

# Commercial Arbitration Act 2010 No 61

[2010-61]



New South Wales

## Status Information

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# Commercial Arbitration Act 2010 No 61



New South Wales

An Act relating to the conduct of commercial arbitrations; to repeal the *Commercial Arbitration Act 1984*; and for other purposes.

## Part 1A Preliminary

### Note—

Sections of this Act that contain a reference to the “Model Law” in the heading are substantially the same as the provisions of the UNCITRAL Model Law on International Commercial Arbitration (as adopted by the United Nations Commission on International Trade Law on 21 June 1985 with amendments as adopted by that Commission in 2006) so as to be as uniform as possible with the UNCITRAL Model Law. Some changes have been made to those provisions of the Act based on the UNCITRAL Model Law to amend or supplement the provisions in their application to domestic arbitrations in New South Wales or to accommodate modern drafting styles and conventions (for example, provisions are drafted in gender neutral terms and archaisms are replaced with modern alternatives). Notes draw attention to substantive changes. The original numbering of the “articles” of the UNCITRAL Model Law has been retained but converted to references to “sections” and articles containing more than one sentence have been re-formatted into subsections. There are a number of additional provisions to those based on the UNCITRAL Model Law.

### 1A Name of Act

This Act is the *Commercial Arbitration Act 2010*.

### 1B Commencement

This Act commences on a day or days to be appointed by proclamation.

### 1C Paramount object of Act

- (1) The paramount object of this Act is to facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense.
- (2) This Act aims to achieve its paramount object by:
  - (a) enabling parties to agree about how their commercial disputes are to be resolved (subject to subsection (3) and such safeguards as are necessary in the public interest), and
  - (b) providing arbitration procedures that enable commercial disputes to be resolved in a cost effective manner, informally and quickly.

- (3) This Act must be interpreted, and the functions of an arbitral tribunal must be exercised, so that (as far as practicable) the paramount object of this Act is achieved.
- (4) Subsection (3) does not affect the application of section 33 of the *Interpretation Act 1987* for the purposes of interpreting this Act.

## Part 1 General provisions

### 1 Scope of application (cf Model Law Art 1)

- (1) This Act applies to domestic commercial arbitrations.

**Note—**

The *International Arbitration Act 1974* of the Commonwealth covers international commercial arbitrations and the enforcement of foreign arbitral awards.

- (2) The provisions of this Act, except sections 8, 9, 17H, 17I, 17J, 35 and 36, apply only if the place of arbitration is in New South Wales.
- (3) An arbitration is **domestic** if:
  - (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in Australia, and
  - (b) the parties have (whether in the arbitration agreement or in any other document in writing) agreed that any dispute that has arisen or may arise between them is to be settled by arbitration, and
  - (c) it is not an arbitration to which the Model Law (as given effect by the *International Arbitration Act 1974* of the Commonwealth) applies.
- (4) For the purposes of subsection (3):
  - (a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement, and
  - (b) if a party does not have a place of business, reference is to be made to the party's habitual residence.
- (5) This Act does not affect any other Act by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Act.
- (6) Subject to subsection (5), this Act applies to arbitrations provided for in any other Act as if:
  - (a) the other Act were an arbitration agreement, and
  - (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.

**Model Law note—**

The term “commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road.

**Note—**

This section differs from the Model Law to the extent necessary to apply Art 1 as incorporated in this Act to domestic commercial arbitrations. Section 40 contains provisions that also relate to the application of this Act.

**2 Definitions and rules of interpretation** (cf Model Law Art 2)

(1) In this Act:

***arbitral tribunal*** means a sole arbitrator or a panel of arbitrators.

***arbitration*** means any domestic commercial arbitration whether or not administered by a permanent arbitral institution.

***arbitration agreement***—see section 7.

***confidential information***, in relation to arbitral proceedings, means information that relates to the arbitral proceedings or to an award made in those proceedings and includes the following:

- (a) the statement of claim, statement of defence and all other pleadings, submissions, statements or other information supplied to the arbitral tribunal by a party,
- (b) any information supplied by a party to another party in compliance with a direction of the arbitral tribunal,
- (c) any evidence (whether documentary or otherwise) supplied to the arbitral tribunal,
- (d) any notes made by the arbitral tribunal of oral evidence or submissions given before the arbitral tribunal,
- (e) any transcript of oral evidence or submissions given before the arbitral tribunal,
- (f) any rulings of the arbitral tribunal,



(g) any award of the arbitral tribunal.

**disclose**, in relation to confidential information, includes publishing or communicating or otherwise supplying the confidential information.

**domestic commercial arbitration**—see section 1.

**exercise** a function includes perform a duty.

**function** includes a power, authority or duty.

**interim measure**—see section 17.

**Model Law** means the UNCITRAL Model Law on International Commercial Arbitration (as adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006).

**party** means a party to an arbitration agreement and includes:

- (a) any person claiming through or under a party to the arbitration agreement, and
- (b) in any case where an arbitration does not involve all of the parties to the arbitration agreement, those parties to the arbitration agreement who are parties to the arbitration.

**the Court** means, subject to section 6 (2), the Supreme Court.

**Note—**

The definitions of **arbitration agreement**, **confidential information**, **disclose**, **domestic commercial arbitration**, **exercise**, **function**, **interim measure**, **Model Law**, **party** and **the Court** are not included in the Model Law.

**Note—**

The [Interpretation Act 1987](#) contains definitions and other provisions that affect the interpretation and application of this Act.

- (2) Where a provision of this Act, except section 28, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorise a third party, including an institution, to make that determination.
- (3) Where a provision of this Act refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement.
- (4) Where a provision of this Act, other than sections 25 (1) (a) and 32 (2) (a), refers to a claim, it also applies to a counter-claim, and where it refers to a defence, it also applies to a defence to such counter-claim.

- (5) Notes (other than the Model Law note to section 1) included in this Act do not form part of this Act.

**Note—**

This provision is not included in the Model Law.

**2A International origin and general principles** (cf Model Law Art 2A)

- (1) Subject to section 1C, in the interpretation of this Act, regard is to be had to the need to promote so far as practicable uniformity between the application of this Act to domestic commercial arbitrations and the application of the provisions of the Model Law (as given effect by the *International Arbitration Act 1974* of the Commonwealth) to international commercial arbitrations and the observance of good faith.

(2)

**Note—**

This section differs from the Model Law. Art 2A (1) has been changed as a consequence of the application of the Act to domestic (instead of international) commercial arbitrations. Art 2A (2) is omitted because it is covered by the provision referred to in section 1C (4). Subsections (3) and (4) reflect section 17 of the *International Arbitration Act 1974* of the Commonwealth.

- (3) Without limiting subsection (1), in interpreting this Act, reference may be made to the documents relating to the Model Law of:
- (a) the United Nations Commission on International Trade Law, and
  - (b) its working groups for the preparation of the Model Law.
- (4) Subsection (3) does not affect the application of section 34 (Use of extrinsic material in the interpretation of Acts and statutory rules) of the *Interpretation Act 1987* for the purposes of interpreting this Act.

