

QUEENSLAND

A REPORT OF THE LAW REFORM COMMISSION

ON A BILL TO CONSOLIDATE THE LAW

RELATING TO

ARBITRATION

Q. L. R. C. 4

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To the Honourable P. R. Delamothe, O. B. E., M. L. A.,
Minister for Justice and Attorney-General,
BRISBANE.

Item 7 in Part B of the approved programme of the Law Reform Commission requires the Commission:-

"To examine the law relating to the determination
"of disputes by commercial arbitration with a view
"to preparing an improved and modern Arbitration
"Act."

The enclosed draft Bill and Commentary represent the recommendations of the Law Reform Commission on this subject.

A working paper on this matter has been circulated to persons and bodies believed to be interested from whom comment was invited. A number of suggestions and recommendations received in answer thereto have been embodied in the draft Bill.

In Australia at the present time there is no general code regulating Commercial Arbitrations. In most States legislation in regard thereto is based on the Arbitration Act 1889 (52 & 53 Vic. c. 49) U.K. Although research has not disclosed any State Act based on the latest legislation, i. e. the Arbitration Act 1950 (14 Geo. VI, c. 27), some of the States have adopted a number of the (but not always the same) amendments of the 1889 Act passed between that date and the enactment of the new Act in 1950. Furthermore, a draft Bill for a new South Australian Act based on the U.K. Act of 1950 has recently been prepared by the Law Reform Committee of South Australia and is at present under consideration in that State. The Arbitration Act 1950 purports to be a consolidation without amendment of four earlier U.K. Acts:- The Arbitration Act 1889; The Arbitration Clauses (Protocol) Act 1924 (which was only concerned with staying certain legal proceedings); the Arbitration (Foreign Awards) Act 1930 (which was only concerned with procedure for enforcing certain foreign awards); and the Arbitration Act 1934 (which amended and supplemented the 1889 Act).

In Victoria the law was consolidated in the "Arbitration Act 1958" and in New South Wales in the "Arbitration Act 1902-1957". In South Australia the existing legislation is contained in the "Arbitration Act 1891-1934", whilst in Queensland it is contained in sections 2-21 of the Interdict Act of 1867.

The Interdict Act of 1867 was modelled on the Act of 1697 (9 & 10 Wm. III, c. 15) as amended by the Common Law Procedure Acts 1833 and 1854 (3 & 4 Wm. IV, c. 42 and 17 & 18 Vic. c. 125) and since 1867, at least in so far as the sections dealing with arbitration are concerned, has remained unaltered.

From time to time both the Bar Association of Queensland and the Queensland Law Society have received requests, not only from their own members, but also from several other organisations, for assistance in formulating more up-to-date arbitration legislation and the members of this Commission concur in the view already expressed by the above bodies, that the existing arbitration legislation in Queensland is completely archaic in the light of present day commercial practice.

The accompanying draft Bill is based on the present U.K. legislation, the Arbitration Act 1950. In addition, assistance has been derived from The United States Federal Code on Commercial Arbitration and The United States Model Code on Arbitration.

W. B. Campbell. Chairman

Raymond Smith Member

B. H. Anderson Member

[Signature] Member

BRISBANE
8th June, 1970.

COMMENTARY

An arbitration may be defined as the reference of a dispute or difference between not less than two parties, for determination, after hearing both sides in a judicial manner, by a person or persons other than a Court of competent jurisdiction - (Halsbury's Laws of England, 3rd Ed. Vol. 2, p. 2).

Arbitrations properly so called arise either out of an agreement between parties, out of the terms of an Act of Parliament, or out of some other instrument of statutory force. Where they are not otherwise defined by law, the subject matter of the reference, and the authority of the arbitrator in references arising out of an agreement between the parties, derive from and are prescribed by the agreement of reference.

In references under an Act of Parliament, the subject matter of the reference is prescribed by, and the authority of the arbitrator is derived from, the particular statute. In some instances a statute may expressly exclude the application of the existing arbitration legislation or render its application dependent on the agreement of the parties; however, in all other cases of what may be called statutory arbitrations, the provisions of the arbitration legislation are applicable, just as if the statute giving rise to the arbitration were itself a submission, except in so far as those provisions may be inconsistent with the particular statute regulating the arbitration in question.

