



COMMERCIAL ARBITRATION ACT, 1986

No. 102 of 1986

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ANNO TRICESIMO QUINTO

ELIZABETHAE II REGINAE

A.D. 1986

No. 102 of 1986

An Act to make provision with respect to the arbitration of certain disputes; to repeal the Arbitration Act, 1891; to make related amendments to the Local and District Criminal Courts Act, 1926, and the Supreme Court Act, 1935; and for other purposes.

[Assented to 18 December 1986]

The Parliament of South Australia enacts as follows:

PART I

PRELIMINARY

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| Short title. | 1. This Act may be cited as the "Commercial Arbitration Act, 1986". |
| Commencement. | 2. This Act shall come into operation on a day to be fixed by proclamation. |
| Repeal, transitional and application provisions. | <p>3. (1) The Acts mentioned in the schedule are repealed or amended to the extent to which they are in that schedule expressed to be repealed or amended.</p> <p>(2) Subject to subsection (3)—</p> <p style="padding-left: 20px;">(a) this Act applies to an arbitration agreement (whether made before or after the commencement of this Act) and to an arbitration under such an agreement;</p> <p style="padding-left: 20px;">and</p> <p style="padding-left: 20px;">(b) a reference in an arbitration agreement to the Arbitration Act, 1891, or a provision of that Act, shall be construed as a reference to this Act or to the corresponding provision (if any) of this Act.</p> <p>(3) Where an arbitration was commenced before the commencement of this Act, the law governing the arbitration and the arbitration agreement</p> |

shall be that which would have been applicable if this Act had not been enacted.

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

(a) the other Act were an arbitration agreement;

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

and

(c) the parties to the dispute which, by virtue of the other Act, is referred to arbitration were the parties to the arbitration agreement,

except insofar as the other Act otherwise indicates or requires.

(5) For the purposes of this section, an arbitration shall be deemed to have been commenced if—

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

and

(b) a party to the agreement—

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

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

or

(iii) has taken any other step contemplated by the agreement, or the law in force at the time the dispute arose, with a view to referring the dispute to arbitration or appointing, or securing the appointment of, an arbitrator in relation to the dispute.

(6) Nothing in this Act applies to—

(a) an arbitration under the Supreme Court Act, 1935, or the Local and District Criminal Courts Act, 1926 (except to the extent that those Acts expressly provide for the application of this Act);

(b) an arbitration under the Industrial Conciliation and Arbitration Act, 1972;

or

(c) an arbitration, or class of arbitrations prescribed as an arbitration, or class of arbitrations, to which this Act does not apply.

4. In this Act unless the contrary intention appears—

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

“award” means final or interim award:

“the Court” means—

Interpretation.

(a) the Supreme Court;

(b) if—

(i) the dispute referred or sought to be referred to arbitration would, but for the arbitration agreement, be justiciable by a District Court;

or

(ii) the parties have (either in the arbitration agreement or some collateral agreement) agreed that a District Court should have jurisdiction in relation to matters arising under the arbitration agreement—

the District Court;

or

(c) if—

(i) the dispute referred or sought to be referred to arbitration would, but for the arbitration agreement, be justiciable by a local court;

or

(ii) the parties have (either in the arbitration agreement or some collateral agreement) agreed that a local court should have jurisdiction in relation to matters arising under the arbitration agreement—

the local court:

“domestic arbitration agreement” means an arbitration agreement other than an international arbitration agreement:

“international arbitration agreement” means an arbitration agreement in relation to which one or more of the parties was, at the time of entering into the agreement, neither domiciled nor ordinarily resident in Australia:

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

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

“prescribed arbitration agreement” means—

(a) an international arbitration agreement;

or

(b) an Act that is treated as if it were an arbitration agreement by virtue of section 3 (4):

“power of appointment” or “power to appoint”, in relation to an arbitrator or umpire, means a power to appoint an arbitrator or umpire, to join in the appointment of an arbitrator or umpire, to concur in or approve of the appointment of an arbitrator or

umpire, or to take any other step in or towards the appointment of an arbitrator or umpire.