**3 Receipt of written communications** (cf Model Law Art 3)

- (1) Unless otherwise agreed by the parties:
- (a) any written communication is taken to be received if:
    - (i) it is delivered to the addressee personally, or
    - (ii) it is delivered at the addressee's place of business, habitual residence or mailing address, or
    - (iii) if none of these can be found after making a reasonable inquiry, it is delivered to the addressee's last-known place of business, habitual residence or mailing address by registered letter or any other means which provides a record of the attempt to deliver it, and
  - (b) the communication is taken to have been received on the day it is so delivered.

(2) The provisions of this section do not apply to communications in court proceedings.

**4 Waiver of right to object** (cf Model Law Art 4)

A party who knows that any provision of this Act from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating the party's objection to such non-compliance without undue delay or, if a time-limit is provided for stating the party's objection, within such period of time, is taken to have waived the party's right to object.

**5 Extent of court intervention** (cf Model Law Art 5)

In matters governed by this Act, no court must intervene except where so provided by this Act.

**6 Court for certain functions of arbitration assistance and supervision** (cf Model Law Art 6)

(1) The functions referred to in sections 11 (3) and (4), 13 (4), 14 (2), 16 (9), 17H-17J, 19 (6), 27-27B, 27H-27J, 33D, 34 and 34A are, subject to subsection (2), to be performed by the Supreme Court.

(2) If:

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

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

the functions are to be performed, in relation to that agreement, by the District Court or Local Court, as the case requires.

**Note—**

This section differs from the Model Law to the extent that it relates to functions conferred on the Court with respect to domestic commercial arbitrations that are not referred to in the Model Law.

## **Part 2 Arbitration agreement**

**7 Definition and form of arbitration agreement** (cf Model Law Art 7)

(1) An **arbitration agreement** is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) The arbitration agreement must be in writing.

- (4) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.
- (5) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained in it is accessible so as to be useable for subsequent reference.
- (6) In this section:
- data message** means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.
- electronic communication** means any communication that the parties make by means of data messages.
- (7) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.
- (8) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.

**Note—**

This section is substantially the same as Option 1 set out in Art 7 of the Model Law.

**8 Arbitration agreement and substantive claim before court** (cf Model Law Art 8)

- (1) A court before which an action is brought in a matter which is the subject of an arbitration agreement must, if a party so requests not later than when submitting the party's first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.
- (2) Where an action referred to in subsection (1) has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

**9 Arbitration agreement and interim measures by court** (cf Model Law Art 9)

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant the measure.

## Part 3 Composition of arbitral tribunal

### 10 Number of arbitrators (cf Model Law Art 10)

- (1) The parties are free to determine the number of arbitrators.
- (2) Failing such determination, the number of arbitrators is to be one.

**Note—**

Subsection (2) differs from Art 10 (2) of the Model Law, which provides for 3 arbitrators if the parties do not determine the number of arbitrators.

### 11 Appointment of arbitrators (cf Model Law Art 11)

- (1)

**Note—**

Art 11 (1) of the Model Law (which provides that no person is precluded by nationality from acting as an arbitrator unless otherwise agreed by the parties) has been omitted.

- (2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of subsections (4) and (5).
- (3) Failing such agreement:
  - (a) in an arbitration with 3 arbitrators and 2 parties, each party is to appoint one arbitrator, and the 2 arbitrators so appointed are to appoint the third arbitrator; if a party fails to appoint the arbitrator within 30 days of receipt of a request to do so from the other party, or if the 2 arbitrators fail to agree on the third arbitrator within 30 days of their appointment, the appointment is to be made, on the request of a party, by the Court, and
  - (b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, an arbitrator is to be appointed, on the request of a party, by the Court, and
  - (c) in an arbitration with 2, 4 or more arbitrators or with 3 arbitrators and more than 2 parties the appointment is to be made, at the request of a party, by the Court.
- (4) Where, under an appointment procedure agreed on by the parties:
  - (a) a party fails to act as required under the procedure, or
  - (b) the parties, or 2 or more arbitrators, are unable to reach an agreement expected of them under the procedure, or
  - (c) a third party, including an institution, fails to perform any function entrusted to it under the procedure,any party may request the Court to take the necessary measure, unless the

agreement on the appointment procedure provides other means for securing the appointment.

- (5) A decision within the limits of the Court's authority on a matter entrusted by subsection (3) or (4) to the Court is final.
- (6) The Court, in appointing an arbitrator, is to have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator.

**Note—**

This section (other than subsections (3) (c), (5) and (6)) is substantially the same as Art 11 of the Model Law. Subsection (3) (c) is added to cover the contingency of the parties failing to agree on the procedure to appoint arbitrators in certain circumstances not covered by the Model Law as incorporated in this Act. It is based on clause 11 (6) of Schedule 1 to the *Arbitration Act 1996* (NZ). Subsection (5) makes it clear that, although a decision of the Court is generally final, review of a decision of the Court that is not made within the limits of its powers and functions is not precluded. Subsection (6) does not include the requirement in Art 11 (5) of the Model Law that the Court take into account the advisability of appointing an arbitrator of a nationality other than those of the parties in appointing a sole or third arbitrator as this is not relevant in the context of domestic commercial arbitrations.

**12 Grounds for challenge** (cf Model Law Art 12)

- (1) When a person is approached in connection with the person's possible appointment as an arbitrator, the person must disclose any circumstances likely to give rise to justifiable doubts as to the person's impartiality or independence.
- (2) An arbitrator, from the time of the arbitrator's appointment and throughout the arbitral proceedings, must without delay disclose any circumstances of the kind referred to in subsection (1) to the parties unless they have already been informed of them by the arbitrator.
- (3) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence, or if the arbitrator does not possess qualifications agreed to by the parties.
- (4) A party may challenge an arbitrator appointed by the party, or in whose appointment the party has participated, only for reasons of which the party becomes aware after the appointment has been made.
- (5) For the purposes of subsection (1), there are justifiable doubts as to the impartiality or independence of a person approached in connection with a possible appointment as arbitrator only if there is a real danger of bias on the part of the person in conducting the arbitration.
- (6) For the purposes of subsection (3), there are justifiable doubts as to the impartiality or independence of an arbitrator only if there is a real danger of bias on the part of the arbitrator in conducting the arbitration.

**Note—**

This section (other than subsections (5) and (6)) is substantially the same as Art 12 of the Model Law. Subsections (5) and (6) provide that the test for whether there are justifiable doubts as to the impartiality or independence of a person or arbitrator is whether there is a real danger of bias.

**13 Challenge procedure** (cf Model Law Art 13)

- (1) The parties are free to agree on a procedure for challenging an arbitrator, subject to subsection (4).
- (2) Failing such agreement, a party who intends to challenge an arbitrator must, within 15 days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in section 12 (3), send a written statement of the reasons for the challenge to the arbitral tribunal.
- (3) Unless the challenged arbitrator withdraws from office or the other party agrees to the challenge, the arbitral tribunal must decide on the challenge.
- (4) If a challenge under any procedure agreed on by the parties or under the procedure of subsections (2) and (3) is not successful, the challenging party may request, within 30 days after having received notice of the decision rejecting the challenge, the Court to decide on the challenge.
- (5) A decision of the Court under subsection (4) that is within the limits of the authority of the Court is final.
- (6) While a request under subsection (4) is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

**Note—**

Section 13 (other than subsection (5)) is substantially the same as Art 13 of the Model Law. Subsection (5) makes it clear that, although a decision of the Court is generally final, review of a decision of the Court that is not made within the limits of its powers and functions is not precluded.