The essence of the type of arbitration with which this Bill is concerned is that some dispute is referred by the parties for determination and settlement to a tribunal of their own choosing, instead of to a Court. However, in order that such a method of settling disputes shall be effective, it is necessary that some assistance should be provided by the ordinary machinery of the law. In particular, recourse to this machinery may be necessary for enforcing the decision of the arbitral tribunal. In consequence, some degree of control by the Courts inevitably accompanies the official status thus afforded to duly constituted arbitrations.

Any justiciable issue that may be triable civilly is susceptible of being referred to arbitration. A fair test is whether the difference can be compromised lawfully by way of accord and satisfaction. In consequence an indictment for an offence of a public nature cannot be the subject of a submission to arbitration, nor can a dispute arising out of an illegal contract. Neither, it seems, can any agreement purporting to give an arbitrator the right to give a judgment in rem, be referred.

In as much as arbitrations differ from legal proceedings proper only in the choice of a tribunal, all ordinary legal defences are available. The parties to an arbitration may, to a large degree, determine the powers of the arbitrator, the procedure to be followed and the constitution of the arbitral tribunal.

The accompanying Bill constitutes a code governing such matters. However, many of its provisions may be excluded by agreement between the parties, and it is possible for the parties themselves, either by design or by inadvertence, so to arrange matters that an arbitration will never come within many of the compulsory provisions of the Bill.

Specific Clauses of the Bill.

PART I - PRELIMINARY

1. Short Title.

2. Repeal and Saving Clause. It is necessary to provide not only for arbitrations commenced before the Bill becomes an Act, but also for arbitrations commenced after the Bill becomes an Act where the agreement to arbitrate was made prior thereto; e.g. an arbitration clause in a Contract entered into prior to the Bill becoming an Act.

3. Interpretation. Jurisdiction is given in the Bill both to the Supreme Court and to the District Court. Attention is drawn in particular to the two definitions "Imperfect execution of powers", which becomes necessary because of the provisions of clause 23, and "misconduct" which has been adapted from The United States Federal Code on Commercial Arbitration. The latter definition is necessary because of the provisions of clause 31.

In the U.K. legislation an agreement to submit disputes to arbitration was, until 1934, almost invariably called a "submission". So far as concerns written agreements, however, this expression has since that date been superseded by the expression "arbitration agreement", and this expression is used in the Arbitration Act 1950. Both the Victorian and New South Wales Statutes have retained "submission", likewise the South Australian Bill. In the enclosed Bill, however, the expression "agreement to arbitrate" has been preferred.

4. Application of Act. The reservations are necessary because of the specific references to arbitration in the three Acts. It is not the intention of the Bill to seek to circumvent any legislation where the legislature has either expressly excluded arbitration or specifically defined the manner in which it should operate.

5. Act to bind Crown. The Crown is bound by the terms of an agreement to arbitrate and in consequence the provisions of this Bill will apply to the Crown. Both the U.K. Act and those of most other Australian States likewise bind the Crown.

PART II - GENERAL PROVISIONS AS TO
ARBITRATION

6. Revocation. The authority of an arbitrator or umpire, who has been appointed by virtue of an agreement to arbitrate cannot be revoked except by leave of the Court or a Judge; unless the agreement expresses a contrary intention.

Where there is provision for each of the parties to appoint an arbitrator and for the arbitrators in their turn to appoint an umpire, the Court has no power to revoke an appointment against the will of the appointing party. It could in a proper case give leave for that party to revoke an appointment: Frota Nacional de Petroleiros v. Skibs Aktieselskapet Thorsholm (1957); 1 Lloyds Rep. 1 at p. 5.

Subclause (1) follows the U.K. Act.

Subclauses (2) and (3) are new and deal with two problems frequently encountered, namely that there may be third and other parties to a transaction or there may be different transactions between the same parties. If some of the transactions do not involve arbitration clauses, this may have the consequence that the whole dispute or series of disputes cannot be litigated in Court.