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

PART II

APPOINTMENT OF ARBITRATORS AND UMPIRES

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

7. Unless otherwise agreed in writing by the parties to the arbitration agreement, an arbitrator who is to be appointed for the purposes of an arbitration to be conducted under an arbitration agreement shall be jointly appointed by the parties to the agreement. Presumption as to joint appointment of arbitrator.

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

(a) require the person in default to exercise the power within such period (not being a period of less than seven days after service of the notice) as may be specified in the notice;

and

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

(i) a person named in the notice (“a default nominee”) should be appointed to the office in respect of which the power is exercisable;

or

(ii) specified arbitrators (being the arbitrators who have prior to the date of the notice been appointed in relation to the arbitration) should be the sole arbitrators in relation to the arbitration.

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

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

and

(b) each other person (not being a party to the arbitration agreement) who is in default in the exercise of a power of appointment in relation to the office in question,

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

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

(a) where the notice named a default nominee—that nominee shall be deemed to have been duly appointed to the office in respect of which the power was exercisable;

or

(b) where the notice proposed that specified arbitrators should be the sole arbitrators in relation to the arbitration—

(i) the power to which the notice relates shall lapse;

(ii) the arbitrators specified in the notice may enter on the arbitration as if they were the sole arbitrators to be appointed in relation to the arbitration;

and

(iii) the arbitration agreement shall be construed subject to such modifications (if any) as are necessary to enable those arbitrators effectively to enter on and conduct the arbitration.

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

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

Power to appoint
new arbitrator or
umpire.

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

General power of
the Court to fill
vacancy.

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

(a) neither the provisions of the arbitration agreement nor the provisions of this Act (other than this section) provide a method for filling the vacancy;

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

or

(c) the parties to the arbitration agreement agree that, notwithstanding that the provisions of the arbitration agreement or of this Act (other than this section) provide a method for filling the vacancy, the vacancy should be filled by the Court,

the Court may, on the application of a party to the arbitration agreement, make an appointment to fill the vacancy.

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

Power of the Court where arbitrator or umpire is removed.

(a) appoint a person as arbitrator or umpire in place of the person removed;

or

(b) subject to subsection (2), order that the arbitration agreement shall cease to have effect with respect to the dispute to which the arbitration relates.

(2) The power conferred by subsection (1) (b) shall not be exercised in relation to a prescribed arbitration agreement.

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

Appointment of umpire.

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

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

Position of person appointed by Court, etc.

PART III

CONDUCT OF ARBITRATION PROCEEDINGS

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

Procedure of arbitrator or umpire.

15. Unless a contrary intention is expressed in the arbitration agreement, where an arbitration agreement provides for the appointment of three or more arbitrators—

Manner in which decisions are made.

(a) the arbitrators may, by a majority, appoint one of their number to preside;

(b) any decision to be made in the course of the proceedings may be made by a majority;

and

(c) if the arbitrators are equally divided in opinion, and one of the arbitrators has been appointed to preside (whether under this section or the agreement), the decision of the presiding arbitrator shall prevail.

16. (1) Unless otherwise agreed in writing by the parties to the arbitration agreement, an umpire appointed in relation to an arbitration may

Circumstances in which umpires may enter on the arbitration.

forthwith enter on the arbitration in place of the arbitrators and as if the umpire were the sole arbitrator in any case where—

(a) the arbitration agreement fixes a time within which an award is to be made and the arbitrators fail to make the award within that time or any extension of that time granted by the Court under section 48;

or

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

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

Party may obtain summons.

17. (1) The Court may, on the application of a party to an arbitration agreement, issue a summons requiring a person to attend for examination before the arbitrator or umpire or requiring a person to attend for examination before the arbitrator or umpire and to produce to the arbitrator or umpire the document or documents specified in the summons (as the case requires).

(2) A person shall not be compelled under any summons issued in accordance with subsection (1) to answer any question or produce any document which that person could not be compelled to answer or produce on the trial of an action.