**14 Failure or impossibility to act** (cf Model Law Art 14)

- (1) If an arbitrator becomes in law or in fact unable to perform the arbitrator's functions or for other reasons fails to act without undue delay, the arbitrator's mandate terminates if the arbitrator withdraws from office or if the parties agree on the termination.
- (2) Otherwise, if a controversy remains concerning any of these grounds, any party may request the Court to decide on the termination of the mandate.
- (3) A decision of the Court under subsection (2) that is within the limits of the authority of the Court is final.
- (4) If, under this section or section 13 (3), an arbitrator withdraws from office or a party

agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this section or section 12 (3).

**Note—**

Section 14 (other than subsection (3)) is substantially the same as Art 14 of the Model Law. Subsection (3) makes it clear that, although a decision of the Court is generally final, review of a decision of the Court that is not made within the limits of its powers and functions is not precluded.

**15 Appointment of substitute arbitrator** (cf Model Law Art 15)

Where the mandate of an arbitrator terminates under section 13 or 14 or because of the arbitrator's withdrawal from office for any other reason or because of the revocation of the arbitrator's mandate by agreement of the parties or in any other case of termination of the arbitrator's mandate, a substitute arbitrator must be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

**Part 4 Jurisdiction of arbitral tribunal**

**16 Competence of arbitral tribunal to rule on its jurisdiction** (cf Model Law Art 16)

- (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.
- (2) For that purpose, an arbitration clause which forms part of a contract is to be treated as an agreement independent of the other terms of the contract.
- (3) A decision by the arbitral tribunal that the contract is null and void does not of itself entail the invalidity of the arbitration clause.

**Note—**

The Model Law provides that such a decision does not "ipso jure" entail the invalidity of the arbitration clause.

- (4) A plea that the arbitral tribunal does not have jurisdiction must be raised not later than the submission of the statement of defence.
- (5) A party is not precluded from raising such a plea by the fact that the party has appointed, or participated in the appointment of, an arbitrator.
- (6) A plea that the arbitral tribunal is exceeding the scope of its authority must be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.
- (7) The arbitral tribunal may, in the case of a plea referred to in subsection (4) or (6), admit a later plea if it considers the delay justified.
- (8) The arbitral tribunal may rule on a plea referred to in subsection (4) or (6) either as a preliminary question or in an award on the merits.



- (9) If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within 30 days after having received notice of that ruling, the Court to decide the matter.
- (10) A decision of the Court under subsection (9) that is within the limits of the authority of the Court is final.
- (11) While a request under subsection (9) is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

**Note—**

Section 16 (other than subsection (10)) is substantially the same as Art 16 of the Model Law. Subsection (10) makes it clear that, although a decision of the Court is generally final, review of a decision of the Court that is not made within the limits of its powers and functions is not precluded.

## **Part 4A Interim measures**

### **Division 1 Interim measures**

#### **17 Power of arbitral tribunal to order interim measures** (cf Model Law Art 17)

- (1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.
- (2) An **interim measure** is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:
  - (a) maintain or restore the status quo pending determination of the dispute, or
  - (b) take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself, or
  - (c) provide a means of preserving assets out of which a subsequent award may be satisfied, or
  - (d) preserve evidence that may be relevant and material to the resolution of the dispute.
- (3) Without limiting subsection (2), the arbitral tribunal may make orders with respect to any of the following:
  - (a) security for costs,
  - (b) discovery of documents and interrogatories,
  - (c) giving of evidence by affidavit,
  - (d) the inspection of any property which is or forms part of the subject-matter of the

dispute,

- (e) the taking of photographs of any property which is or forms part of the subject-matter of the dispute,
- (f) samples to be taken from, or any observation to be made of or experiment conducted on, any property which is or forms part of the subject-matter of the dispute,
- (g) dividing, recording and strictly enforcing the time allocated for a hearing between the parties (a **stop clock** arbitration).

**Note—**

Subsections (1) and (2) are substantially the same as Art 17 of the Model Law. There is no equivalent subsection (3) in the Model Law.

**17A Conditions for granting interim measures** (cf Model Law Art 17A)

- (1) The party requesting an interim measure under section 17 (2) (a), (b) or (c) must satisfy the arbitral tribunal that:
  - (a) harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and that harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted, and
  - (b) there is a reasonable possibility that the requesting party will succeed on the merits of the claim.
- (2) The determination on the possibility referred to in subsection (1) (b) does not affect the discretion of the arbitral tribunal in making any subsequent determination.
- (3) With regard to a request for an interim measure under section 17 (2) (d), the requirements in subsection (1) (a) and (b) and subsection (2) apply only to the extent the arbitral tribunal considers appropriate.

## Division 2 Preliminary orders

### 17B

**Note—**

Art 17B of the Model Law, which provides for ex parte requests for interim measures together with applications for preliminary orders directing parties not to frustrate the interim measures, has been omitted.

### 17C

**Note—**

Art 17C of the Model Law, which contains safeguards for the party against whom a preliminary order is directed under Art

17B, is omitted as a consequence of the omission of Art 17B.

### **Division 3 Provisions applicable to interim measures**

#### **17D Modification, suspension, termination** (cf Model Law Art 17D)

The arbitral tribunal may modify, suspend or terminate an interim measure it has granted, on application of any party or, in exceptional circumstances and on prior notice to the parties, on the arbitral tribunal's own initiative.

**Note—**

This section is substantially the same as Art 17D of the Model Law but contains no reference to preliminary orders as a consequence of this Act not including an equivalent of Arts 17B and 17C of the Model Law.

#### **17E Provision of security** (cf Model Law Art 17E)

(1) The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

(2)

**Note—**

Subsection (1) is the same as Art 17E (1) of the Model Law. Art 17E (2) is omitted as a consequence of this Act not including equivalents to Arts 17B and 17C of the Model Law.

#### **17F Disclosure** (cf Model Law Art 17F)

(1) The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the measure was requested or granted.

(2)

**Note—**

Subsection (1) is the same as Art 17F (1) of the Model Law. Art 17F (2) is omitted as a consequence of this Act not including equivalents to Arts 17B and 17C of the Model Law.

#### **17G Costs and damages** (cf Model Law Art 17G)

(1) The party requesting an interim measure is liable for any costs and damages caused by the measure to any party if the arbitral tribunal later determines that, in the circumstances, the measure should not have been granted.

(2) The arbitral tribunal may award such costs and damages at any point during the proceedings.

**Note—**

This section is substantially the same as Art 17G of the Model Law but the reference to applications for preliminary orders is omitted as a consequence of this Act not including equivalents to Arts 17B and 17C of the Model Law.

## **Division 4 Recognition and enforcement of interim measures**

### **17H Recognition and enforcement** (cf Model Law Art 17H)

- (1) An interim measure issued by an arbitral tribunal under the law of this State is to be recognised as binding and, unless otherwise provided by the arbitral tribunal, enforced on application to the Court, subject to the provisions of section 17I.
- (2) An interim measure issued by an arbitral tribunal under the law of another State or Territory is to be recognised as binding in this State and, unless otherwise provided by the arbitral tribunal, enforced on application to the Court, irrespective of the State or Territory in which it was issued, subject to the provisions of section 17I.
- (3) The party who is seeking or has obtained recognition or enforcement of an interim measure must promptly inform the Court of any termination, suspension or modification of that interim measure.
- (4) The Court may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.

