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**FIFTH REPORT**

of the

**LAW REFORM COMMITTEE**  
of  
**SOUTH AUSTRALIA**

to

**THE ATTORNEY-GENERAL**

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**ARBITRATION ACT, 1891-1935**

1969



The Law Reform Committee of South Australia was established by Proclamation which appeared in the *South Australian Government Gazette* of 19th September, 1968. The Members are:

THE HONOURABLE MR. JUSTICE ZELLING, C.B.E., *Chairman*.  
W. A. N. WELLS, Q.C., Solicitor-General.  
S. J. JACOBS, Q.C.  
K. P. LYNCH.  
D. ST.L. KELLY.

The Secretary of the Committee is Mr. H. G. Edwards, c/o Adelaide Magistrates' Court Department, Adelaide, South Australia.

**FIFTH REPORT OF THE LAW REFORM COMMITTEE OF  
SOUTH AUSTRALIA**

To:

The Honourable R. R. Millhouse, M.P.,  
Attorney-General for South Australia.

Sir,

We have the honour to report at your request upon the Arbitration Act, 1891-1935.

We recommend that the present Act be repealed and that a new Act substantially along the lines of the draft annexed be enacted in its place.

As will be seen from the explanatory notes which accompany the draft Bill the Imperial Arbitration Act of 1950 has been taken as the prototype except that there are certain very useful sections in the United States Codes on Arbitration which we have thought fit to recommend for inclusion.

We have also of course had to depart from the English Act in that in the Australian States constitutional questions which are inherent in a Federal system obtrude themselves and these have been dealt with in the appropriate places.

We accordingly forward the draft Bill and accompanying notes for your consideration.

We have the honour to be

HOWARD ZELLING.  
W. A. N. WELLS.  
S. J. JACOBS.  
K. P. LYNCH.  
D. ST.L. KELLY.

Law Reform Committee of South Australia.

*A Bill for an Act to amend and consolidate the law relating to arbitration.*

BE IT ENACTED by the Governor of the State of South Australia, with the advice and consent of the Parliament thereof, as follows:—

## PART I

### PRELIMINARY

- Short title. 1. This Act may be cited as the "Arbitration Act 1969".
- Repeal and saving clause. 2. (1) The Arbitration Act, 1891-1935 is hereby repealed.
- (2) The repeal of the last mentioned Act shall not affect any submission to arbitration entered into or reference to arbitration made pursuant to the order of any Court where such submission was entered into or reference made prior to the passing of this Act. Any arbitration pursuant to such submission or reference may be entered upon continued and completed as if this Act had not been passed.
- Interpretation. 3. In this Act, unless the contrary intention appears:—
- "action" includes a matter or proceeding in a Court;
- "Court" means the Supreme Court of South Australia or where the amount in dispute and the subject matter thereof are within the jurisdiction of a Local Court the nearest Local Court of Full Jurisdiction;
- "Judge" means a Judge of the Court and includes in its reference to a Local Court a Special Magistrate;
- "misconduct" includes—
- (a) corruption fraud or undue influence in relation to the umpire or the arbitrators or any of them;
  - (b) evident partiality or bias in relation to the umpire or the arbitrators or any of them;
  - (c) any excess of powers or imperfect execution of powers by the arbitrators or the umpire;
  - (d) failure to make a mutual final and definite award upon the subject matter by the arbitrators or the umpire;
- "submission" means an agreement wholly or partly in writing to submit present or future differences to arbitration whether an arbitrator is named therein or not contained in a contract to which this Act applies.
- Application of Act. 4. (1) This Act applies to submissions and references:—
- (a) where the subject matter thereof is within South Australia;
  - (b) where the contract was made in South Australia;

- (c) where the proper law of the contract is the law of South Australia;
- (d) where the parties have expressly submitted to arbitration in South Australia or have expressly contracted to enter into a submission to arbitration in this State;
- (e) where the reference is made by the Court.

(2) Nothing in this Act shall affect the operation of Part V of the Hire-Purchase Agreements Act, 1960-1966.

5. (1) This Act shall bind the Crown.