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

18. (1) Unless a contrary intention is expressed in the arbitration agreement, where any person (whether or not a party to the agreement)—

(a) refuses or fails to attend before the arbitrator or umpire for examination when required under a summons or by the arbitrator or umpire to do so;

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

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

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

or

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

or

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

a party to the arbitration agreement or the arbitrator or umpire may apply to the Court and the Court may order the person so in default to attend before the Court for examination or to produce to the Court the relevant document or to do the relevant thing.

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

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

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

(3) If a party to an arbitration agreement—

- (a) refuses or fails to attend before the arbitrator or umpire for examination when required under a summons or by the arbitrator or umpire to do so;

or

- (b) fails within the time specified by the arbitrator or umpire or, if no time is so specified, within a reasonable time to comply with a requirement of the arbitrator or umpire,

the arbitrator or umpire may continue with the arbitration proceedings in default of appearance or of any other act by the party if in similar proceedings before the Supreme Court the Supreme Court could in the event of such a default continue with the proceedings.

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

Evidence before arbitrator or umpire.

- (a) may be given orally or in writing;

and

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

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

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

20. (1) A party to arbitration proceedings is entitled to be represented in proceedings before the arbitrator or an umpire by a legal practitioner in any of the following cases: Representation.

- (a) where a party to the proceedings is a legal practitioner;
- (b) where all parties agree;
- (c) where the amount or value of the claim subject to the proceedings exceeds the prescribed amount;

or

- (d) where the arbitrator or umpire gives leave for such representation.

(2) A party to arbitration proceedings is entitled to be represented in proceedings before the arbitrator or an umpire by a representative who is not a legal practitioner in any of the following cases:

- (a) where the party is an incorporated or unincorporated body and the representative is an officer, employee or agent of the body;

or

- (b) where the arbitrator or umpire gives leave for such representation.

(3) Where a party applies for leave permitting representation by a legal practitioner or other representative, such leave must be granted (notwithstanding any agreement to the contrary between the parties) if the arbitrator or umpire is satisfied—

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

or

- (b) that the applicant would, if leave were not granted, be unfairly disadvantaged.

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

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

- (a) the umpire or arbitrator shall treat any evidence given, document produced or thing done in the course of the earlier proceedings as if it had been given, produced or done in the course of the proceedings conducted by the umpire or arbitrator;

- (b) any interim award made in the course of the earlier proceedings shall be deemed to have been made by the umpire or arbitrator;

and

- (c) the umpire or arbitrator may adopt and act on any determination of a matter made in the course of the earlier proceedings without applying his or her own judgment to the matter.

Arbitrator to decide according to law or as amiable compositeur or ex aequo et bono.

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

(2) If the parties to an arbitration agreement so agree in writing, the arbitrator or umpire may determine any question that arises for determination in the course of proceedings under the agreement by reference to considerations of general justice and fairness.

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

24. Unless a contrary intention is expressed in the arbitration agreement, the arbitrator or umpire shall have power to make an award ordering specific performance of any contract if the Supreme Court would have power to order specific performance of that contract. Specific performance.

25. (1) Where—

(a) pursuant to an arbitration agreement a dispute between the parties to the agreement is referred to arbitration;

and

(b) there is some other dispute between those same parties (whenever the dispute arose), being a dispute to which the same agreement applies,

Extension of
ambit of
arbitration
proceedings.

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

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

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

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

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

or

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

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

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

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

27. (1) Unless otherwise agreed in writing by the parties to the arbitration agreement, the arbitrator or umpire shall have power to order the Power to seek
settlement of
disputes otherwise
than by
arbitration.

parties to a dispute which has arisen and to which that agreement applies to take such steps as the arbitrator or umpire thinks fit to achieve a settlement of the dispute (including attendance at a conference to be conducted by the arbitrator or umpire) without proceeding to arbitration or (as the case requires) continuing with the arbitration.

(2) Where—

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

and

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

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

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

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

PART IV

AWARDS AND COSTS

Awards to be final.

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

Form of award.