#### **Note—**

This section differs from Art 17H of the Model Law to the extent necessary to apply Art 17H as incorporated in this Act in the context of domestic commercial arbitrations.

### **17I Grounds for refusing recognition or enforcement** (cf Model Law Art 17I)

- (1) Recognition or enforcement of an interim measure may be refused only:
  - (a) at the request of the party against whom it is invoked if the Court is satisfied that:
    - (i) such a refusal is warranted on the grounds set out in section 36 (1) (a) (i), (ii), (iii) or (iv), or
    - (ii) the arbitral tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with, or
    - (iii) the interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the State or Territory in which the arbitration takes place or under the law of which that interim measure was granted, or
  - (b) if the Court finds that:
    - (i) the interim measure is incompatible with the powers conferred on the Court unless the Court decides to reformulate the interim measure to the extent

necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance, or

(ii) any of the grounds set out in section 36 (1) (b) (i) or (ii) apply to the recognition and enforcement of the interim measure.

(2) Any determination made by the Court on any ground in subsection (1) is effective only for the purposes of the application to recognise and enforce the interim measure.

(3) The Court must not, in making a determination with respect to the recognition or enforcement sought, undertake a review of the substance of the interim measure.

**Note—**

This section is substantially the same as Art 17I of the Model Law but has been modified to the extent necessary to apply Art 17I as incorporated in this Act in the context of domestic commercial arbitrations.

## **Division 5 Court-ordered interim measures**

### **17J Court-ordered interim measures** (cf Model Law Art 17J)

(1) The Court has the same power of issuing an interim measure in relation to arbitration proceedings as it has in relation to proceedings in courts.

(2) The Court is to exercise the power in accordance with its own procedures taking into account the specific features of a domestic commercial arbitration.

**Note—**

This section is substantially the same as Art 17J of the Model Law but has been modified to the extent necessary to apply Art 17J as incorporated in this Act in the context of domestic commercial arbitrations.

## **Part 5 Conduct of arbitral proceedings**

### **18 Equal treatment of parties** (cf Model Law Art 18)

The parties must be treated with equality and each party must be given a reasonable opportunity of presenting the party's case.

**Note—**

This section differs from the Model Law to the extent that it requires a party to be given a "reasonable", instead of "full", opportunity of presenting the party's case.

### **19 Determination of rules of procedure** (cf Model Law Art 19)

(1) Subject to the provisions of this Act, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

(2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Act, conduct the arbitration in such manner as it considers appropriate.

- (3) The power conferred on the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.
- (4) The power conferred on the tribunal also includes the power to make orders or give directions for the examination of a party or witness on oath or affirmation.
- (5) For the purposes of the exercise of the power referred to in subsection (4), the arbitral tribunal may administer any necessary oath or take any necessary affirmation.
- (6) An order made or direction given by an arbitral tribunal in the course of arbitral proceedings is, by leave of the Court, enforceable in the same manner as if it were an order of the Court and, where leave is so given, judgment may be entered in terms of the order or direction.

**Note—**

This section (other than subsections (4)–(6)) is substantially the same as Art 19 of the Model Law. Subsections (4)–(6) elaborate on the powers conferred on arbitral tribunals.

**20 Place of arbitration** (cf Model Law Art 20)

- (1) The parties are free to agree on the place of arbitration.
- (2) Failing such agreement, the place of arbitration is to be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.
- (3) Despite subsection (1), the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place (whether or not in New South Wales) it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

**21 Commencement of arbitral proceedings** (cf Model Law Art 21)

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

**22 Language** (cf Model Law Art 22)

- (1) The parties are free to agree on the language or languages to be used in the arbitral proceedings.
- (2) Failing agreement as referred to in subsection (1), the arbitral tribunal is to determine the language or languages to be used in the proceedings.
- (3) This agreement or determination, unless otherwise specified in the agreement or determination, is to apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal.

- (4) The arbitral tribunal may order that any documentary evidence is to be accompanied by a translation into the language or languages agreed on by the parties or determined by the arbitral tribunal.

**23 Statements of claim and defence** (cf Model Law Art 23)

- (1) Subject to any contrary agreement of the parties or a direction of the arbitral tribunal, within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant must state the facts supporting his or her claim, the points at issue and the relief or remedy sought, and the respondent must state the respondent's defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements.
- (2) The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.
- (3) Unless otherwise agreed by the parties, either party may amend or supplement the party's claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it.
- (4) Subsection (1) does not require a statement by a claimant or respondent to be in a particular form.

**Note—**

This section (other than subsections (1) and (4)) is substantially the same as Art 23 of the Model Law. Subsection (1) has effect subject to any contrary agreement of the parties or direction of the arbitral tribunal. Subsection (4) makes it clear that it is not necessary to use a particular form of statement of claim or defence.

**24 Hearings and written proceedings** (cf Model Law Art 24)

- (1) Subject to any contrary agreement by the parties, the arbitral tribunal is to decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings are to be conducted on the basis of documents and other materials.
- (2) However, unless the parties have agreed that no hearings are to be held, the arbitral tribunal must hold such hearings at an appropriate stage of the proceedings, if so requested by a party.
- (3) The parties must be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents.
- (4) All statements, documents or other information supplied to the arbitral tribunal by one party must be communicated to the other party.

- (5) Also, any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision must be communicated to the parties.

#### **24A Representation**

- (1) The parties may appear or act in person, or may be represented by another person of their choice, in any oral hearings under section 24.
- (2) A person who is not an Australian legal practitioner does not commit an offence under or breach the provisions of the *Legal Profession Uniform Law (NSW)* or any other Act or law merely by representing a party in arbitral proceedings in this State.

**Note—**

There is no equivalent of this section in the Model Law.

#### **24B General duties of parties**

- (1) The parties must do all things necessary for the proper and expeditious conduct of the arbitral proceedings.
- (2) Without limitation, the parties must:
- (a) comply without undue delay with any order or direction of the arbitral tribunal with respect to any procedural, evidentiary or other matter, and
  - (b) take without undue delay any necessary steps to obtain a decision (if required) of the Court with respect to any function conferred on the Court under section 6.
- (3) A party must not wilfully do or cause to be done any act to delay or prevent an award being made.

**Note—**

There is no equivalent of this section in the Model Law.

#### **25 Default of a party** (cf Model Law Art 25)

- (1) Unless otherwise agreed by the parties, if, without showing sufficient cause:
- (a) the claimant fails to communicate the claimant's statement of claim in accordance with section 23 (1)—the arbitral tribunal may terminate the proceedings, or
  - (b) the respondent fails to communicate the respondent's statement of defence in accordance with section 23 (1)—the arbitral tribunal may continue the proceedings without treating such failure in itself as an admission of the claimant's allegations, or
  - (c) any party fails to appear at a hearing or to produce documentary evidence—the arbitral tribunal may continue the proceedings and make the award on the



evidence before it.