Act to bind Crown.

(2) Any award made against the Crown or any instrumentality of the Crown may be paid and satisfied in the same matter as judgments against the Crown are paid and satisfied pursuant to section 77 of the Supreme Court Act, 1935-1967 and the public revenue of the State is appropriated accordingly for such purpose.

6. Nothing in this Act shall affect any original jurisdiction conferred by the Constitution or the Parliament of the Commonwealth on the High Court of Australia.

Saving of jurisdiction of High Court.

## PART II

### GENERAL PROVISIONS AS TO ARBITRATION

7. (1) A submission unless a contrary intention is expressed therein shall be valid irrevocable and enforceable except upon such grounds as exist at law or in equity for the revocation of any such submission or by the leave of the Court or a Judge thereof.

Revocation.

(2) The Court or a Judge thereof may order that a submission to arbitration shall cease to have effect as regards any particular dispute where the matter in dispute forms part of a transaction or a series of transactions which are the subject of litigation in that Court.

(3) The authority of an arbitrator or umpire appointed under a submission shall unless a contrary intention is expressed therein or the submission is revoked under paragraph (1) hereof be irrevocable except by leave of the Court or a Judge thereof.

8. Unless a contrary intention is expressed in a submission the parties thereto are deemed to have contracted on the basis that every question of law or fact or of mixed law and fact necessary to a decision is included within the authority of the arbitrator.

Provisions implied in submission.

9. (1) A submission shall not be discharged by the death of any party thereto either as respects the deceased or any other party but shall in such an event be enforceable by or against the personal representative of the deceased.

Effect of death of party.

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

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

**Bankruptcy.** 10. Subject to the Bankruptcy Act, 1966 of the Parliament of the Commonwealth where it is provided by a term in a contract to which a bankrupt is a party that any differences arising thereout or in connection therewith shall be referred to arbitration the said term shall unless the trustee in bankruptcy disclaims the contract be enforceable by or against him so far as relates to any such difference.

**Power to stay proceedings.** 11. Notwithstanding anything contained in section 4 of this Act if any party to a submission or any person claiming through or under him commences any legal proceedings in any court against any other party to the submission or any person claiming through or under him in respect of any matter agreed to be referred any party to those legal proceedings may at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings apply to that Court to stay the proceedings and that Court or a Judge thereof if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submissions and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration may make an order staying the proceedings.

**Interpleader.** 12. Where relief by way of interpleader is granted and it appears to the Court that the claims in question are matters to which a submission to which the claimants are parties applies the Court may direct the issue between the claimants to be determined in accordance with the submission.

**Admiralty proceedings.** 13. If the basis of jurisdiction be a cause of action in rem which would otherwise be justiciable in admiralty any party to a submission may take proceedings in admiralty to seize any vessel or other property of another party thereto according to the usual course of proceedings in admiralty and the Court may then direct the parties to proceed with an arbitration upon the submission and shall retain jurisdiction to make the award a rule of Court.

### PART III ARBITRATORS AND UMPIRES

**Presumption of single arbitrator.** 14. Unless a contrary intention is expressed therein every submission shall if no other mode of reference is provided be deemed to include a provision that the reference shall be to a single arbitrator.

**Supply of vacancy.** 15. Where a submission provides that the reference shall be to two or more arbitrators then unless a contrary intention is expressed therein—  
(a) if any of the arbitrators dies refuses to act or is or becomes incapable of acting the party who appointed him may appoint a new arbitrator in his place;  
(b) if on such a reference one party fails to appoint an arbitrator either originally or by way of substitution as aforesaid for seven clear days after the other party having appointed his arbitrator has served the party making default with notice to make the appointment the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference and his award shall be binding on both parties as if he had been appointed by consent.

Provided that the Court or a Judge thereof may set aside any appointment made in pursuance of this section.

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

(2) If the arbitrators fail to appoint an umpire for seven days after the date of their own appointment any party to the submission may apply to the Court or a Judge thereof to appoint an umpire.

