference is to an uneven number of arbitrators, be deemed to include a provision that the arbitrators may act by a majority decision.

Umpires
U.K. 8 W.A. 1st Sched. (2)

14. (1) Unless a contrary intention is expressed therein every agreement to arbitrate shall -

(a) where the reference is to an even number of arbitrators, be deemed to include a provision that the arbitrators shall appoint an umpire immediately after they themselves are appointed;

(b) where such a provision is applicable to the reference, be deemed to include a provision that, if the arbitrators have delivered to any party to the agreement or to the umpire a notice in writing stating that they cannot agree, the umpire may forthwith enter upon the reference in lieu of the arbitrators.

(2) At any time after the appointment of an umpire, however appointed, the court may, on the application of any party to the reference and notwithstanding anything to the contrary in the agreement to arbitrate, order that the umpire shall enter upon the reference in lieu of the arbitrators and as if he were a sole arbitrator.

Filling of vacancy by parties
U.K. 7 W.A. 8

15. (1) Where an agreement to arbitrate provides that the reference shall be to two or more arbitrators, then, unless a contrary intention is expressed therein -

(a) if any of the nominated or appointed arbitrators refuses to act, or is incapable of acting, or dies, the party who nominated or appointed him may appoint a new arbitrator in his place; provided that where the arbitrator to be replaced had entered on the reference, no new arbitrator shall be appointed except by leave of the court and subject to such terms and directions as the court may impose;
(b) if no arbitrator is appointed, either originally or by way of substitution as aforesaid, for seven clear days after any other party has served the party making default with notice to make the appointment, the other party or parties as the case may be may appoint his or their arbitrators to be the only arbitrator or arbitrators in the reference, and any award shall be binding on all parties.

(2) Except where the leave of the court was obtained to the appointment, the court may set aside any appointment made under this section.

16. In any of the following cases -

(a) where an agreement to arbitrate provides that the reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator;

(b) if a nominated or appointed single arbitrator refuses to act, or is incapable of acting, or dies, and the agreement to arbitrate does not show that it was intended that the vacancy should not be filled and the parties do not fill the vacancy;

(c) where the parties or the arbitrators may appoint an umpire or an additional arbitrator and do not appoint him or where the arbitrators are required to appoint an umpire and do not appoint him;

(d) where a nominated or appointed umpire or additional arbitrator refuses to act, or is incapable of acting, or dies, and the agreement to arbitrate does not show that it was intended that the vacancy should not be filled, and the parties or arbitrators do not fill the vacancy;

(e) where in any other case it is necessary to appoint, either originally or by way of substitution, an arbitrator or an umpire, and any difficulty arises in connection with such appointment,

any party may serve the other parties or the arbitrators with a written notice to appoint or concur in appointing an arbitrator or umpire or additional arbitrator, and if the appointment is not made within seven clear days after the service of the notice the court may, on application by the party who gave the notice, appoint an arbitrator or umpire or additional arbitrator who shall have the like powers to act in the reference and make an award as if he had been appointed in accordance with the terms of the agreement to arbitrate.
PART IV - CONDUCT OF ARBITRATION PROCEEDINGS

17. (1) Unless a contrary intention is expressed therein every agreement to arbitrate shall, where such a provision is applicable to the reference, be deemed to include a provision that the parties to a reference and all persons claiming through them respectively shall, if required to do so by another party to the reference and subject to any legal objection, -

(a) submit to be examined before an arbitrator or umpire on oath or affirmation in relation to the matters in dispute, and

(b) produce before the arbitrator or umpire all documents in their possession or power which may be required or called for.

(2) Unless a contrary intention is expressed therein every agreement to arbitrate shall, where such a provision is applicable to the reference, be deemed to include a provision that the witnesses called on a reference shall, if the arbitrator or umpire thinks fit, be examined on oath or affirmation.

(3) An arbitrator or umpire shall, unless a contrary intention is expressed in the agreement to arbitrate, have power to administer oaths to or take the affirmations of the parties to and witnesses called on a reference under the agreement.

(4) No persons shall be compelled in any arbitration to answer any question he would not be compelled to answer at the trial of an action.

18. (1) Any party to a reference under an agreement to arbitrate may sue out in aid of that reference a writ of subpoena ad testificandum or a writ of subpoena duces tecum, and no order of the court for the issue of such a writ shall be necessary; but no person shall be compelled under any such writ to produce any document which he could not be compelled to produce on the trial of an action.

(2) A writ of subpoena issued pursuant to this section -

(a) shall be issued in accordance with the practice and forms of the court, with such variations as circumstances may require;

(b) continues to have effect until the disposal of proceedings at which the attendance of the witness is required;

(c) must be served personally, unless the court
otherwise directs.

(3) No person to whom a writ of subpoena is directed under the provisions of this section shall be liable to any penalty for failure to obey the writ unless it is served on him not less than four days or such other period as the court may fix before the day on which his attendance is required.