- (2) Unless otherwise agreed by the parties, if a party fails to do any other thing necessary for the proper and expeditious conduct of the arbitration the arbitral tribunal:
  - (a) if satisfied that there has been inordinate and inexcusable delay on the part of the claimant in pursuing the claim—may make an award dismissing the claim or may give directions (with or without conditions) for the speedy determination of the claim, or
  - (b) if without sufficient cause a party fails to comply with any order or direction of the arbitral tribunal—may make an order requiring the party to comply with the terms of the earlier order or direction within the period specified by the arbitral tribunal (a **peremptory order**).
- (3) If a party fails to comply with a peremptory order, the arbitral tribunal may do any of the following:
  - (a) direct that the party in default is not to be entitled to rely on any allegation or material which was the subject matter of the peremptory order,
  - (b) draw such adverse inferences from the failure to comply as the circumstances justify,
  - (c) proceed to an award on the basis of any materials that have been properly provided to the arbitral tribunal,
  - (d) without limiting section 33B (4), in making an award give any direction or order that it thinks fit as to the payment of the costs of the arbitration incurred in consequence of the non-compliance.

**Note—**

Subsection (1) is substantially the same as Art 25 of the Model Law. There are no equivalents to the other provisions of the section in the Model Law.

**26 Expert appointed by arbitral tribunal** (cf Model Law Art 26)

- (1) Unless otherwise agreed by the parties, the arbitral tribunal:
  - (a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal, and
  - (b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for the expert's inspection.
- (2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert must, after delivery of the expert's written or oral

report, participate in a hearing where the parties have the opportunity to put questions to the expert and present expert witnesses in order to testify on the points at issue.

**27 Court assistance in taking evidence** (cf Model Law Art 27)

- (1) The arbitral tribunal or a party with the approval of the arbitral tribunal may request from the Court assistance in taking evidence.
- (2) The Court may execute the request within its competence and subject to and in accordance with rules of court.

**Note—**

This section is substantially the same as Art 27 of the Model Law but the reference to rules of court has been amended for consistency with sections 27A and 27B and a request for assistance may only be made to the Court, not any competent court.

**27A Parties may obtain subpoenas**

- (1) The Court may, on the application of any party, and subject to and in accordance with rules of court, issue a subpoena requiring a person:
  - (a) to attend for examination before the arbitral tribunal, or
  - (b) to produce to the arbitral tribunal the documents specified in the subpoena, or
  - (c) to do both of those things.
- (2) A party may only make an application to the Court under subsection (1) with the permission of the arbitral tribunal.
- (3) A person must not be compelled under any subpoena issued in accordance with subsection (1) to answer any question or produce any document that the person could not be compelled to answer or produce in a proceeding before the Court.

**Note—**

There is no equivalent to this section in the Model Law.

**27B Refusal or failure to attend before arbitral tribunal or to produce document**

- (1) For the purposes of this section, a person is a ***person in default*** in relation to proceedings before an arbitral tribunal under an arbitration agreement if the person:
  - (a) refuses or fails to attend before the arbitral tribunal for examination when required under a subpoena or by the arbitral tribunal to do so, or
  - (b) refuses or fails to produce a document that the person is required under a subpoena or by the arbitral tribunal to produce, or

- (c) when appearing as a witness before the arbitral tribunal:
    - (i) refuses or fails to take an oath or to make an affirmation or affidavit when required by the arbitral tribunal to do so, or
    - (ii) refuses or fails to answer a question that the witness is required by the arbitral tribunal to answer, or
  - (d) refuses or fails to do any other thing which the arbitral tribunal may require.
- (2) Unless otherwise agreed by the parties, the Court may, on the application of a party or the arbitral tribunal, order a person in default to do any or all of the following:
- (a) attend the Court to be examined as a witness,
  - (b) produce the relevant document to the Court,
  - (c) do the relevant thing.
- (3) A party may only make an application to the Court under subsection (2) with the permission of the arbitral tribunal.
- (4) The Court must not make an order under subsection (2) in relation to a person who is not a party to the arbitral proceedings unless:
- (a) before the order is made, the person is given an opportunity to make representations to the Court, and
  - (b) the Court is satisfied that it is reasonable in all the circumstances to make the order.
- (5) A person must not be compelled under an order made under subsection (2) to answer any question or produce any document which the person could not be compelled to answer or produce in a proceeding before the Court.
- (6) If the Court makes an order under subsection (2), it may in addition make orders for the transmission to the arbitral tribunal of any of the following:
- (a) a record of any evidence given under the order,
  - (b) any document produced under the order or a copy of any such document,
  - (c) particulars of any thing done under the order.
- (7) Any evidence, document or thing transmitted under subsection (6) is taken to have been given, produced or done (as the case requires) in the course of the arbitral proceedings.

**Note—**

There is no equivalent of this section in the Model Law.

### **27C Consolidation of arbitral proceedings**

- (1) Unless otherwise agreed by the parties, a party to arbitral proceedings may apply to the arbitral tribunal for an order under this section in relation to those proceedings and other arbitral proceedings (whether before that tribunal or another tribunal or other tribunals) on the ground that:
  - (a) a common question of law or fact arises in all those proceedings, or
  - (b) the rights to relief claimed in all those proceedings are in respect of, or arise out of, the same transaction or series of transactions, or
  - (c) for some other reason specified in the application, it is desirable that an order be made under this section.
- (2) In this section, 2 or more arbitral proceedings that are the subject of an application under subsection (1) are called the ***related proceedings***.
- (3) The following orders may be made under this section in relation to the related proceedings:
  - (a) that the proceedings be consolidated on terms specified in the order,
  - (b) that the proceedings be heard at the same time or in a sequence specified in the order,
  - (c) that any of the proceedings be stayed pending the determination of any of the other proceedings.
- (4) If all the related proceedings are being conducted by the same tribunal, the tribunal may make any order under this section that it thinks fit in relation to those proceedings and, if an order is made, the proceedings must be dealt with in accordance with the order.
- (5) If 2 or more arbitral tribunals are conducting the related proceedings:
  - (a) the tribunal that received the application must communicate the substance of the application to the other tribunals concerned, and
  - (b) the tribunals must, as soon as practicable, deliberate jointly on the application.
- (6) If the tribunals agree, after deliberation on the application, that a particular order under this section should be made in relation to the related proceedings:
  - (a) the tribunals are to jointly make the order, and
  - (b) the related proceedings are to be dealt with in accordance with the order, and

- (c) if the order is that the related proceedings be consolidated—the arbitrator or arbitrators for the purposes of the consolidated proceedings are to be appointed, in accordance with sections 10 and 11, from the members of the tribunals.
- (7) If the tribunals are unable to make an order under subsection (6), the related proceedings are to proceed as if no application has been made under subsection (1).
- (8) Before making an order under this section, the arbitral tribunal or tribunals concerned must take into account whether any party would or might suffer substantial hardship if the order were made.
- (9) This section does not prevent the parties to related proceedings from agreeing to consolidate them and taking such steps as are necessary to effect that consolidation.

**Note—**

There is no equivalent to this section in the Model Law.

**27D Power of arbitrator to act as mediator, conciliator or other non-arbitral intermediary**

- (1) An arbitrator may act as a mediator in proceedings relating to a dispute between the parties to an arbitration agreement (***mediation proceedings***) if:
  - (a) the arbitration agreement provides for the arbitrator to act as mediator in mediation proceedings (whether before or after proceeding to arbitration, and whether or not continuing with the arbitration), or
  - (b) each party has consented in writing to the arbitrator so acting.
- (2) An arbitrator acting as a mediator:
  - (a) may communicate with the parties collectively or separately, and
  - (b) must treat information obtained by the arbitrator from a party with whom he or she communicates separately as confidential, unless that party otherwise agrees or unless the provisions of the arbitration agreement relating to mediation proceedings otherwise provide.
- (3) Mediation proceedings in relation to a dispute terminate if:
  - (a) the parties to the dispute agree to terminate the proceedings, or
  - (b) any party to the dispute withdraws consent to the arbitrator acting as mediator in the proceedings, or
  - (c) the arbitrator terminates the proceedings.
- (4) An arbitrator who has acted as mediator in mediation proceedings that are terminated may not conduct subsequent arbitration proceedings in relation to the dispute without the written consent of all the parties to the arbitration given on or after the

termination of the mediation proceedings.

