

# Commercial Arbitration Act 1984 No 160

[1984-160]



New South Wales

## Status Information

### Currency of version

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### Provisions in force

The provisions displayed in this version of the legislation have all commenced.

### Notes—

- **See also**  
[Courts Legislation Amendment Bill 2004](#)

### Authorisation

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# Commercial Arbitration Act 1984 No 160



New South Wales

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

## Part 1 Preliminary

### 1 Name of Act

This Act may be cited as the *Commercial Arbitration Act 1984*.

### 2 Commencement

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

### 3 Repeal, transitional and application provisions

- (1) The Acts mentioned in Schedule 1 are repealed to the extent to which they are in that Schedule expressed to be repealed.
- (2) Subject to subsection (3):
  - (a) this Act applies to an arbitration agreement (whether made before or after the commencement of this Act) and to an arbitration under such an agreement, and
  - (b) a reference in an arbitration agreement to the *Arbitration Act 1902*, or a provision of that Act, shall be construed as a reference to this Act or to the corresponding provision (if any) of this Act.
- (3) Where an arbitration was commenced before the commencement of this Act, the law governing the arbitration and the arbitration agreement shall be that which would have been applicable if this Act had not been enacted.
- (4) Subject to this section, this Act shall apply to arbitrations provided for in any other Act as if:

- (a) the other Act were an arbitration agreement,
  - (b) the arbitration were pursuant to an arbitration agreement, and
  - (c) the parties to the dispute which, by virtue of the other Act, is referred to arbitration were the parties to the arbitration agreement,
- except in so far as the other Act otherwise indicates or requires.
- (5) For the purposes of this section, an arbitration shall be deemed to have been commenced if:
- (a) a dispute to which the relevant arbitration agreement applies has arisen, and
  - (b) a party to the agreement:
    - (i) has served on another party to the agreement a notice requiring that other party to appoint an arbitrator or to join or concur in or approve of the appointment of an arbitrator in relation to the dispute,
    - (ii) has served on another party to the agreement a notice requiring that other party to refer, or to concur in the reference of, the dispute to arbitration, or
    - (iii) has taken any other step contemplated by the agreement, or the law in force at the time the dispute arose, with a view to referring the dispute to arbitration or appointing, or securing the appointment of, an arbitrator in relation to the dispute.
- (6) Nothing in this Act applies to:
- (a) an arbitration under the *Supreme Court Act 1970*, the *District Court Act 1973* or the *Arbitration (Civil Actions) Act 1983* (except to the extent that those Acts expressly provide for the application of this Act), or
  - (b) an arbitration, or class of arbitrations, prescribed as an arbitration, or class of arbitrations, to which this Act does not apply.
- (7) Nothing in this Act shall affect the operation of section 19 of the *Insurance Act 1902* or section 130 of the *Credit Act 1984*.
- (8) Nothing in this Act affects the operation of Part 3 of the *Building and Construction Industry Security of Payment Act 1999*.

#### 4 Definitions

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

**arbitration agreement** means an agreement in writing to refer present or future

disputes to arbitration.

**award** means final or interim award.

**misconduct** includes corruption, fraud, partiality, bias and a breach of the rules of natural justice.

**party**, in relation to an arbitration agreement, includes any person claiming through or under a party to the arbitration agreement.

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

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

(2) Where:

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

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

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

(3) A reference in this Act to an arbitrator includes, in a case where there are 2 or more arbitrators, a reference to the arbitrators.

## **5 Crown to be bound**

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

## **Part 2 Appointment of arbitrators and umpires**

### **6 Presumption of single arbitrator**

An arbitration agreement shall be taken to provide for the appointment of a single arbitrator unless:

(a) the agreement otherwise provides, or

(b) the parties otherwise agree in writing.

## 7 Presumption as to joint appointment of arbitrator

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.

## 8 Default in the exercise of power to appoint arbitrator

- (1) Where a person who has a power to appoint an arbitrator defaults in the exercise of that power, a party to the relevant arbitration agreement may, by notice in writing:
  - (a) require the person in default to exercise the power within such period (not being a period of less than 7 days after service of the notice) as may be specified in the notice, and
  - (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.