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

(a) make the award in writing;

(b) sign the award;

and

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

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

Power to correct award.

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

(a) a clerical mistake;

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

(c) a material miscalculation of figures or a material mistake in the description of any person, thing or matter referred to in the award;

or

(d) a defect of form,

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

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

Interest up to making of award.

(2) Subsection (1) does not—

(a) authorise the awarding of interest upon interest;

(b) apply in relation to any amount upon which interest is payable as of right whether by virtue of an agreement or otherwise;

or

(c) affect the damages recoverable for the dishonour of a bill of exchange.

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

Interest on debt under award.

(2) If judgment is entered by the Court in terms of an award, interest shall cease to accrue in pursuance of a direction under this section on the date of the entry of the judgment.

33. An award made under an arbitration agreement may, by leave of the Court, be enforced in the same manner as a judgment or order of the Court to the same effect, and where leave is so given, judgment may be entered in terms of the award.

Enforcement of award.

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

Costs.

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

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

and

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

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

(3) A provision in an arbitration agreement (being an arbitration agreement that provides for the reference of future disputes to arbitration) to the effect that—

- (a) the parties to the agreement shall in any event pay their own costs of the arbitration or any part of those costs;

or

- (b) a particular party to the agreement shall in any event pay his or her own costs of the arbitration or the costs of the arbitration of any other party to the agreement or any part of those costs,

is void.

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

(5) Where a sum of money has been paid into the Court in accordance with rules made under this Act in satisfaction of a claim to which an arbitration agreement applies, the arbitrator or umpire shall, in exercising the discretion as to costs conferred on the arbitrator or umpire by subsection (1), take into account both the fact that money was paid into the Court and the amount of that payment.

(6) Where—

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

and

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

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

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

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

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

and

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

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

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

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

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

Costs of abortive arbitration.

(2) For the purposes of this section where—

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

or

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

an arbitration shall be deemed to have failed.

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

Duties of parties.

PART V

POWERS OF THE COURT

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

Judicial review of awards.

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

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

(a) confirm, vary or set aside the award;

or

(b) remit the award, together with the Supreme Court's opinion on the question of law which was the subject of the appeal, to the

arbitrator or umpire for reconsideration or, where a new arbitrator or umpire has been appointed, to that arbitrator or umpire for consideration,

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

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

(a) with the consent of all the other parties to the arbitration agreement;

or

(b) subject to section 40, with the leave of the Supreme Court.

(5) The Supreme Court—

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

and

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

(6) Unless the Supreme Court gives leave, an appeal shall not lie to the Full Court of the Supreme Court from a decision of the Supreme Court to grant or refuse leave under subsection (4) (b).

(7) An appeal shall not lie to the Full Court of the Supreme Court from a decision of the Supreme Court on an appeal under subsection (2) unless—

(a) the Supreme Court or the Full Court of the Supreme Court grants leave;

and

(b) it is certified by the Supreme Court that the question of law to which its decision relates either is one of general public importance or is one which for some other special reason should be considered by the Full Court of the Supreme Court.

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

Determination of preliminary point of law by Supreme Court.

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

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

or

(b) with the consent of all other parties,

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

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

(a) the determination of the application might produce substantial savings in cost to the parties;

and

(b) the question of law is one in respect of which leave to appeal would be likely to be granted under section 38 (4) (b).

(3) Unless the Supreme Court gives leave, no appeal shall lie to the Full Court of the Supreme Court from a decision of the Supreme Court to entertain or not to entertain an application under subsection (1) (a).

(4) An appeal shall not lie to the Full Court of the Supreme Court from a decision of the Supreme Court on a question of law under subsection (1) unless—

(a) the Supreme Court or the Full Court of the Supreme Court grants leave;

and

(b) it is certified by the Supreme Court that the question of law to which its decision relates either is one of general public importance or is one which for some other special reason should be considered by the Full Court of the Supreme Court,

and for the purpose of such an appeal a decision of the Supreme Court under that subsection shall be deemed to be a judgment of the Supreme Court.