In considering the exercise by the Court of the power of revocation it must not be forgotten that arbitration is a particular method of settling disputes. Parties not wishing to avail themselves of the normal process of the law, know, or at least ought to know, that in referring a dispute to arbitration they take the arbitrator for better or for worse, and that, subject to the particular provision of the reference, his decision is final both as to fact and law. In many cases parties prefer arbitration for these very reasons. The grounds upon which leave to revoke may be given may broadly be grouped under the following headings:-

- (a) Excess or refusal of jurisdiction by arbitrator.
- (b) Misconduct of arbitrator.
- (c) Disqualification of arbitrator.
- (d) Charges of fraud.
- (e) Exceptional cases.

7. Death of party. Except in the few cases where the maxim actio personalis moritur cum persona still applies, the authority of the arbitrator is not revoked and the agreement to arbitrate is not discharged by the death of any party.

8. Bankruptcy. The bankruptcy of a party to an agreement to arbitrate does not of itself operate as a revocation of the agreement, and the trustee in bankruptcy has no power to revoke it. The situation is otherwise if the trustee disclaims the contract. Neither the Victorian nor New South Wales statutes appear to deal with the question of bankruptcy.

9. Power to stay proceedings. For the Court to have power to exercise the discretion conferred upon it by the clause, there must have been a valid agreement between the parties to submit to arbitration; which implies that there must be a valid "agreement to arbitrate" within clause 3.

Where a statute provides that disputes of a particular type shall be settled by arbitration, the Court cannot try such a dispute: see Norwich Corporation v. Norwich Electric Tramways Co. (1906) 2 K.B. 119.

The effect of clause 9 is that, apart from any prohibition in any other relevant statute, a party to a contract embodying a reference of disputes to arbitration retains a right to bring an action in respect of these disputes and the Court has jurisdiction to determine such disputes. However, if the requisite procedure is followed the Court has a discretion to try such disputes or stay the proceedings.

Subclause (2) eliminates the operation of the "Scott v. Avery" clauses (see the similar effect in s. 25(4) of the Arbitration Act of 1950 (U.K.)).

10. Interpleader. On an interpleader summons the Court has an analogous power, if the claimants have agreed to refer the claims to arbitration, to direct the issue between the claimants to be determined in accordance with the agreement to arbitrate. The discretion in this section is to be exercised on similar grounds to the discretion in clause 9.

11. Admiralty Proceedings. This clause is an innovation and deals with a problem which arises in Admiralty jurisdiction. If there be an arbitration clause in, for example, a salvage agreement, a question may well arise whether this deprives the Court of jurisdiction, including in particular jurisdiction to arrest the vessel. The clause is drawn from The United States Federal Code on Commercial Arbitration with some slight alterations as their concept of Admiralty jurisdiction is wider than that in Queensland.

PART III - ARBITRATORS AND UMPIRES

12. Presumption of single arbitrator. Unless some other mode of reference is provided, or a contrary intention is expressed, a term to the effect that the reference shall be to a single arbitrator is implied in every agreement to arbitrate.

An agreement to refer disputes to "an arbitrator or umpire" has been held to be a reference to a single arbitrator: see re Eyre & Leicester Corporation (1892) 1 Q.B. 136.

13. Power of parties in certain cases to supply vacancy. There is no provision in clause 13(2) analogous to the provision in clause 16 expressly making the power to appoint dependent upon whether or not differences have arisen.

The clause does not apply where the reference is to three arbitrators; but where the reference is to two arbitrators, with power to appoint a third, whose decision is to be final, the clause does apply: see SS Den of Airlie Co. v. Mitsui & Co. (1912) 106 L.T. 451 and Marinos & Frangos Ltd. v. Dulien Steel Products Inc. of Washington (1961) 2 Lloyd's Rep. 192. Clause 13(2) gives the Court or a Judge thereof a discretion to set aside any appointment made under it and the Court or a Judge thereof may then proceed to make its own appointment in lieu thereof (see clause 33). On the suggestion of various Government Departments the period of time provided in subclause (2) has been extended to fourteen days.

14. Umpires. Where the reference is to two arbitrators they must appoint an umpire immediately after they themselves are appointed, unless the agreement to arbitrate expresses a contrary intention. If they do not, the Court may appoint in default.