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

(4) At any time after the appointment of an umpire however appointed the Court or a Judge thereof may on the application of any party to the reference and notwithstanding anything to the contrary in the submission order that the umpire shall enter upon the reference in lieu of the arbitrators and as if he were a sole arbitrator.

(5) Unless a contrary intention is expressed therein every submission to an uneven number of arbitrators shall be deemed to include a provision that the arbitrators may act by a majority decision.

17. In any of the following cases—

Powers of Court.

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

(b) if an appointed arbitrator refuses to act or is incapable of acting or dies and the submission does not show that it was intended that the vacancy should not be supplied and the parties do not supply the vacancy;

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

(d) where an appointed umpire or arbitrator refuses to act or is incapable of acting or dies and the submission does not show that it was intended that the vacancy should not be supplied and the parties or arbitrators do not supply the vacancy;

any party may serve the other parties or the arbitrators as the case may be with a written notice to appoint or as the case may be concur in appointing an arbitrator or umpire and if the appointment is not made within seven clear days after the service of the notice the Court or a Judge thereof may on application by the party who gave the notice appoint an arbitrator or umpire who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties.



PART IV  
PROCEEDINGS

Conduct of  
proceedings.

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

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

(3) An arbitrator or umpire shall unless a contrary intention is expressed in the submission have power to administer oaths to or take the affirmation of the parties to and witness on a reference under the submission.

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

(5) Any party to a reference under a submission may sue out a writ of subpoena ad testificandum or a writ of subpoena duces tecum but no person shall be compelled under any such writ to produce any document which he could not be compelled to produce on the trial of an action and the Court or a Judge thereof may order that a writ of subpoena ad testificandum or of subpoena duces tecum shall issue to compel the attendance before an arbitrator or umpire of a witness.

(6) The Court or a Judge thereof may also order that a writ of habeas corpus ad testificandum shall issue to bring up a prisoner for examination before an arbitrator or umpire.

(7) The Court or a Judge thereof shall have for the purpose of and in relation to a reference the same power of making orders in respect of—

- (a) security for costs;
- (b) discovery of documents and interrogatories;
- (c) the giving of evidence by affidavit;
- (d) examination on oath of any witness before an officer of the Court or any other person and the issue of a commission or request for the examination of a witness out of the jurisdiction;
- (e) the preservation interim custody or sale of any goods which are the subject matter of the reference;
- (f) securing the amount in dispute in the reference;

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

(h) interim injunctions or the appointment of a receiver; as it has for the purpose of and in relation to an action or matter in the Court.

Provided that nothing in this subsection shall be taken to prejudice any power which may be vested in an arbitrator or umpire of making orders with respect to any of the matters aforesaid.

19. Any person who wilfully and corruptly gives false evidence before any referee, arbitrator, or umpire shall be guilty of perjury, as if the evidence had been given in open court, and may be dealt with, prosecuted, and punished accordingly. Penalty for perjury.

## PART V AWARDS

20. (1) Subject to the provisions of subsection (2) of section twenty-nine of this Act and anything to the contrary in the submission an arbitrator or umpire shall have power to make an award at any time. Time for making award.

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

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

For the purposes of this subsection the expression "proceeding with a reference" includes in a case where two arbitrators are unable to agree giving notice of that fact to the parties and to the umpire.

21. Unless a contrary intention is expressed therein every submission shall where such a provision is applicable to the reference be deemed to contain a provision that the arbitrator or umpire may if he thinks fit make an interim award and any reference in this Part of this Act to an award includes a reference to an interim award. Interim awards.

22. Unless a contrary intention is expressed therein every submission shall where such a provision is applicable to the reference be deemed to contain a provision that the arbitrator or umpire shall have the same power as the Court or a Judge thereof to order specific performance of any contract other than a contract relating to land or any interest in land. Specific performance.

Awards to be final.

23. Unless a contrary intention is expressed therein every submission shall where such a provision is applicable to the reference be deemed to contain a provision that the award to be made by the arbitrator or umpire shall be final and binding on the parties and the persons claiming under them respectively.

Power to correct slips.