- (5) If the parties consent under subsection (4), no objection may be taken to the conduct of subsequent arbitration proceedings by the arbitrator solely on the ground that he or she has acted previously as a mediator in accordance with this section.
- (6) If the parties do not consent under subsection (4), the arbitrator's mandate is taken to have been terminated under section 14 and a substitute arbitrator is to be appointed in accordance with section 15.
- (7) If confidential information is obtained from a party during mediation proceedings as referred to in subsection (2) (b) and the mediation proceedings terminate, the arbitrator must, before conducting subsequent arbitration proceedings in relation to the dispute, disclose to all other parties to the arbitration proceedings so much of the information as the arbitrator considers material to the arbitration proceedings.
- (8) In this section, a reference to a **mediator** includes a reference to a conciliator or other non-arbitral intermediary between parties.

**Note—**

There is no equivalent of this section in the Model Law.

**27E Disclosure of confidential information**

- (1) The provisions of this section apply in arbitral proceedings unless otherwise agreed by the parties.
- (2) The parties must not disclose confidential information in relation to the arbitral proceedings unless:
  - (a) the disclosure is allowed under section 27F, or
  - (b) the disclosure is allowed under an order made under section 27G and no order is in force under section 27H prohibiting that disclosure, or
  - (c) the disclosure is allowed under an order made under section 27I.
- (3) An arbitral tribunal must not disclose confidential information in relation to the arbitral proceedings unless:
  - (a) the disclosure is allowed under section 27F, or
  - (b) the disclosure is allowed under an order made under section 27G and no order is in force under section 27H prohibiting that disclosure, or
  - (c) the disclosure is allowed under an order made under section 27I.

**Note—**

There is no equivalent to this section in the Model Law.

## **27F Circumstances in which confidential information may be disclosed**

- (1) This section sets out the circumstances in which confidential information in relation to arbitral proceedings may be disclosed by:
  - (a) a party, or
  - (b) an arbitral tribunal.
- (2) The information may be disclosed with the consent of all the parties to the arbitral proceedings.
- (3) The information may be disclosed to a professional or other adviser of any of the parties.
- (4) The information may be disclosed if it is necessary to ensure that a party has a reasonable opportunity to present the party's case and the disclosure is no more than reasonable for that purpose.
- (5) The information may be disclosed if it is necessary for the establishment or protection of a party's legal rights in relation to a third party and the disclosure is no more than reasonable for that purpose.
- (6) The information may be disclosed if it is necessary for the purpose of enforcing an arbitral award and the disclosure is no more than reasonable for that purpose.
- (7) The information may be disclosed if it is necessary for the purposes of this Act and the disclosure is no more than reasonable for that purpose.
- (8) The information may be disclosed if the disclosure is in accordance with an order made or a subpoena issued by a court.
- (9) The information may be disclosed if the disclosure is authorised or required by a relevant law or required by a competent regulatory body, and the person making the disclosure gives written details of the disclosure (including an explanation of the reasons for the disclosure) to:
  - (a) if the person is a party—the other parties and the arbitral tribunal, and
  - (b) if the arbitral tribunal is making the disclosure—all the parties.
- (10) In this section:

**relevant law** means:

  - (a) a law of this State (other than this Act), and
  - (b) a law of the Commonwealth, and

(c) a law of another State or Territory.

**Note—**

There is no equivalent to this section in the Model Law.

**27G Arbitral tribunal may allow disclosure of confidential information in certain circumstances**

- (1) An arbitral tribunal may make an order allowing a party to arbitral proceedings to disclose confidential information in relation to the proceedings in circumstances other than those mentioned in section 27F.
- (2) An order under subsection (1) may only be made at the request of one of the parties and after giving each of the parties the opportunity to be heard.

**Note—**

There is no equivalent to this section in the Model Law.

**27H The Court may prohibit disclosure of confidential information in certain circumstances**

- (1) The Court may make an order prohibiting a party from disclosing confidential information in relation to the arbitral proceedings if the Court is satisfied, in the circumstances of the particular case, that:
  - (a) the public interest in preserving the confidentiality of arbitral proceedings is not outweighed by other considerations that render it desirable in the public interest for the confidential information to be disclosed, or
  - (b) the disclosure is more than is reasonable for that purpose.
- (2) An order under subsection (1) may only be made on the application of a party to the arbitral proceedings and after giving each of the parties to the arbitral proceedings the opportunity to be heard.
- (3) A party may only apply for an order under subsection (1) if the arbitral tribunal has made an order under section 27G (1) allowing disclosure of the information.
- (4) The Court may order that the confidential information not be disclosed pending the outcome of the application under subsection (2).
- (5) An order of the Court under this section that is made within the limits of the authority of the Court is final.

**Note—**

There is no equivalent to this section in the Model Law.



**27I The Court may allow disclosure of confidential information in certain circumstances**

- (1) The Court may make an order allowing a party to disclose confidential information in relation to the arbitral proceedings in circumstances other than those mentioned in section 27F if the Court is satisfied, in the circumstances of the particular case, that:
  - (a) the public interest in preserving the confidentiality of arbitral proceedings is outweighed by other considerations that render it desirable in the public interest for the confidential information to be disclosed, and
  - (b) the disclosure is no more than is reasonable for that purpose.
- (2) An order under subsection (1) may only be made on the application of a person who is or was a party to the arbitral proceedings and after giving each person who is or was a party to the arbitral proceedings the opportunity to be heard.
- (3) A party to arbitral proceedings may only apply for an order under subsection (1) if:
  - (a) the mandate of the arbitral tribunal has been terminated under section 32, or
  - (b) a request by the party to the arbitral tribunal to make an order under section 27G has been refused.
- (4) An order of the Court under this section that is made within the limits of the authority of the Court is final.

**Note—**

There is no equivalent to this section in the Model Law.

**27J Determination of preliminary point of law by the Court**

- (1) Unless otherwise agreed by the parties, on an application to the Court made by any of the parties to an arbitration agreement the Court has jurisdiction to determine any question of law arising in the course of the arbitration.
- (2) An application under this section may be made by a party only with the consent of:
  - (a) an arbitrator who has entered on the reference, or
  - (b) all the other parties,and with the leave of the Court.

**Note—**

There is no equivalent to this section in the Model Law.

## **Part 6 Making of award and termination of proceedings**

### **28 Rules applicable to substance of dispute** (cf Model Law Art 28)

- (1) The arbitral tribunal must decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute.
- (2) Any designation of the law or legal system of a given State or Territory must be construed, unless otherwise expressed, as directly referring to the substantive law of that State or Territory and not to its conflict of laws rules.
- (3) Failing any designation by the parties, the arbitral tribunal must apply the law determined by the conflict of laws rules which it considers applicable.
- (4) The arbitral tribunal must decide the dispute, if the parties so agree, in accordance with such other considerations as are agreed to by the parties.
- (5) In all cases, the arbitral tribunal must decide in accordance with the terms of the contract and must take into account the usages of the trade applicable to the transaction.