The umpire may "enter upon the reference" unless the agreement to arbitrate expresses a contrary intention, when notice of disagreement is served on him. It is then, prima facie, that he is under an obligation to act.

15. Agreements for reference to three arbitrators. By clause (1) if the agreement to arbitrate requires reference to three arbitrators, one to be appointed by each party, and the third to be appointed by the first two, they must appoint an umpire and not a third arbitrator. The parties could of course provide for reference to three arbitrators if they so desire.

It must be noted that if an umpire is called upon to act the award is his alone; while if there are three arbitrators the award must be made by at least two of the three.

No particular method of appointment of an umpire is prescribed by the Bill. The method usually prescribed in agreements to arbitrate and statutes is by writing under the hands of the arbitrators. However, it would seem that a parol appointment is valid, subject to any express provision in the agreement: see Oliver v. Collings (1809) 11 East 367.

16. Power of Court in certain cases to appoint an arbitrator or umpire. There is no general power for the Court to appoint in cases not falling within either this clause or clause 33: see Smith & Service and Nelson & Sons (1890) 25 Q. B. D. 545.

Neither will the Court make an appointment where the agreement to arbitrate provides a method by which appointments are to be made, e. g. appointment by a named person, and that method has not been invoked: see Wilson & Son and the Eastern Counties Navigation Co. (1892) 1 Q. B. 81.

Subclause (1) - It will be noted that the power of the Court or a Judge does not arise until "differences have arisen".

"All the parties" refers to all the parties to the agreement to arbitrate.

Subclause (2) - The words "an appointed arbitrator" mean an appointed single arbitrator and not one of two appointed arbitrators. In cases of reference to two arbitrators see clause 13.

The Commission considered suggestions put forward by certain representative Government Departments to the effect that where parties do not agree or concur in the appointment of an arbitrator, where one of the parties is a Government instrumentality, the agreement to arbitrate could provide that the Governor in Council appoint an arbitrator. It was suggested that clause 16 be amended so that it apply "unless the agreement contains an express intention to the contrary".

Whilst appreciating the reasons for the various Departments' request, the Commission is of opinion:-

- (i) that this is a question which the judiciary is best suited to decide;
- (ii) the matter is one where not only should justice be done but also it should appear to be done;
- (iii) it is desirable to maintain a degree of uniformity with the U.K. Act where possible.

At the request of various bodies the period of time provided in subclause (4) has been extended to fourteen days.

PART IV - CONDUCT OF PROCEEDINGS, WITNESSES

17. Conduct of proceedings. It is considered eminently desirable that the Bill should contain provisions to provide the necessary machinery to enable an arbitrator to control and regulate the proceedings before him.

Subject to any provision to the contrary therein, every agreement to arbitrate impliedly empowers an arbitrator to examine witnesses on oath or affirmation, parties to a reference are entitled to compel the attendance of witnesses by subpoena, and finally the Court or a Judge thereof may make such orders for discovery, interrogatories and other interlocutory or procedural matters as it or he might do in any matter before a Court.

At the same time the legal rights of parties and witnesses are protected.

Under the Interdict Act of 1867 (s. 6) the arbitrator has power only to administer an oath or to take an affirmation "When in any rule or order of reference or in any submission or arbitration containing an agreement that the submission shall be made a rule of Court it shall be ordered or agreed that the witnesses upon such reference shall be examined on oath.....".

Furthermore the Interdict Act contains no provision for other normal procedural steps.

Order 38 Rule 19 of The Supreme Court Practice 1970 (U.K.) provides for the issue of a writ of subpoena ad testificandum or a writ of subpoena duces tecum in aid of a tribunal out of the Crown Office of the Supreme Court and no order of the Court for the issue of such a writ is necessary.

The Rules of the Supreme Court (Queensland) contain no similar provision. Order 40 Rule 29 provides that any party to a cause or matter may require the attendance of a witness and so does not extend to a party to an arbitration.

The Commission accordingly considered that the draft Bill should provide the necessary power to enable any party to a reference under an agreement to arbitrate to sue out a subpoena where required without the necessity of obtaining any order of the Court or a Judge so to do.