24. Unless a contrary intention is expressed in the submission the arbitrator or umpire shall have power to correct in an award any clerical mistake or error arising from any accidental slip or omission.

Costs.

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

(2) Any costs directed by an award to be paid shall unless the award otherwise directs be taxable in the Court.

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

(4) A solicitor shall have a charge for his taxed costs on any property recovered or preserved through his instrumentality to the same extent as he would have if the arbitration had been an action in the Court and the Court may make such orders in relation to the taxation of his costs and the payment thereof out of the property as it thinks just provided that no order shall be made if the right to recover the costs is barred by any Statute of limitations. No conveyance transfer or other dealing with any such property shall operate to defeat such a charge except in the case of a sale for valuable consideration to a *bona fide* purchaser without notice of the charge.

Taxation of arbitrator's or umpire's fees.

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

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

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

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

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

## PART VI

### SPECIAL CASES REMISSION CORRECTION AND SETTING ASIDE OF AWARDS AND OTHER POWERS OF THE COURT

28. (1) An arbitrator or umpire may and shall if so directed by the Court state— Case stated.

- (a) any question of law arising in the course of the reference; or
- (b) an award or any part of an award in the form of a special case for the decision of the Court.

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

29. (1) In all cases of reference to arbitration the Court or Judge thereof may from time to time remit the matters referred or any of them to the reconsideration of the arbitrator or umpire. Power to remit award.

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

30. The Court may make order modifying or correcting the award upon the application of any part to the application— Power to correct award.

- (a) where there is an evident material miscalculation of figures or an evident material mistake in the description of any person thing or property referred to in the award;
- (b) where the arbitrators have awarded upon a matter not submitted to them unless it is a matter not affecting the merits of the decision upon the matter submitted;
- (c) where the award is imperfect in matter of form not affecting the merits of the controversy.

31. (1) Where an arbitrator or umpire has misconducted himself or the proceedings the Court or a Judge thereof may remove him. Misconduct by arbitrator.

(2) Where an arbitrator or umpire has misconducted himself or the proceedings or an arbitration or award has been improperly procured the Court or a Judge thereof may set the award aside.

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

32. (1) Where a submission provides that disputes which may arise in the future between them shall be referred to an arbitrator named or designated in the submission and after a dispute has arisen any party applies on the ground that the arbitrator so named or designated is not or may not be impartial for leave to revoke the authority of the arbitrator or for an injunction to restrain any other party or the arbitrator from proceeding with the arbitration it shall not be a ground for refusing the application that the said party at the time when he made the submission knew or ought to have known that the arbitrator by reason of his relation towards any other party to the submission or of his connection with the subject referred might not be capable of impartiality.

(2) Where a submission between any parties provides that disputes which may arise in the future between them shall be referred to arbitration and a dispute which so arises involves the question whether any such party has been guilty of fraud the Court or a Judge thereof shall so far as may be necessary to enable the question to be determined by the Court or a Judge thereof have power to order that the submission shall cease to have effect and power to give leave to revoke the authority of any arbitrator or umpire appointed by or by virtue of the submission.

(3) In any case where by virtue of this section the Court or a Judge thereof has power to order that a submission shall cease to have effect or to give leave to revoke the authority of an arbitrator or umpire the Court or a Judge thereof may refuse to stay any action brought in breach of the submission.

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

(2) Where the authority of an arbitrator or arbitrators or umpire is revoked by leave of the Court or a Judge thereof or a sole arbitrator or all the arbitrators or an umpire who has entered on the reference is or are removed by the Court or a Judge thereof the Court or a Judge thereof may on the application of any party to the submission either—

- (a) appoint a person to act as sole arbitrator in place of the person or persons removed; or
- (b) order that the submission shall cease to have effect with respect to the dispute referred.

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

(4) Where it is provided (whether by means of a provision in the submission or otherwise) that an award under a submission shall be a condition precedent to the bringing of an action with respect to any matter to which the submission applies, the Court or a Judge thereof if it orders (whether under this section or under any other enactment) that the submission shall cease to have effect as regards any particular

dispute may further order that the provision making an award a condition precedent to the bringing of an action shall also cease to have effect as regards that dispute.