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

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

and

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

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

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

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

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

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

Exclusion agreements affecting rights under sections 38 and 39.

or

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

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

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

Exclusion
agreements not to
apply in certain
cases.

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

(a) a question or claim falling within the Admiralty jurisdiction of the Supreme Court;

(b) a dispute arising out of a contract of insurance;

or

(c) a dispute arising out of a commodity contract,

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

(d) the exclusion agreement is entered into after the commencement of the arbitration in which the award is made or, as the case requires, in which the question of law arises;

or

(e) the award or question relates to a contract which is expressed to be governed by a law other than the law of the State.

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

(a) for the sale of goods regularly dealt with on a commodity market or exchange in South Australia which is specified for the purposes of this section by a regulation made by the Governor;

and

(b) of a description specified for the purposes of this section by a regulation made by the Governor.

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

(a) shall cease to have effect;

or

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

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

Power to set aside
award.

42. (1) Where—

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

or

(b) the arbitration or award has been improperly procured,

the Court may, on the application of a party to the arbitration agreement, set the award aside either wholly or in part.

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

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

43. Subject to section 38 (1), the Court may remit any matter referred to arbitration by an arbitration agreement together with any directions it thinks proper to the arbitrator or umpire for reconsideration or, where a new arbitrator or umpire has been appointed, to that arbitrator or umpire for consideration.

Court may remit matter for reconsideration.

44. Where the Court is satisfied that—

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

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

or

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

Removal of arbitrator or umpire.

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

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

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

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

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

and

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

46. (1) Unless a contrary intention is expressed in the arbitration agreement, it is an implied term of the agreement that in the event of a dispute arising to which the agreement applies it is the duty of each party to the

Delay in prosecuting claims.

agreement to exercise due diligence in the taking of steps that are necessary to have the dispute referred to arbitration and dealt with in the arbitration proceedings.

(2) Where there has been undue delay by a party, the Court may, on the application of any other party to the dispute or an arbitrator or umpire, make orders—

- (a) terminating the arbitration proceedings;
- (b) removing the dispute into Court;
- and
- (c) dealing with any incidental matters.

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

- (a) that the delay has been intentional and contumacious;
- or
- (b) that the delay—
 - (i) has been inordinate and inexcusable;
 - and
 - (ii) will give rise to a substantial risk of it not being possible to have a fair trial of the issues in the arbitration proceedings or is such as is likely to cause or to have caused serious prejudice to the other parties to the arbitration proceedings.

General power of the Court to make interlocutory orders.

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

Extension of time.

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

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

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

- (a) the Court is satisfied that in the circumstances of the case undue hardship would otherwise be caused;
- and
- (b) the making of the order would not contravene the provision of any enactment limiting the time for the commencement of arbitration proceedings.

Power to impose terms on orders. etc.

49. Subject to this Act, an order, direction or decision made under this Act by a court may be made on such terms and conditions (including terms and conditions as to costs) as the court thinks just.

PART VI

GENERAL PROVISIONS AS TO ARBITRATION

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

Authority of
arbitrator or
umpire.

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

Liability of
arbitrator or
umpire.

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

Death of party.

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

53. (1) If—

(a) a party to an arbitration agreement (not being a prescribed arbitration agreement) commences proceedings in a court against another party to the agreement in respect of a matter agreed to be referred to arbitration;

(b) an application for a stay of the proceedings is made by another party to the arbitration agreement;

(c) the application is made—

(i) before the applicant has delivered pleadings or taken any other step in the proceedings other than the entry of an appearance;

or

(ii) by leave of the court—at some later stage in the proceedings;

(d) the court is satisfied—

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

and

(ii) the applicant was at the commencement of the proceedings and still remains ready and willing to do all things necessary for the proper conduct of the arbitration,

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

Relationship
between judicial
and arbitral
powers.