Under the Service and Execution of Process Act 1901-1963 (Section 16(1)), leave of a Court or a Judge must be obtained to serve a subpoena in a State or part of the Commonwealth other than that in which such subpoena was issued.

The proviso to subclause 11(a) does not appear in the U.K. Act, neither does subclause 11(c).

18. Duties of parties. Where the time and place of meeting appointed by the arbitrator are reasonable, and due notice thereof has been given to the parties, but one of the parties refuses or neglects to attend, the arbitrator may proceed with the reference in his absence. However, if a reasonable excuse for not attending the appointment can be shown, the Court will set aside an award made by an arbitrator ex parte: see Gladwin v. Chilcote (1841) 9 Dowl 550.

It seems that every arbitrator is authorised by the nature of his office to proceed ex parte for good cause: (see Benedetti v. Sasvary (1967) 2 N. S. W. R. 792) and in many instances, express power so to do is given to the arbitrator in the agreement to arbitrate. However, it is considered preferable to include an express power to this effect in the statute.

PART V - AWARDS

19. Time for making award. The provision as to enlargement of time is applicable only when the parties have fixed in the agreement to arbitrate a definite time within which the award must be made.

The umpire's obligation to enter on the reference normally does not begin until the arbitrators disagree.

The Court or a Judge may have power under section 19(2) to enlarge the time for an award in a statutory arbitration, even where a limit is placed upon the time for making the award by the statute: see Knowles & Sons Ltd. v. Bolton Corporation (1900) 2 Q.B. 253.

The effect of an order of enlargement is that the extended time is to be treated as if it had been given originally in the agreement to arbitrate. Consequently, the award and all else done in the arbitration during such extended time is rendered valid and effective: see Oakland Metal Co. Ltd. v. Benaim (D) & Co. Ltd. (1953) 2 Q.B. 261.

Where an arbitrator or umpire is removed by the Court or a Judge, the Court or a Judge has powers of appointment in lieu, and where the whole arbitral tribunal is so removed, or leave is given by the Court or a Judge to revoke the appointment of an arbitrator or umpire, the Court or a Judge has an alternative power to order that the agreement concerned (including any Scott v. Avery clause contained in it) cease to have effect in relation to the dispute: see clause 33(2).

Several interested bodies suggested the provision of a fixed time within which an award should be made but the Commission considered this undesirable.

20. Interim awards. In the absence of some special authority an arbitrator may make only one final award. However, this clause provides that unless the agreement to arbitrate expresses a contrary intention, he may make an interim award and such interim award may well be final as to some of the claims referred, e. g. the issue of liability may be determined leaving the issue of quantum to be determined at a later stage.

21. Specific performance. Apart from the power to order specific performance, as provided in this clause, the arbitrator, unless there is some specific clause in the agreement to arbitrate empowering an arbitrator to say what shall be done, is seldom empowered to give particular directions regarding the property in dispute: see Price v. Popkin (1839) 8 L. J. Q. B. 198.

This clause puts beyond doubt the power of an arbitrator or umpire to order specific performance except in the case of a contract relating to land or an interest therein.

22. Awards to be final. A valid award on a voluntary reference operates between the parties as a final and conclusive judgment upon all matters referred, unless there is an express provision in the agreement to arbitrate that it shall have a temporary effect only, or is an interim award.

As to power of Court to correct an award: see clause 30.

Subject to the power of the arbitrator to correct slips, and to the power of the Court or a Judge to remit the matters referred for reconsideration, the making of the award determines the arbitrator's authority and he cannot alter his award after making it.

23. Form of award. This clause does not appear in the U.K. Statute or in any of those of the other Australian States. It is modelled in part on the provisions of the Tribunals and Inquiries Act 1958 (U.K.). The reasons for its inclusion are set out in the commentary to clause 28 and clause 23 should be read in conjunction with the definition "Imperfect execution of powers" in clause 3.

24. Power to correct slips. An arbitrator or umpire who has made his award is *functus officio*, and at common law could not alter it in any way whatsoever; he could not even correct an obvious clerical mistake: see Mordue v. Palmer (1820) L.R. 6 Ch. 22.