(5) Where it appears to the Court at or before the hearing of any action that by reason of the existence of an arbitration agreement or a submission to arbitration some issues which might otherwise arise in the action or some persons who might otherwise be made parties to the action are bound to go to arbitration and it is more convenient and beneficial to have all the issues disposed of or all the parties before it in the same action or to do both of these things as the case may be the Court or a Judge thereof may make an order that such arbitration agreement or submission shall cease to have effect with regard to that action and the action shall be heard as if such arbitration agreement or submission had not been entered into.

33a. Where the Court is satisfied that a contract containing a submission (whether or not an award upon such submission is by the contract made a condition precedent to any cause of action between the parties to the contract) is such that any person dealing with a supplier of goods or services in a business or industry cannot ordinarily obtain goods or services the subject matter of the contract from that supplier except by entering into a contract containing that submission, the Court shall, unless it is proved that the justice of the case requires the submission to be enforced, order that the submission shall not bind or shall cease to bind the parties to the contract.

34. An award on a submission may by leave of the Court or a Judge thereof be enforced in the same manner as a judgment or order to the same effect and where leave is so given judgment may be entered in terms of the award. Enforcement of award.

35. Where the terms of a submission to refer future disputes to arbitration provide that any claims to which the submission applies shall be barred unless notice to appoint an arbitrator is given or an arbitrator is appointed or some other step to commence arbitration proceedings is taken within a time fixed by the submission and a dispute arises to which the submission applies the Court or a Judge thereof if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused and notwithstanding that the time so fixed has expired may on such terms if any as the justice of the case may require but without prejudice to the provisions of any enactment limiting the time for the commencement of arbitration proceedings extend the time for such period as it thinks proper. Power to extend time.

36. (1) Any order made under this Part of this Act may be made on such terms as to costs or otherwise as the authority making the order thinks just. Costs.

(2) Any person taking proceedings under this Act in the Supreme Court which could have been taken in the nearest Local Court of Full Jurisdiction shall unless the Supreme Court for good cause shown otherwise orders recover no greater costs than he would have received if the proceedings had been taken in such Local Court.

Severance.

37. If any provision of this Act or the application thereof to any person or circumstance is held to be invalid the invalidity shall not affect any other provisions or applications of the Act which can be given effect to without the invalid provision or application and the provisions of this Act shall be deemed severable accordingly.

## PART VII

### REFERENCES UNDER ORDER OF COURT

Reference for report.

38. (1) Subject to rules of court and to any right to have particular cases tried by a jury, the Court or a Judge thereof may refer any question arising in any action, cause, or matter (other than a criminal proceeding) for inquiry or report to any special referee.

(2) The report of a special referee upon such reference may be adopted wholly or partially by the Court or a Judge thereof, and if so adopted may be enforced as a judgment or order to the same effect.

Power to refer in certain cases.

39. In any action cause or matter (other than a criminal proceeding)—

(a) if all the parties interested who are not under disability consent; or

(b) if the action cause or matter requires any prolonged examination of documents or any scientific or local investigation which cannot in the opinion of the Court or a Judge conveniently be made before a jury or conducted by the Court through its other ordinary officers; or

(c) if the question in dispute consists wholly or in part of matters of account;

the Court or a Judge thereof may at any time order the whole section cause or matter or any question or issue of fact arising therein to be tried before a special referee or arbitrator respectively agreed on by the parties or before an officer of the Court.

Powers of referees and arbitrators.

40. (1) In all cases of reference to a special referee or arbitrator under an order of the Court or a Judge in any action cause or matter the special referee or arbitrator shall be deemed to be an officer of the Court, and shall have such authority, and shall conduct the reference in such manner as may be prescribed by rules of court and subject thereto as the Court or a Judge thereof may direct.

(2) The report or award of any special referee arbitrator or officer shall unless set aside by the Court or a Judge thereof be equivalent to the verdict of a jury.

Remuneration.