(4) Every person whose attendance is required pursuant to a writ of subpoena issued in accordance with this section shall be entitled to the like conduct money or payment of expenses as upon a trial in the court.

(5) The court shall have the same power of making orders in respect of the production of a prisoner for examination before an arbitrator or umpire as it has under s.72 of the *Prisons Act 1903* in respect of the production of a prisoner at a trial.

<table>
<thead>
<tr>
<th>Power of court to make orders</th>
<th>19. (1) The court shall have for the purpose of and in relation to a reference the power of making orders in respect of —</th>
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<tr>
<td>U.K.12</td>
<td>(a) security for costs;</td>
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<td>(b) discovery of documents and interrogatories;</td>
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<td>(c) the giving of evidence by affidavit;</td>
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<td>(d) examination on oath of any witness before an officer of the court or any other person and the issue of a commission or request for the examination of a witness out of the jurisdiction;</td>
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<td>(e) the preservation, interim custody or sale of any goods which are the subject matter of the reference;</td>
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<td>(f) securing the amount in dispute in the reference;</td>
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<td>(g) the detention, preservation or inspection of any property or thing which is the subject of the reference or as to which any question may arise therein, and authorising for any of these purposes any persons to enter upon or into any land or building in the possession of any party to the reference, or authorising any samples to be taken or any observation to be made or experiment to be tried which may be necessary or expedient for the purpose of obtaining full information or evidence;</td>
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<td>(h) interim injunctions or the appointment of a receiver; and</td>
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<td></td>
<td>(i) delivery of pleadings -</td>
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</table>
Duties of parties
Qld. 19

20. (1) If any party to a reference who has been given reasonable notice of the hearing of such reference at any time neglects or refuses to attend on the hearing, it shall be lawful for the hearing to proceed ex parte and for an award thereon to be made in the same manner as if the party had attended: provided that the court, if the defaulting party shows good and sufficient cause for not attending the hearing, may set aside or vary the award upon such terms as the court may think fit.

(2) The parties to any reference shall do whatever the arbitrator or umpire requires to enable a just award to be made, and no party shall wilfully or wrongfully do any act to delay or prevent an award being made.

PART V - AWARDS

21. (1) Subject to subsection (2) of section twenty-nine of this Act and anything to the contrary in the agreement to arbitrate, an arbitrator or umpire shall have power to make an award at any time.

(2) The time, if any, limited for making an award, whether under this Act or otherwise, may from time to time be enlarged by the agreement of the parties or by order of the court, whether that time has expired or not.

(3) The court may, on the application of any party to a reference, remove an arbitrator or umpire who fails to use all reasonable dispatch in entering on and proceeding with the reference and making an award, and an arbitrator or umpire who is removed by the court under this subsection shall not be entitled to any remuneration in respect of his services.

For the purposes of this subsection the expression “proceeding with the reference” includes, in the case where the arbitrators are unable to reach a decision, giving notice of that fact to the parties and to the umpire.

22. (1) Notwithstanding anything to the contrary contained in an agreement to arbitrate but subject to subsection (2) of this section, every such agreement shall be deemed to include a provision that the arbitrator or umpire shall -

(a) make his award in writing; and

(b) contemporaneously with his award furnish to the parties a written statement of his reasons for his award.
(2) The parties to an agreement to arbitrate may, at any time after a dispute has arisen thereunder and before an award is made, by notification to the arbitrator or umpire in writing, dispense with either or both the requirements in subsection (1) of this section.

(3) A written statement shall, when furnished in accordance with the requirements of subsection (1) of this section, form part of the award of the arbitrator or umpire.

23. Unless a contrary intention is expressed therein every agreement to arbitrate shall, where such a provision is applicable to the reference, be deemed to include a provision that -

- (a) the arbitrator or umpire may, if he thinks fit, make an interim award and any reference in this Act to an award includes a reference to an interim award;
- (b) the arbitrator or umpire shall have the same power as the court to order specific performance of any contract;
- (c) the award to be made by the arbitrator or umpire shall be final and binding on the parties and the persons claiming under them respectively;
- (d) the arbitrator or umpire shall have power to correct in an award any clerical mistake or error arising from any accidental slip or omission.

24. (1) Unless a contrary intention is expressed therein every agreement to arbitrate shall be deemed to include a provision that the costs of the reference and award shall be in the discretion of the arbitrator or umpire who may direct to and by whom and in what manner those costs or any part thereof shall be paid and may tax or settle the amount of costs to be so paid or any part thereof.

(2) Any costs directed to be paid by an award shall, when the award so directs, be taxable under a scale appropriate to the Supreme Court, the District Court or the Local Court, as the arbitrator or umpire may direct, and in that event shall be taxed in the appropriate court.

(3) Any provision in an agreement to refer future disputes to arbitration, to the effect that the parties or any party thereto shall in any event pay their or his own costs of the reference or award or any part thereof, shall be void.