#### **9 Power to appoint new arbitrator or umpire**

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.

#### **10 General power of the Court to fill vacancy**

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 Power of the Court where arbitrator or umpire is removed**

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

- (a) appoint a person as arbitrator or umpire in place of the person removed, or
  - (b) subject to subsection (2), order that the arbitration agreement shall cease to have effect with respect to the dispute to which the arbitration relates.
- (2) Subsection (1) (b) does not apply unless all the parties to the arbitration agreement are domiciled or ordinarily resident in Australia at the time the arbitration agreement is entered into.
- (3) Subsection (2) does not apply to an arbitration agreement that is treated as an arbitration agreement for the purposes of this Act by virtue only of the operation of section 3 (4) (a).

## **12 Appointment of umpire**

- (1) Unless otherwise agreed in writing by the parties to the arbitration agreement, where an arbitration agreement provides for the appointment of an even number of arbitrators, the arbitrators may appoint an umpire at any time after they are themselves appointed and shall do so forthwith if they fail to determine a matter arising for determination.
- (2) An umpire appointed in relation to an arbitration is not required to sit with the arbitrators while the arbitrators are conducting proceedings under the arbitration agreement.

## **13 Position of person appointed by the Court etc**

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

## **Part 3 Conduct of arbitration proceedings**

### **14 Procedure of arbitrator or umpire**

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.

### **15 Manner in which decisions are made**

Unless a contrary intention is expressed in the arbitration agreement, where an arbitration agreement provides for the appointment of 3 or more arbitrators:

- (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 Circumstances in which umpires may enter on the arbitration**

- (1) Unless otherwise agreed in writing by the parties to the arbitration agreement, an umpire appointed in relation to an arbitration may forthwith enter on the arbitration in place of the arbitrators and as if the umpire were the sole arbitrator in any case where:
  - (a) the arbitration agreement fixes a time within which an award is to be made and the arbitrators fail to make the award within that time or any extension of that time granted by the Court under section 48, or
  - (b) the arbitrators fail to determine a matter arising for determination and by reason of that failure the dispute cannot be resolved pursuant to the arbitration agreement and at least one of the arbitrators has served on a party to the dispute or the umpire a notice in writing to that effect.
- (2) At any time after the appointment of an umpire, the Court may, on the application of a party to the arbitration agreement and notwithstanding anything to the contrary in that agreement or any other agreement (whether 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.

#### **17 Parties may obtain subpoenas**

- (1) The Court may, on the application of any party to an arbitration agreement, and subject to and in accordance with rules of court, issue a subpoena requiring a person:
  - (a) to attend for examination before the arbitrator or umpire, or
  - (b) to produce to the arbitrator or umpire the documents specified in the subpoena, or
  - (c) to do both of those things.
- (2) A person shall not be compelled under any subpoena issued in accordance with subsection (1) to answer any question or produce any document which that person could not be compelled to answer or produce on the trial of an action.

#### **18 Refusal or failure to attend before arbitrator or umpire or to produce document**

- (1) Unless a contrary intention is expressed in the arbitration agreement, where any person (whether or not a party to the agreement):
  - (a) refuses or fails to attend before the arbitrator or umpire for examination when required under a subpoena or by the arbitrator or umpire to do so, or
  - (ba) refuses or fails to produce a document that the person is required under a

subpoena or by the arbitrator or umpire to produce, or

(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) (Repealed)

(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 the order,
- (b) any document produced pursuant to the order or a copy of any such document, or
- (c) particulars of any thing done pursuant to the order,

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

(3) If a party to an arbitration agreement:

- (a) refuses or fails to attend before the arbitrator or umpire for examination when required under a subpoena or by the arbitrator or umpire to do so, or
- (b) fails within the time specified by the arbitrator or umpire or, if no time is so specified, within a reasonable time to comply with a requirement of the arbitrator or umpire,