The provision in clause 24 is taken from the U.K. Act which re-enacted section 7(c) of the Arbitration Act 1889 and corresponds with the power conferred on the Supreme Court by Order 32 Rule 12 of the Rules of the Supreme Court (Qld.).

25. Costs. Following section 18 of the U.K. Act, clause 25 provides that unless the agreement to arbitrate expresses a contrary intention an arbitrator has a full discretion as to the costs of the reference. No distinction is made between the costs of the award and the costs of the reference.

According to Russell on Arbitration, 17th Ed. at p. 265: "the 'costs of reference' include all the expenses properly incurred by the parties in the course of the whole inquiry before the arbitrator. They may include the costs of negotiating and settling the terms of the submission, and of any fresh submission, between the parties".

An arbitration itself and subsequent Court proceedings on a special case stated by the arbitrator are part of the same proceedings for the purpose of set off of costs.

The parties, in their agreement to arbitrate, may require the arbitrator himself to fix the costs, in which case he must do so. Parties to a reference are, in general, at liberty to make agreements as to who shall pay the costs: see Mansfield v. Robinson (1928) 2 K.B. 353, but subclause 3 declares void a provision contained in an agreement to arbitrate to the effect that any party or parties shall in any event pay his or their own costs (or any part of them) when contained in an agreement to refer future differences (as distinct from a submission of an existing dispute).

Whilst subclause 5 gives a solicitor a charge for his taxed costs on any property the subject matter of the arbitration, such charge is expressly made subject to the provisions of the Real Property Acts 1861 to 1963.

26. Taxation of arbitrator's or umpire's fees. The arbitrator's right to remuneration depends, in cases where there is no express promise to pay him, upon an undertaking (to be implied from his appointment) to remunerate him reasonably for his services.

It is usual for the arbitrator to settle for himself what he considers a proper remuneration but this is subject to taxation under subclause (1).

If the amount of fees demanded by the arbitrator is paid into Court pursuant to subclause (1) the arbitrator's fees may be taxed in the manner of a normal taxation, the arbitrator being entitled to be heard.

The arbitrator has a lien for his reasonable charges on the reference and the award but not on any documents tendered in evidence by the parties. His chief security for his charges is his retention of the award until his fees have been paid.

27. Interest. Apart from interest payable under this clause an arbitrator or umpire appears to have in his discretion power to award interest on the amount of any debt for the whole or any part of the period between the date when the cause of action arose and the date of the award pursuant to s. 72 of "The Common Law Practice Acts, 1867-1964": see Edwards v. Great Western Railway Co. (1851) 11 C.B. 588.

In England the power of the arbitrator extends to awarding interest on an unliquidated sum but this power derives from s. 3 of the Law Reform (Miscellaneous Provisions) Act, 1934; see Chandris v. Isbrandtsen - Moller Co. Inc. (1951) 1 K.B. 240.

PART VI - SPECIAL CASES, REMISSION CORRECTION AND SETTING ASIDE OF AWARDS

28. Case Stated. Careful consideration has been given to the question of the extent to which the awards of arbitrators ought to be made subject to appeal to or review by the Courts. The question is one which in turn involves a consideration of the nature, function and purpose of private arbitration proceedings as an alternative to proceedings in the Courts of law in the ordinary way. The advantages which an arbitral determination is popularly thought to possess as compared with proceedings in a Court are:-

- (i) that it enables the parties to have their disputes determined by an individual or individuals well versed by personal experience or expertise in the practices, techniques and conventions of a particular trade or business, and -
- (ii) that it avoids the expense, delays, formality and procedural niceties of ordinary legal proceedings.