(3) The remuneration to be paid to any special referee or arbitrator to whom any matter is referred under order of the Court or a Judge shall be determined by the Court or a Judge thereof.

## PART VIII

### ENFORCEMENT OF FOREIGN AWARDS

Effect of foreign awards.

41. (1) A foreign award shall, subject to the provisions of this Part of this Act, be enforceable in South Australia either by action or in the same manner as the award of an arbitrator is enforceable by virtue of section thirty-four of this Act.

(2) Any foreign award which would be enforceable under this Part of this Act shall be treated as binding for all purposes on the persons as between whom it was made and may accordingly be relied on by any of those persons by way of defence set off or otherwise in any legal proceedings in South Australia and any references in this Part of this Act to enforcing a foreign award shall be construed as including references to relying on an award.

42. (1) In order that a foreign award may be enforceable under this Part of this Act it must have—

Conditions for enforcement of foreign awards.

- (a) been made in pursuance of an agreement for arbitration which was valid under the law by which it was governed;
- (b) been made by the tribunal provided for in the agreement or constituted in manner agreed upon by the parties;
- (c) been made in conformity with the law governing the arbitration procedure;
- (d) become final in the country in which it was made;
- (e) been in respect of a matter which may lawfully be referred to arbitration under the law of South Australia;

and the enforcement thereof must not be contrary to the public policy or the law of South Australia.

(2) Subject to the provisions of this subsection a foreign award shall not be enforceable under this Part of this Act if the Court dealing with the case is satisfied that—

- (a) the award has been annulled in the country in which it was made; or
- (b) the party against whom it is sought to enforce the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case, or was under some legal incapacity and was not properly represented; or
- (c) the award does not deal with all the questions referred or contains decisions on matters beyond the scope of the agreement for arbitration.

Provided that if the award does not deal with all the questions referred the Court may if it thinks fit either postpone the enforcement of the award or order its enforcement subject to the giving of such security by the person seeking to enforce it as the Court may think fit.

(3) If a party seeking to resist the enforcement of a foreign award proves that there is any ground other than the non-existence of the conditions specified in paragraphs (a), (b) and (c) of subsection (1) of this section or the existence of the conditions specified in paragraphs (b) and (c) of subsection (2) of this section entitling him to contest the validity of the award the Court may if it thinks fit either refuse to enforce the award or adjourn the hearing until after the expiration of such period as appears to the Court to be reasonably sufficient to enable that party to take the necessary steps to have the award annulled by the competent tribunal.

43. (1) The party seeking to enforce a foreign award must produce—

Evidence.

- (a) the original award or a copy thereof duly authenticated in manner required by the law of the country in which it was made; and



(b) evidence proving that the award has become final; and

(c) such evidence as may be necessary to prove that the award is a foreign award and that the conditions mentioned in paragraphs (a), (b) and (c) of subsection (1) of the last foregoing section are satisfied.

(2) In any case where any document required to be produced under subsection (1) of this section is in a foreign language it shall be the duty of the party seeking to enforce the award to produce a translation certified as correct by a diplomatic or consular agent of the country to which that party belongs, or certified as correct in such other manner as may be sufficient according to the law of South Australia.

Meaning of  
"final award".

44. For the purposes of this Part of this Act an award shall not be deemed final if any proceedings for the purpose of contesting the validity of the award are pending in the country in which it was made.

Saving.

45. (1) Nothing in this Part shall apply to any award if—

(a) the subject matter of the award is covered by section 4 of this Act; and

(b) the party against whom it is sought to enforce the award has taken proper steps to claim an arbitration under this Act or has taken proceedings in any court of competent jurisdiction in South Australia which have not been stayed under section 11 hereof.

(2) Subject to the last preceding subsection nothing in this Part of the Act shall prejudice any right which any person would have had to enforce any award or of availing himself in South Australia of any award if this Act had not been enacted.

## PART IX

### RULES OF COURT AND REGULATIONS

Rules of  
Court.

46. The Judges of the Supreme Court or any three or more of them may make rules of Court regulating the procedure under this Act in all Courts in South Australia and prescribing any fees to be taken in connection therewith.