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

## **19 Evidence before arbitrator or umpire**

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

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

- (1) A party to an arbitration agreement may be represented in proceedings before the arbitrator or umpire by a legal practitioner, but only in the following cases:
- (a) where a party to the proceedings is, or is represented by, a legally qualified person,
  - (b) where all the parties agree,
  - (c) where the amount or value of the claim subject to the proceedings exceeds \$20,000 or such other amount as is prescribed instead by regulation, or
  - (d) where the arbitrator or umpire gives leave for such representation.
- (2) A party to an arbitration agreement may be represented in proceedings before the arbitrator or umpire by a representative who is not a legal practitioner, but only in 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,
  - (b) where all the parties agree, or
  - (c) where the arbitrator or umpire gives leave for such representation.
- (3) If a party applies for leave permitting representation by a legal practitioner or other representative, it shall be granted if the arbitrator or umpire is satisfied:
- (a) that the granting of leave is likely to shorten the proceedings or reduce costs, or
  - (b) that the applicant would, if leave were not granted, be unfairly disadvantaged.
- (4) A party is entitled to be represented by a legal practitioner or other representative on leave granted under subsection (3), notwithstanding any agreement to the contrary

between the parties.

- (5) A person not admitted to practise in New South Wales shall not be taken to have committed an offence under or breached the provisions of the *Legal Profession Act 1987* or any other Act merely by representing a party in arbitration proceedings in New South Wales.
- (6) A reference in this section to:
  - (a) a legal practitioner shall be read as a reference to a person who is admitted or entitled to practise as a barrister, solicitor or legal practitioner in New South Wales or in any other place, whether within or outside Australia, and
  - (b) a legally qualified person shall be read as a reference to:
    - (i) such a legal practitioner, or
    - (ii) a person who, though not such a legal practitioner, has such qualifications or experience in law (whether acquired in New South Wales or in any other place, whether within or outside Australia) as, in the opinion of the arbitrator or umpire, would be likely to afford an advantage in the proceedings.

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

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, or for the purposes of, the earlier proceedings in the same manner in all respects as if it had been given, produced or done in the course of, or for the purposes 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.

## **22 Determination to be made according to law or as amiable compositeur or ex aequo et bono (See UNCITRAL Arbitration Rules Article 33, paragraph 2)**

- (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 Interim awards**

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

### **24 Specific performance**

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.

### **25 Extension of ambit of arbitration proceedings**

(1) Where:

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

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

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

### **26 Consolidation of arbitration proceedings**

(1) The following provisions of this subsection apply to arbitration proceedings all of which have the same arbitrator or umpire:

- (a) the arbitrator or umpire may, on the application of a party in each of the arbitration proceedings, order:
  - (i) those proceedings to be consolidated on such terms as the arbitrator or umpire thinks just,
  - (ii) those proceedings to be heard at the same time, or one immediately after the other, or

- (iii) any of those proceedings to be stayed until after the determination of any of them,
  - (b) if the arbitrator or umpire refuses or fails to make such an order, the Court may, on application by a party in any of the proceedings, make such an order as could have been made by the arbitrator or umpire.
- (2) The following provisions of this subsection apply to arbitration proceedings not all of which have the same arbitrator or umpire:
  - (a) the arbitrator or umpire for any one of the arbitration proceedings may, on the application of a party in the proceeding, provisionally order:
    - (i) the proceeding to be consolidated with other arbitration proceedings on such terms as the arbitrator or umpire thinks just,
    - (ii) the proceeding to be heard at the same time as other arbitration proceedings, or one immediately after the other, or
    - (iii) any of those proceedings to be stayed until after the determination of any of them,
  - (b) an order ceases to be provisional when consistent provisional orders have been made for all of the arbitration proceedings concerned,
  - (c) the arbitrators or umpires for arbitration proceedings may communicate with each other for the purpose of conferring on the desirability of making orders under this subsection and of deciding on the terms of any such order,
  - (d) if a provisional order is made for at least one of the arbitration proceedings concerned, but the arbitrator or umpire for another of the proceedings refuses or fails to make such an order (having received an application from a party to make such an order), the Court may, on application by a party in any of the proceedings, make an order or orders that could have been made under this subsection,
  - (e) if inconsistent provisional orders are made for the arbitration proceedings, the Court may, on application by a party in any of the proceedings, alter the orders to make them consistent.
- (3) An order or a provisional order may not be made under this section unless it appears:
  - (a) that some common question of law or fact arises in all of the arbitration proceedings,
  - (b) that the rights to relief claimed in all of the proceedings are in respect of or arise out of the same transaction or series of transactions, or
  - (c) that for some other reason it is desirable to make the order or provisional order.