#### **Note—**

This section (other than subsection (4)) is substantially the same as Art 28 of the Model Law.

### **29 Decision-making by panel of arbitrators** (cf Model Law Art 29)

- (1) In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal must be made, unless otherwise agreed by the parties, by a majority of all its members.
- (2) However, questions of procedure may be decided by a presiding arbitrator, if so authorised by the parties or all members of the arbitral tribunal.

### **30 Settlement** (cf Model Law Art 30)

- (1) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal must terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.
- (2) An award on agreed terms is to be made in accordance with section 31 and must state that it is an award.
- (3) Such an award has the same status and effect as any other award on the merits of the case.

**31 Form and contents of award** (cf Model Law Art 31)

- (1) The award must be made in writing and must be signed by the arbitrator or arbitrators.
- (2) In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal suffices, provided that the reason for any omitted signature is stated.
- (3) The award must state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under section 30.
- (4) The award must state its date and the place of arbitration as determined in accordance with section 20.
- (5) The award is taken to have been made at the place stated in the award in accordance with subsection (4).
- (6) After the award is made, a copy signed by the arbitrators in accordance with subsection (1) must be delivered to each party.

**32 Termination of proceedings** (cf Model Law Art 32)

- (1) The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal in accordance with subsection (2).
- (2) The arbitral tribunal is to issue an order for the termination of the arbitral proceedings when:
  - (a) the claimant withdraws his or her claim, unless the respondent objects and the arbitral tribunal recognises a legitimate interest on the respondent's part in obtaining a final settlement of the dispute, or
  - (b) the parties agree on the termination of the proceedings, or
  - (c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible, or
  - (d) the arbitral tribunal makes an award under section 25 (2) (a) dismissing the claim.
- (3) The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to sections 33 and 34 (4).

**33 Correction and interpretation of award; additional award** (cf Model Law Art 33)

- (1) Within 30 days of receipt of the award, unless another period of time has been agreed on by the parties:

- (a) a party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature, and
  - (b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.
- (2) If the arbitral tribunal considers a request under subsection (1) to be justified, it must make the correction or give the interpretation within 30 days of receipt of the request.
  - (3) The interpretation forms part of the award.
  - (4) The arbitral tribunal may correct any error of the type referred to in subsection (1) (a) on its own initiative within 30 days of the date of the award.
  - (5) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within 30 days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award.
  - (6) If the arbitral tribunal considers the request to be justified, it must make the additional award within 60 days.
  - (7) The arbitral tribunal may extend, if necessary, the period of time within which it may make a correction, interpretation or an additional award under subsection (2) or (5).
  - (8) Section 31 applies to a correction or interpretation of the award or to an additional award.

### **33A Specific performance**

Unless otherwise agreed by the parties, the arbitrator has the power to make an award ordering specific performance of any contract if the Court would have power to order specific performance of that contract.

**Note—**

There is no equivalent to this section in the Model Law.

### **33B Costs**

- (1) Unless otherwise agreed by the parties, the costs of an arbitration (including the fees and expenses of the arbitrator or arbitrators) are to be in the discretion of the arbitral tribunal.
- (2) Unless otherwise agreed by the parties, the arbitral tribunal may direct that the costs of an arbitration, or of any part of the arbitral proceedings, are to be limited to a specified amount.

- (3) A direction under subsection (2) may be varied at any stage, but this must be done sufficiently in advance of the incurring of costs to which it relates, or the taking of any steps in the proceedings which may be affected by it, for the limit to be taken into account.
- (4) The arbitral tribunal may, in making an award:
  - (a) direct to whom, by whom, and in what manner, the whole or any part of the costs that it awards are to be paid, and
  - (b) tax or settle the amount of costs to be paid or any part of those costs, and
  - (c) award costs to be taxed or settled as between party and party or as between legal practitioner and client.
- (5) Any costs of an arbitration (other than the fees or expenses of an arbitrator) that are directed to be paid by an award are, to the extent that they have not been taxed or settled by the arbitral tribunal, to be assessed in accordance with section 33C.
- (6) If no provision is made by an award with respect to the costs of the arbitration, a party may, within 14 days after receiving the award, apply to the arbitral tribunal for directions as to the payment of those costs.
- (7) The arbitral tribunal must, after hearing any party who wishes to be heard, amend the award by adding to it such directions as the arbitral tribunal thinks proper with respect to the payment of the costs of the arbitration.

**Note—**

There is no equivalent to this section in the Model Law.

**33C Application of legal costs legislation**

- (1) For the purposes of section 33B (5), the costs of an arbitration are to be assessed in accordance with the legal costs legislation (as defined in section 3A of the [Legal Profession Uniform Law Application Act 2014](#)).
- (2) The legal costs legislation applies accordingly with any necessary modifications. Part 7 of the [Legal Profession Uniform Law Application Act 2014](#) so applies as if the costs of the arbitration were ordered costs as defined in that Part.

**Note—**

There is no equivalent to this section in the Model Law.

**33D Costs of abortive arbitration**

- (1) Unless otherwise agreed in writing by the parties, if an arbitration is commenced but for any reason fails, the Court may, on the application of a party or the arbitral tribunal made within 6 months after the failure of the arbitration, make such orders in

relation to the costs of the arbitration as it thinks just.

- (2) For the purposes of this section, an arbitration is taken to have failed if:
  - (a) a final award is not made by the arbitral tribunal before the arbitration terminates, or
  - (b) an award made is wholly set aside by the Court.
- (3) If the failed arbitration is a related proceedings (within the meaning of section 27C), the Court may stay proceedings on the application under subsection (1) pending the determination of the other arbitration proceedings to which the failed arbitration is related.

**Note—**

There is no equivalent to this section in the Model Law.

**33E Interest up to making of award**

- (1) Unless otherwise agreed by the parties, where an arbitral tribunal makes an award for the payment of money (whether on a claim for a liquidated or an unliquidated amount), the arbitral tribunal may include in the sum for which the award is made interest, at such reasonable rate as the arbitral tribunal determines:
  - (a) on the whole or any part of the money, and
  - (b) 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) Subsection (1) does not:
  - (a) authorise the awarding of interest on interest awarded under this section, or
  - (b) apply in relation to any amount on which interest is payable as of right whether because of an agreement or otherwise, or
  - (c) affect the damages recoverable for the dishonour of a bill of exchange.

**Note—**

There is no equivalent to this section in the Model Law.

**33F Interest on debt under award**

- (1) This section applies if:
  - (a) an arbitral tribunal makes an award for the payment of an amount of money, and
  - (b) under the award, the amount is to be paid by a particular day (the **due date**), unless otherwise agreed by the parties.

- (2) The arbitral tribunal may direct that interest, including compound interest, is payable if the amount is not paid on or before the due date.
- (3) The arbitral tribunal may set a reasonable rate of interest.
- (4) The interest is payable:
  - (a) from the day immediately following the due date, and
  - (b) on so much of the money as remains unpaid.
- (5) The direction is taken to form part of the award.

**Note—**

There is no equivalent to this section in the Model Law.