Regulations.

47. The Governor may make regulations not inconsistent with this Act prescribing all matters which are necessary or convenient to be prescribed for carrying this Act into effect.

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

Governor

## LAW REFORM COMMITTEE OF SOUTH AUSTRALIA

### NOTES TO ACCOMPANY DRAFT BILL FOR A NEW STATE ACT REGULATING COMMERCIAL ARBITRATION

I have drawn this for the consideration of the Law Reform Committee in the form of a bill in the first instance because I had already drawn a Federal bill for this purpose and it seemed to me easier if I were to set it out in bill form together with a note of the sources from which it was taken, rather than do the type of position paper which I have done to delimit the scope of the subject, in the previous matters in which I have circulated notes among the members of the Committee.

Basically our Act in South Australia is the Imperial arbitration Act, 1889, 52 & 53 Vic. c. 49 together with two or three of the intervening amendments to the Imperial Act. The latest Imperial Act the Arbitration Act, 1950, 13 & 14 Geo. VI c. 27 which has not been adopted in South Australia has been the principal quarry for this Act although as may be seen from the notes I have used United States sources as well as other States Acts in the drafting.

Turning now to the specific sections of the Act:—

1. *Section 1* is simply the title.
2. *Section 2* is the usual repeal and saving clause.
3. *Section 3*—the interpretation clause—includes a definition of “misconduct” which is taken from the United States Federal Code on Commercial Arbitration.
4. *Section 4* is new and is deliberately done this way to widen the jurisdiction. In private international law the grounds of jurisdiction are two:—either an express submission to the jurisdiction in the contract or the proper law of the contract is the law of South Australia. It has always seemed to me and to a number of other commentators that if the subject matter of the dispute is within South Australia and it can be controlled from South Australia then in the interests of the commercial community South Australia should assume jurisdiction and I have deliberately altered the law by putting in subclause (a) to cover this point. Subsection (2) deals with the existing treatment of arbitration clauses in insurance policies where the insurance policy insures goods the subject of a hire-purchase agreement.
5. *Section 5*. The English, New South Wales and Victorian Acts all bind the Crown. Subsection (2) is my own drafting and I should be glad if it could be looked at carefully. It deals with a wellknown problem, namely how does one enforce an award against the Crown. The textbooks tentatively suggest that petition of right is the proper answer but the cases when examined do not bear this out and in any case I doubt if an award on an arbitration is within section 74 of our Supreme Court Act. In order to resolve these matters I have assimilated the treatment of enforcement of an award to the way in which a judgment against the Crown is now treated under section 77 of the Supreme Court Act.

6. *Section 6* is necessary because it is to my mind impossible on constitutional grounds to oust the jurisdiction of the High Court of Australia in the cases in which it exists. As this cannot be ousted by statute it is almost certain that it cannot be ousted by a private agreement. There is only one inconclusive discussion of this matter by the early High Court but this would seem to be the probable answer and I have inserted section 6 accordingly.
7. *Section 7*. Subsection (1) is taken from the United States Federal Code on Commercial Arbitration. Subsection (2) is new but deals with a problem which is frequently encountered, namely that there are third, fourth and fifth parties to a transaction and some of them have arbitration clauses and therefore the whole dispute cannot be litigated in the Court and it takes several hearings before several different tribunals in which the judgments of one and the awards of the other are probably not even evidence in the corresponding proceeding before the arbitrator or the Judge as the case may be in the next step along the line. This section should be read with section 33 (5) of my bill which deals with the other problem where some issue in the action or some one or more parties to the action are in fact bound by arbitration clauses. This arises frequently: for example, in the standard Architects' Contract where one of the grounds of argument may be a products liability argument which is not bound by the arbitration clause in the architects' agreement and one would otherwise have an action at law and an arbitration on the same facts going at the same time which does not endear us to the commercial community.
8. *Section 8* is taken from the United States Model Code on Arbitration.
9. *Section 9* comes from section 2 of the Imperial Act of 1950.
10. *Section 10* is a modification of section 3 of the Imperial Act of 1950.
11. *Section 11* is largely section 4 (1) of the 1950 Act.
12. *Section 12* is section 5 of the 1950 Act.
13. *Section 13* deals with a wellknown problem in Admiralty. If one has an arbitration clause in say a salvage agreement, does that take away the whole jurisdiction of the Court including the jurisdiction to arrest a vessel or not. This has been canvassed to my knowledge on a number of occasions and the answer could prove to be very costly to somebody arresting a ship if in fact the whole jurisdiction of the Court is ousted by the arbitration clause. The section is taken from the United States Federal Code on Commercial Arbitration with some slight alterations because their concept of admiralty jurisdiction is wider than ours.
14. *Section 14* is section 6 of the English Act of 1950.