- (4) When arbitration proceedings are to be consolidated under this section, the arbitrator or umpire for the consolidated proceedings shall be the person agreed on for the purpose by all the parties to the individual proceedings, but, failing any such agreement, the Court may appoint an arbitrator or umpire for the consolidated proceedings.
- (5) Any proceedings before an arbitrator or umpire for the purposes of this section shall be taken to be part of the arbitration proceedings concerned.
- (6) Arbitration proceedings may be commenced or continued, notwithstanding that an application to consolidate them is pending under subsection (1) or (2) and notwithstanding that a provisional order has been made in relation to them under subsection (2).
- (7) Subsections (1) and (2) apply in relation to arbitration proceedings whether or not all or any of the parties are common to some or all of the proceedings.
- (8) Nothing in subsection (1) or (2) prevents the parties to 2 or more arbitration proceedings from agreeing to consolidate those proceedings and taking such steps as are necessary to effect that consolidation.

## **27 Settlement of disputes otherwise than by arbitration**

- (1) Parties to an arbitration agreement:
  - (a) may seek settlement of a dispute between them by mediation, conciliation or similar means, or
  - (b) may authorise an arbitrator or umpire to act as a mediator, conciliator or other non-arbitral intermediary between them (whether or not involving a conference to be conducted by the arbitrator or umpire),whether before or after proceeding to arbitration, and whether or not continuing with the arbitration.
- (2) Where:
  - (a) an arbitrator or umpire acts as a mediator, conciliator or intermediary (with or without a conference) under subsection (1), and
  - (b) that action 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 taken that action in relation to the dispute.
- (3) Unless the parties otherwise agree in writing, an arbitrator or umpire is bound by the

rules of natural justice when seeking a settlement under subsection (1).

- (4) Nothing in subsection (3) affects the application of the rules of natural justice to an arbitrator or umpire in other circumstances.
- (5) 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 is not affected by any action taken by an arbitrator or umpire under subsection (1).
- (6) Nothing in subsection (5) shall be construed as preventing the making of an application to the Court for the making of an order under section 48.

## **Part 4 Awards and costs**

### **28 Award to be final**

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.

### **29 Form of award**

- (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 7 days after the making of the award, give to the party a statement in writing signed by the arbitrator or umpire of the date, the terms of the award and the reasons for making the award.

### **30 Power to correct award**

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 Interest up to making of award**

(1) Unless a contrary intention is expressed in the arbitration agreement, but subject to subsection (4), where the arbitrator or umpire determines to make an award for the payment of money (whether on a claim for a liquidated or an unliquidated amount), the arbitrator or umpire shall have power to include in the sum for which the award is made interest at such rate as the arbitrator or umpire may direct (being a rate not exceeding the rate at which interest is 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.

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

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

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

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

- (a) a dispute to which the relevant arbitration agreement applies has arisen, and
- (b) a party to the agreement:
  - (i) has served on another party to the agreement a notice requiring that other party to appoint an arbitrator or to join or concur in or approve of the appointment of an arbitrator in relation to the dispute,
  - (ii) has served on another party to the agreement a notice requiring the other party to refer, or to concur in the reference of, the dispute to arbitration, or
  - (iii) has taken any other step contemplated by the agreement or the law in force at the time the dispute arose, with a view to referring the dispute to arbitration or appointing, or securing the appointment of, an arbitrator in relation to the

dispute.