(2) If—

- (a) a party to an arbitration agreement (not being a prescribed arbitration agreement) commences arbitration proceedings;
- (b) an application for removal of the proceedings into the Court is made by another party to the arbitration agreement;
- (c) the application is made—
 - (i) before the arbitrator begins taking evidence in the proceedings;
 - or
 - (ii) by leave of the Court—at some later stage in the proceedings;
- (d) the Court is satisfied that there is a sufficient reason why the subject matter of the proceedings should be dealt with by the Court rather than by arbitration,

the Court may make orders terminating the arbitration proceedings and removing the matter into the Court.

(3) If—

- (a) a party to a prescribed arbitration agreement commences proceedings in a court against another party to the agreement in respect of a matter agreed to be referred to arbitration;
- and
- (b) an application for a stay of the proceedings is made by another party to the agreement,

the court shall make an order staying the proceedings.

(4) Notwithstanding any rules of law to the contrary, a party to an arbitration agreement is not entitled to recover damages from another party to the agreement on the ground that the other party takes proceedings in a court in respect of a matter agreed to be referred to arbitration.

Interpleader.

54. Where in proceedings for relief by way of interpleader it appears that there is an arbitration agreement relating to the conflicting claims to the property to which the proceedings relate, the Court shall, unless it is satisfied that there is sufficient reason why the matters should not be referred to arbitration in accordance with the agreement, make an order directing the issue between the claimants to be determined in accordance with the agreement.

Scott v. Avery clauses.

55. A contractual provision (whether written or oral) that arbitration or an award in arbitration proceedings or the happening of some other event in or in relation to arbitration is a condition precedent to the bringing or maintenance of legal proceedings in respect of a matter or the establishing of a defence to legal proceedings brought in respect of a matter—

- (a) shall, where no arbitration agreement relating to the matter is subsisting between the parties to the provision, be construed as an agreement to refer the matter to arbitration;

and

- (b) is not more effective than any other form of arbitration agreement to prevent legal proceedings being brought or maintained in respect of that matter or a defence being established to legal proceedings brought in respect of that matter.

PART VII
MISCELLANEOUS

56. Where under this Act a notice is required or permitted to be served on any person, the notice may be served in or out of South Australia—

Service of notices.

- (a) by delivering it personally to the person to be served;
- (b) by leaving it at the usual or last known place of residence or business of the person to be served with a person apparently over the age of 16 years and apparently residing thereat or (in the case of a place of business) apparently in charge of or employed at that place;
- (c) by sending it by post addressed to the person to be served at the usual or last known place of residence or business of that person;

or

- (d) by serving it in such other manner as the Court may, on application made to it in that behalf, direct.

57. The Governor may make such regulations as are contemplated by this Act, or as are necessary or expedient for the purposes of this Act.

Regulations.

Section 3 (1)

SCHEDULE

The Arbitration Act, 1891, is repealed.

The Local and District Criminal Courts Act, 1926, is amended by inserting after section 35g the following section:

Application of sections 65 to 70 (inclusive) of the Supreme Court Act extended to this Act.

35h. (1) Without limiting the application of sections 65 to 70 (inclusive) of the Supreme Court Act, 1935, relating to inquiries and trials by referees and arbitrators, but subject to the rules, the provisions of those sections are extended and shall apply and have effect as if those sections were expressly enacted in this Act and as if any reference in those sections—

(a) to a court were a reference to a local court of full jurisdiction or limited jurisdiction;

and

(b) to a judge were a reference to a Local Court Judge or a special magistrate.

(2) An order or decision of a local court, Judge or a special magistrate to refer a question arising in any cause or matter for inquiry or report in pursuance of subsection (1) may be subject to appeal as an interlocutory order.

(3) The report or award of an official, special referee or arbitrator appointed in pursuance of this section shall, unless set aside by a Judge or special magistrate, be equivalent to a determination or order of the court.

The Supreme Court Act, 1935, is amended by repealing section 68 and substituting the following section:

Powers of court in references.

68. The court or a judge shall, in relation to references, have all the powers that are conferred on a court by the Commercial Arbitration Act, 1986, in relation to the appointment of arbitrators and the conduct of proceedings under that Act.

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

D. B. DUNSTAN, Governor