15. *Sections 15 and 16* are in effect sections 7 and 8 of the English Act of 1950 with amendments because Australian practice differs from the English. The English Act assumes that there never would be more than three arbitrators. I have met in practice references to four and five arbitrators and whilst I think such a reference completely unwieldy there are certain trades which do not think so and one must therefore give effect to what does in fact happen in Australia as distinct from England and the drafting has accordingly been altered to provide for any number of arbitrators.
16. *Section 17* is in effect section 10 of the English Act of 1950.
17. *Section 18*. Subsection (1) to (3) are from section 12 of the English Act. Subsection (4) is taken from the New South Wales Arbitration Act. Subsections (5), (6) and (7) are taken from the English Act.
18. *Section 19* is taken from section 22 of our present Arbitration Act, 1891-1935.
19. *Section 20* is the English Act of 1950 section 13.
20. *Sections 21-24* are sections 14 to 17 of the English Act of 1950.
21. *Section 25*. Subsections (1) to (3) are as in the Imperial Act of 1950. Subsection (4) is an expanded form of the English subsection (5) which merely sets out a reference to section 69 of the Imperial Solicitors Act, 1932. As there is no analogous section in our Legal Practitioners Act at present, although there will be one when the new Act becomes law, I have set the right out in extenso.
22. *Sections 26 and 27* are sections 19 and 20 of the Imperial Act of 1950.
23. *Section 28* deals with the wellknown problems which at present exist as to when one can state a case and over what matters.
24. *Section 29* is section 22 of the Imperial Act of 1950.
25. *Section 30* has no Australian or English equivalent but would be very useful in many cases. It is taken from section 11 of the American Federal Code on Commercial Arbitration.
26. *Section 31* is section 23 of the Imperial Act of 1950.
27. *Sections 32, 33, 34 and 35* are in substance sections 24, 25, 26 and 27 of the Imperial Act of 1950.
28. *Section 33a* is new. It follows in part a Law Society submission made through the Law Reform Committee of the Law Society and in part is due to the consideration by this Committee of the difficulties inhering in contracts of adhesion.
29. *Section 36*. Subsection (1) is the English section 28. Subsection (2) is taken from section 15 of the existing South Australian Act.

30. *Section 37* relating to severance has no analogue in the Australian Acts and is taken from section 22 of the United States Model Commercial Code.
31. *Sections 38-40* are sections 11, 12 and 13 of our present Act.

Part VII—dealing with the enforcement of foreign awards—is in England made conditional on reciprocal legislation in the other country. I have found reciprocity legislation in other instances spotty in that one State or another will accept and another will not and in any case one has frequently to bargain about the form of our own legislation before getting an agreement to reciprocate, and it seemed to me a great deal easier to set out a code for the enforcement of foreign awards and hope that it will receive general acceptance in Australia in due course. It is taken with amendments from the English Act of 1950 Part II.
32. *Section 41* is with amendments section 36 of the English Act.
33. *Section 42* is with amendments section 37 of the English Act.
34. *Section 43* is section 38 of the English Act.
35. *Section 44* is section 39 of the English Act.
36. *Section 45* is based on section 40 of the English Act but departs substantially from it in wording to cover the different position in South Australia.
37. *Sections 46 and 47* are the usual rules of Court and regulation making powers which are necessary in any Act of this kind.