(4) This section does not:

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

### **32 Interest on debt under award**

- (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 on and from the date of the making of the award or such later date as the arbitrator or umpire may specify on so much of the money as is from time to time unpaid and any interest that so accrues shall be deemed to form part of the award.
- (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 Enforcement of award**

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

### **34 Costs**

- (1) Unless a contrary intention is expressed in the arbitration agreement, the costs of the arbitration (including the fees and expenses of the arbitrator or umpire) shall be in the discretion of the arbitrator or umpire, who may:
  - (a) direct to and by whom and in what manner the whole or any part of those costs shall be paid,
  - (b) tax or settle the amount of costs to be so paid or any part of those costs, and
  - (c) award costs to be taxed or settled as between party and party or as between solicitor and client.
- (2) Any costs of the arbitration (other than the fees or expenses of the arbitrator or umpire) that are directed to be paid by an award shall, except so far as taxed or

settled by the arbitrator or umpire, be taxable in the Court.

- (3) A provision in an arbitration agreement (being an arbitration agreement that provides for the reference of future disputes to arbitration) is void if:
  - (a) it is to the effect that a particular party, or the parties, to the agreement shall in any event pay their own costs of the arbitration or any part of those costs, or
  - (b) except in so far as it relates to a right of indemnity or a right of subrogation—it is to the effect that a particular party to the agreement shall in any event pay the costs of any other party or any part of those costs.
- (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 cost of the arbitration.
- (5) Where a sum of money has been paid into the Court in accordance with the rules of court 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 in accordance with rules of court an offer of compromise has been made in relation to 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 the offer was made and the terms of the offer.
- (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 Taxation of arbitrator's or umpire's fees and expenses**

- (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 Costs of abortive arbitration**

- (1) Unless otherwise agreed in writing by the parties to the arbitration agreement, where an arbitration is commenced but for any reason the arbitration fails, the Court may, on the application of a party to the arbitration agreement or the arbitrator or umpire, make such orders in relation to the costs of the arbitration as it thinks just.
- (2) For the purposes of this section, where:
  - (a) a final award is not made by the arbitrator or umpire before the arbitration terminates, or
  - (b) an award made is wholly set aside by the Court,an arbitration shall be deemed to have failed.

### **37 Duties of parties**

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

## **Part 5 Powers of the Court**

### **38 Judicial review of awards**

- (1) Without prejudice to the right of appeal conferred by subsection (2), the Court shall not have jurisdiction to set aside or remit an award on the ground of error of fact or law on the face of the award.
- (2) Subject to subsection (4), an appeal shall lie to the Supreme Court on any question of law arising out of an award.
- (3) On the determination of an appeal under subsection (2) the Supreme Court may by order:
  - (a) confirm, vary or set aside the award, or

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

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

- (4) An appeal under subsection (2) may be brought by any of the parties to an 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 shall not grant leave under subsection (4) (b) unless it considers that:
- (a) having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more parties to the arbitration agreement, and
  - (b) there is:
    - (i) a manifest error of law on the face of the award, or
    - (ii) strong evidence that the arbitrator or umpire made an error of law and that the determination of the question may add, or may be likely to add, substantially to the certainty of commercial law.
- (6) The Supreme Court may make any leave which it grants under subsection (4) (b) subject to the applicant complying with any conditions it considers appropriate.
- (7) 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.

### **39 Determination of preliminary point of law by Supreme Court**

- (1) Subject to subsection (2) and section 40, on an application to the Supreme Court made by any of the parties to an arbitration agreement:
- (a) with the consent of an arbitrator who has entered on the reference or, if an umpire has entered on the reference, with the consent of the umpire, or
  - (b) with the consent of all the other parties,
- the Supreme Court shall have jurisdiction to determine any question of law arising in

the course of the arbitration.

- (2) The Supreme Court shall not entertain an application under subsection (1) (a) with respect to any question of law unless it is satisfied that:
  - (a) the determination of the application might produce substantial savings in costs to the parties, and
  - (b) the question of law is one in respect of which leave to appeal would be likely to be granted under section 38 (4) (b).

#### **40 Exclusion agreements affecting rights under sections 38 and 39**

- (1) Subject to 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 a case falling within paragraph (b), in relation to an award to which the determination of the question of law is material.