(4) If no provision is made by an award with respect to the costs of the reference, any party to the reference may, within fourteen
days of the publication of the award or such further time as the court may
direct, apply to the arbitrator or umpire for an order directing by and to
whom those costs shall be paid, and thereupon the arbitrator or umpire
shall, after hearing any party who may desire to be heard, amend his
award by adding thereto such directions as he may think proper with
respect to the payment of the costs of the reference.

25. (1) If in any case an arbitrator or umpire refuses to deliver his
award except on payment of the fees demanded by him, the court may on
an application for the purpose order that the arbitrator or umpire shall
deliver the award to the applicant on payment into court by the applicant
of the fees demanded, and further that the fees demanded shall be taxed
by the taxing officer and that out of the money paid into court there shall
be paid out to the arbitrator or umpire by way of fees such sum as may be
found reasonable on taxation, and that the balance of the money (if any)
shall be paid out to the applicant.

(2) An application for the purpose of this section may be made
by any party to the reference unless the fees demanded have been fixed
by a written agreement between him and the arbitrator or umpire.

(3) A taxation of fees under this section may be reviewed in
the same manner as a taxation of costs.

(4) The arbitrator or umpire shall be entitled to appear and be
heard on any taxation or review of taxation under this section.

26. A sum directed to be paid by an award shall, unless the award
otherwise directs, carry interest as from the date of the award at the same
rate as a judgment debt.

PART VI - SPECIAL CASES, POWERS OF COURT IN
RELATION TO AWARDS

27. An award on an agreement to arbitrate may by leave of the court
be enforced in the same manner as a judgment or order to the same effect
and, where leave is so given, judgment may be entered in terms of the
award.

28. (1) An arbitrator or umpire may, and shall if so directed by the
court, state in the form of a special case for the decision of the court -

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

(b) an award or any part of an award.

(2) A special case with respect to an interim award or with
respect to a question of law arising in the course of a reference may be
stated or may be directed by the court to be stated notwithstanding that
proceedings under the reference are still pending.

(3) A decision of the court under this section shall, for the purpose of an appeal, be deemed to be an order or judgment of the court.

29. (1) In all cases of reference to arbitration the court may from time to time remit the matters referred or any of them, with any directions it sees fit, to the consideration or further consideration of the arbitrator or umpire.

(2) Where any such matter is remitted the arbitrator or umpire shall, unless the order otherwise directs, make his award within three months after the date of the order.

30. The court may make an order modifying or correcting the award upon the application of any party to the agreement to arbitrate -

(a) where there is an evident material miscalculation of figures or an evident material mistake in the description of any person, thing or property referred to in the award;

(b) where an arbitrator or umpire has made an award upon a matter not submitted to him, if it is a matter not affecting the merits of the decision upon the matter submitted;

(c) where the award is imperfect in matter of form not affecting the merits of the controversy.

31. (1) Where an arbitrator or umpire has been guilty of misconduct, the court may remove him.

(2) Where an arbitrator or umpire has committed a jurisdictional error in relation to the proceedings, the court may give him such directions as it considers will enable him to correct the error.

(3) Where an arbitrator or umpire has been guilty of misconduct or has committed a jurisdictional error in relation to the proceedings, or where an arbitration or award has been improperly procured, the court may set the award aside.

(4) Where an application is made to set aside an award, the court may order that any money made payable by the award shall be brought into court or otherwise secured pending the determination of the application.

(5) In this section -

‘Jurisdictional error” includes -

(a) any excess of power or imperfect execution of power,
any error of law on the face of an award, or failure to comply with the requirements of section twenty-two of this Act; or

(b) failure to make a final and definite award upon the subject matter;

“Misconduct” includes corruption, fraud, evident partiality or bias.

32. (1) Where an arbitrator (not being a sole arbitrator) or two or more arbitrators (not being all the arbitrators) or an umpire who has not entered on the reference is or are removed by the court, the court may, on the application of any party to the agreement to arbitrate, appoint a person or persons to act as arbitrator or arbitrators or umpire in place of the person or persons so removed.

(2) Where the authority of an arbitrator or arbitrators or umpire is revoked by leave of the court, or a sole arbitrator or all the arbitrators or an umpire who has entered on the reference is or are removed by the court, the court may, on the application of any party to the agreement to arbitrate, either -

(a) appoint a person to act as sole arbitrator in place of the person or persons removed; or

(b) order that the agreement to arbitrate shall cease to have effect with respect to the dispute referred.

(3) A person appointed under this section by the court as an arbitrator or umpire shall have the like power to act in the reference and to make an award as if he had been appointed in accordance with the terms of the agreement to arbitrate.

33. Any order made by a court under this Act may be made on such terms as to costs or otherwise as the court thinks just. The order may direct that the costs shall be taxable under a scale appropriate to the Supreme Court, the District Court or the Local Court.