## **Part 7 Recourse against award**

### **34 Application for setting aside as exclusive recourse against arbitral award** (cf Model Law Art 34)

- (1) Recourse to the Court against an arbitral award may be made only by an application for setting aside in accordance with subsections (2) and (3) or by an appeal under section 34A.

**Note—**

The Model Law does not provide for appeals as under section 34A.

- (2) An arbitral award may be set aside by the Court only if:
  - (a) the party making the application furnishes proof that:
    - (i) a party to the arbitration agreement referred to in section 7 was under some incapacity, or the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication in it, under the law of this State, or
    - (ii) the party making the application was not given proper notice of the appointment of an arbitral tribunal or of the arbitral proceedings or was otherwise unable to present the party's case, or
    - (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside, or
    - (iv) the composition of the arbitral tribunal or the arbitral procedure was not in

accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act, or

(b) the Court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State, or

(ii) the award is in conflict with the public policy of this State.

(3) An application for setting aside may not be made after 3 months have elapsed from the date on which the party making that application had received the award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The Court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside of proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

#### **34A Appeals against awards**

(1) An appeal lies to the Court on a question of law arising out of an award if:

(a) the parties agree, before the end of the appeal period referred to in subsection (6), that an appeal may be made under this section, and

(b) the Court grants leave.

(2) An appeal under this section may be brought by any of the parties to an arbitration agreement.

(3) The Court must not grant leave unless it is satisfied:

(a) that the determination of the question will substantially affect the rights of one or more of the parties, and

(b) that the question is one which the arbitral tribunal was asked to determine, and

(c) that, on the basis of the findings of fact in the award:

(i) the decision of the tribunal on the question is obviously wrong, or

(ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and

(d) that, despite the agreement of the parties to resolve the matter by arbitration, it



is just and proper in all the circumstances for the Court to determine the question.

- (4) An application for leave to appeal must identify the question of law to be determined and state the grounds on which it is alleged that leave to appeal should be granted.
- (5) The Court is to determine an application for leave to appeal without a hearing unless it appears to the Court that a hearing is required.
- (6) An appeal may not be made under this section after 3 months have elapsed from the date on which the party making the appeal received the award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal (in this section referred to as the **appeal period**).
- (7) On the determination of an appeal under this section the Court may by order:
  - (a) confirm the award, or
  - (b) vary the award, or
  - (c) remit the award, together with the Court's opinion on the question of law which was the subject of the appeal, to the arbitrator for reconsideration or, where a new arbitrator has been appointed, to that arbitrator for consideration, or
  - (d) set aside the award in whole or in part.
- (8) The Court must not exercise its power to set aside an award, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the arbitral tribunal for reconsideration.
- (9) Where the award is remitted under subsection (7) (c) the arbitrator must, unless the order otherwise directs, make the award within 3 months after the date of the order.
- (10) The Court may make any leave which it grants under subsection (3) (c) subject to the applicant complying with any conditions it considers appropriate.
- (11) Where the award of an arbitrator is varied on an appeal under this section, the award as varied has effect (except for the purposes of this section) as if it were the award of the arbitrator.

**Note—**

There is no equivalent to this section in the Model Law.

## **Part 8 Recognition and enforcement of awards**

### **35 Recognition and enforcement** (cf Model Law Art 35)

- (1) An arbitral award, irrespective of the State or Territory in which it was made, is to be recognised in this State as binding and, on application in writing to the Court, is to be

enforced subject to the provisions of this section and section 36.

- (2) The party relying on an award or applying for its enforcement must supply the original award or a copy of the original award.
- (3) If the award is not made in English, the Court may request the party to supply a translation of it into English.

**Note—**

So much of Art 35 (2) of the Model Law as provides for the translation of an award that is not in the official language of the enforcing State has been modified.

**36 Grounds for refusing recognition or enforcement** (cf Model Law Art 36)

- (1) Recognition or enforcement of an arbitral award, irrespective of the State or Territory in which it was made, may be refused only:
  - (a) at the request of the party against whom it is invoked, if that party furnishes to the Court proof that:
    - (i) a party to the arbitration agreement was under some incapacity, or the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication in it, under the law of the State or Territory where the award was made, or
    - (ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present the party's case, or
    - (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced, or
    - (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the State or Territory where the arbitration took place, or
    - (v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the State or Territory in which, or under the law of which, that award was made, or
  - (b) if the Court finds that:
    - (i) the subject-matter of the dispute is not capable of settlement by arbitration

under the law of this State, or

(ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

(2) If an application for setting aside or suspension of an award has been made to a court referred to in subsection (1) (a) (v), the Court may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the party to provide appropriate security.

## Part 9 Miscellaneous

### 37 Death of party

(1) Unless otherwise agreed by the parties, if a party to an arbitration agreement dies the agreement is not discharged (either as respects the deceased or any other party) and the authority of an arbitral tribunal is not revoked by the death but that agreement is enforceable by or against the personal representative of the deceased.

(2) Nothing in subsection (1) affects 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.

#### Note—

There is no equivalent to this section in the Model Law.

### 38 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 must, 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.

#### Note—

There is no equivalent to this section in the Model Law.

### 39 Immunity

(1) An arbitrator is not liable for anything done or omitted to be done in good faith in his or her capacity as arbitrator.

(2) An entity that appoints, or fails to appoint, a person as arbitrator is not liable in relation to the appointment, failure or refusal if done in good faith.

(3) In this section, a reference to an **arbitrator** includes an arbitrator acting as a mediator, conciliator or other non-arbitral intermediary under section 27D.

**Note—**

There is no equivalent to this section in the Model Law.

**40 Act to bind Crown**

This Act binds the Crown in right of New South Wales and, in so far as the legislative power of the Parliament of New South Wales permits, the Crown in all its other capacities.

**Note—**

There is no equivalent to this section in the Model Law.

**41 Court rules**

- (1) Rules of court may be made for carrying the purposes of this Act into effect and, in particular, for or with respect to the following:
  - (a) applications to a court under this Act and the costs of such applications,
  - (b) the payment or bringing of money into and out of a court in satisfaction of claims to which arbitration agreements apply and the investment of that money,
  - (c) the examination of witnesses before a 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,
  - (d) offers of compromise in relation to claims to which arbitration agreements apply,
  - (e) any other matter or thing for or with respect to which rules are by this Act authorised or required to be made by a court.
- (2) Subsection (1) does not limit the rule-making powers conferred on a court by any other Act.

**Note—**

There is no equivalent to this section in the Model Law.

**42 (Repealed)**

**43 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.

**Note—**

There is no equivalent to this section in the Model Law.

## **Schedule 1 Savings, transitional and other provisions**

### **1 Regulations**

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts:

    this Act

- (2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.
- (3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication on the NSW legislation website, the provision does not operate so as:
- (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or
  - (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

### **2 Savings and transitional provisions**

- (1) Subject to subclause (2):
- (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 *Commercial Arbitration Act 1984*, or a provision of that Act, is to be construed as a reference to this Act or to the corresponding provision (if any) of this Act.
- (2) If an arbitration was commenced before the commencement of this Act, the law governing the arbitration and the arbitration agreement is to be that which would have been applicable if this Act had not been enacted.
- (3) For the purposes of this clause, an arbitration is taken to have been commenced if:
- (a) a dispute to which the relevant arbitration agreement applies has arisen, and
  - (b) the arbitral tribunal has been properly constituted.

## **Schedule 2 (Repealed)**