- (2) An exclusion agreement may be expressed so as to relate to a particular award, to awards under a particular arbitration agreement or to any other description of awards, whether arising out of the same arbitration agreement or not.
- (3) An agreement may be an exclusion agreement for the purposes of this section whether it is entered into before or after the commencement of this Act and whether or not it forms part of an arbitration agreement.
- (4) Except as provided by subsection (1), sections 38 and 39 shall have effect notwithstanding anything in any agreement purporting:
  - (a) to prohibit or restrict access to the Supreme Court, or
  - (b) to restrict the jurisdiction of the Supreme Court.
- (5) An exclusion agreement shall be of no effect in relation to an award made on, or a question of law arising in the course of, an arbitration being an arbitration under any other Act.
- (6) An exclusion agreement shall be of no effect in relation to an award made on, or a question of law arising in the course of, an arbitration under an arbitration agreement which is a domestic arbitration agreement unless the exclusion agreement is entered



into after the commencement of the arbitration in which the award is made or, as the case required, in which the question of law arises.

- (7) In this section, **domestic arbitration agreement** means an arbitration agreement which does not provide, expressly or by implication, for arbitration in a country other than Australia and to which neither:
- (a) an individual who is a national of, or habitually resident in, any country other than Australia, nor
  - (b) a body corporate which is incorporated in, or whose central management and control is exercised in, any country other than Australia,
- is a party at the time the arbitration agreement is entered into.

#### **41 Exclusion agreements not to apply in certain cases**

- (1) Subject to subsection (3), if an award or a question of law arising in the course of an arbitration relates, in whole or in part, to:
- (a) a question or claim falling within the Admiralty jurisdiction of the Supreme Court,
  - (b) a dispute arising out of a contract of insurance, or
  - (c) a dispute arising out of a commodity contract,
- an exclusion agreement shall have no effect in relation to the award or question unless either:
- (d) the exclusion agreement is entered into after the commencement of the arbitration in which the award is made or, as the case requires, in which the question of law arises, or
  - (e) the award or question relates to a contract which is expressed to be governed by a law other than the law of New South Wales.
- (2) In subsection (1) (c), **commodity contract** means a contract:
- (a) for the sale of goods regularly dealt with on a commodity market or exchange in New South Wales which is specified for the purposes of this section by a regulation made by the Governor, and
  - (b) of a description specified for the purposes of this section by a regulation made by the Governor.
- (3) The Governor may by regulation provide that subsection (1):
- (a) shall cease to have effect, or
  - (b) subject to such conditions as may be specified in the regulation, shall not apply to

any exclusion agreement made in relation to an award of a description specified in the regulation,

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

#### **42 Power to set aside award**

(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 Court may remit matter for reconsideration**

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.

#### **44 Removal of arbitrator or umpire**

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,

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

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

- (1) A party to an arbitration agreement is not prevented from alleging in any legal proceedings with respect to the agreement that an arbitrator is not or may not be impartial, suitable or competent by reason of a power of appointment having been exercised by that party in relation to the appointment of that arbitrator or by reason of facts or circumstances that that party knew or ought to have known when exercising that power.
- (2) For the purposes of this section, where an arbitrator is named or designated in an arbitration agreement, a party to the agreement shall be deemed:
  - (a) to have exercised a power of appointment in relation to the appointment of that arbitrator, and
  - (b) to have exercised that power at the time when the party entered into the arbitration agreement.

**46 Delay in prosecuting claims**

- (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 agreement to exercise due diligence in the taking of steps that are necessary to have the dispute referred to arbitration and dealt with in 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 that the delay:
  - (a) has been inordinate and inexcusable, and
  - (b) 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.

**47 General power of the Court to make interlocutory orders**

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.

#### **48 Extension of time**

- (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.

#### **49 Power to impose terms on orders etc**

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

### **Part 6 General provisions as to arbitration**

#### **50 Authority of arbitrator or umpire**

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.

#### **51 Liability of arbitrator or umpire**

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.

#### **52 Death of party**

- (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 that agreement shall be enforceable by or against the personal representative of the deceased.

- (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 Power to stay court proceedings**

- (1) If a party to an arbitration agreement commences proceedings in a court against another party to the arbitration agreement in respect of a matter agreed to be referred to arbitration by the agreement, that other party may, subject to subsection (2), apply to that court to stay the proceedings and that court, if satisfied:
- (a) that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the agreement, and
  - (b) that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary for the proper conduct of the arbitration,

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

- (2) An application under subsection (1) shall not, except with the leave of the court in which the proceedings have been commenced, be made after the applicant has delivered pleadings or taken any other step in the proceedings other than the entry of an appearance.
- (3) Notwithstanding any rule of law to the contrary, a party to an arbitration agreement shall not be entitled to recover damages in any court from another party to the agreement by reason that that other party takes proceedings in a court in respect of the matter agreed to be referred to arbitration by the arbitration agreement.

### **54 Interpleader**

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

### **55 Effect of Scott v Avery clauses**

- (1) Where it is provided (whether in an arbitration agreement or some other agreement, whether oral or written) that arbitration or an award pursuant to arbitration proceedings or the happening of some other event in or in relation to arbitration is a condition precedent to the bringing or maintenance of legal proceedings in respect of a matter or the establishing of a defence to legal proceedings brought in respect of a

matter, that provision, notwithstanding that the condition contained in it has not been satisfied:

(a) shall not operate to prevent:

- (i) legal proceedings being brought or maintained in respect of that matter, or
- (ii) a defence being established to legal proceedings brought in respect of that matter, and

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

- (2) Subsection (1) does not apply to an arbitration agreement unless all the parties to the agreement are domiciled or ordinarily resident in Australia at the time the arbitration agreement is entered into.
- (3) Subsection (2) does not apply to an arbitration agreement that is treated as an arbitration agreement for the purposes of this Act by virtue only of the operation of section 3 (4) (a).

## **Part 7**

### **56-59 (Repealed)**

## **Part 8 Miscellaneous**

### **60 Service of notices**

Where under this Act a notice is required or permitted to be served on any person, the notice may be served in or out of New South Wales:

- (a) by delivering it personally to the person to be served,
- (b) by leaving it at the usual or last known place of residence or business of the person to be served with a person apparently over the age of 16 years and apparently residing thereat or (in the case of a place of business) apparently in charge of or employed at that place,
- (c) by sending it by post addressed to the person to be served at the usual or last known place of residence or business of that person, or
- (d) by serving it in such other manner as the Court may, on application made to it in that behalf, direct.

### **61 (Repealed)**

## 62 Supreme Court rules

- (1) Rules of court may be made under *Supreme Court Act 1970* for carrying the purposes of this Act into effect and, in particular, for or with respect to:
  - (a) applications to the Supreme Court under this Act and the costs of such applications,
  - (b) the payment or bringing of money into and out of the Supreme Court in satisfaction of claims to which arbitration agreements apply and the investment of such money,
  - (c) the examination of witnesses before the Supreme Court or before any other person and the issue of commissions or requests for the examination of witnesses outside New South Wales, for the purposes of an arbitration,
  - (c1) offers of compromise in relation to claims to which arbitration agreements apply, and
  - (d) any other matter or thing for or with respect to which rules are by this Act authorised or required to be made by the Supreme Court.
- (2) Subsection (1) does not limit the rule-making powers conferred by the *Supreme Court Act 1970*.

## 63 District Court rules

- (1) Rules of court may be made under the *District Court Act 1973* for or with respect to:
  - (a) applications to the District Court under this Act and the costs of such applications,
  - (b) the payment or bringing of money into and out of the District Court in satisfaction of claims to which arbitration agreements apply and the investment of such money,
  - (b1) offers of compromise in relation to claims to which arbitration agreements apply, and
  - (c) any other matter or thing for or with respect to which rules are by this Act authorised or required to be made by the District Court.
- (2) Subsection (1) does not limit the rule-making powers conferred by the *District Court Act 1973*.

## 64 Regulations

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

## **65 Saving**

Section 5 of the *Commercial Arbitration (Amendment) Act 1990* continues in force despite the repeal of that Act by the *Statute Law (Miscellaneous Provisions) Act (No 2) 2003*.

## **Schedule 1 Repeals**

(Section 3 (1))

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

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

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

## **Schedule 2 (Repealed)**