The first of these matters is undoubtedly an important consideration and a very valuable advantage which arbitration proceedings do in many instances enjoy over a legal action, in which factual issues are tried by a Judge or a jury who do not always possess a sufficient acquaintance with the background of the particular trade or business to enable them to comprehend fully the significance of all the evidence or to appreciate fully the issues involved. Whether the second of the advantages mentioned above is one which really exists is, at least as far as the expense of a lengthy arbitration is concerned, extremely doubtful, particularly as the parties in arbitration proceedings are in any event often represented by counsel and solicitors. Further, it is not always realised that a determination by arbitration involves the very considerable additional expense of the arbitrator's fees and the high cost of shorthand reporters or other means of taking a transcript of the evidence. For present purposes, however, it is sufficient to emphasise that, contrary to the belief held in some quarters, an arbitrator is not (except by express agreement) at liberty to disregard, but is bound to apply the law in arriving at his determination and that an agreement by the parties that he shall do otherwise is regarded as contrary to public policy and void. "There must", as Scrutton L. J. once remarked, "be no Alsatia to which the King's writ does not run": Czarnikow v. Roth Schmidt & Co. (1922)

2 K.B. 478. Conversely, - see section 6 supra - the parties, in referring a dispute to arbitration, must take the arbitrator for better or for worse.

However, once it is conceded that an arbitrator is bound to apply the law and that the parties may not effectively preclude him from doing so, it follows that he is bound to apply the law properly. If it is true that it cannot be expected of a person not trained in the law that he should never be guilty of errors of law, it is, we believe, equally true that the parties should not, by having submitted to arbitration, be precluded from resorting to the Courts in order to have such errors rectified; or, to express it in another form, if the knowledge, experience and expertise of an arbitrator makes him peculiarly well-fitted to determine the factual aspects of the dispute, the peculiar function and ability of Judges makes them particularly well-suited to apply the law and to correct errors in its application by others.

It is for the foregoing reasons that the Courts have long asserted a jurisdiction to set aside an award for what is technically classified as "misconduct" in cases where there is an error of law appearing on the face of the award, and also that modern Arbitration Acts (such as those in England and the Australian States other than Queensland) all provide a procedure whereby the parties can require a case to be stated for the opinion of the Court on a question of law. However, the present position in these other jurisdictions is anomalous, for no case can be required to be stated once an award has been made (Giacomo Costa Fu Andrea v. British Italian Trading Co. Ltd. (1963) 1 Q.B. 201) and the situations in which an award can be set aside for error on its face are limited by circumstances beyond the control of either party. The latter remark requires explanation. In determining whether an arbitrator has been guilty of "misconduct" in the technical sense of error of law, the Court is restricted to a consideration of the actual award itself and any document incorporated therein. An arbitrator is not (unless the reference otherwise provides) bound to give written reasons for his award. Even if he does so, the Court is not entitled to examine those reasons unless they have been "incorporated" in the award itself. Whether the reasons have been thus incorporated is a question of great legal nicety on which legal minds may, and often do, differ: see, for example, the division of opinion among the Judges of the High Court in Council of the City of Gold Coast v. Canterbury Pipe Lines (Aust.) Pty. Ltd. (1968) 41 A.L.J.R. 307.

Accordingly, the legal position at present is that the right of a party to have an award set aside, and the corresponding liability of the other party to having it set aside, is dependent upon whether the arbitrator chose or troubled to deliver reasons in writing and whether he "incorporated" those reasons in his award. In the great majority of cases the incorporation, in the required manner, of the reasons is the product of pure accident and not design. Few lay arbitrators are aware of the legal significance of such an act of incorporation, and, if they are, they might in many instances deliberately take steps to avoid it. The result therefore is that the question whether a party has a right, or is subject to a liability, to have an award set aside on the ground of error of law is almost invariably dependent upon accident. This cannot be justified on any ground of reason or policy and, in our opinion, is a highly unsatisfactory and anomalous situation.

Since misconduct in the form of error of law is to remain a ground for upsetting an award, in our view the position can be improved if the following reforms are introduced:-

- (i) that, subject to agreement to the contrary, an arbitrator be bound in making his award to deliver written reasons therefor and that his failure to do so be made an imperfect exercise of his powers;
- (ii) that a party aggrieved by an award be given the right to make application for an order requiring the arbitrator to state a special case on any question of law arising out of the reference or award.

29. Power to remit. Under the existing law in Queensland the Court has no general power to remit matters referred to it or any special case back to the arbitrator or umpire for further consideration.

30. Power to correct award. This section does not appear to have any equivalent in the English or other Australian Statutes, although it has been included in the new South Australian Bill. It has been taken from section 11 of The American Federal Code on Commercial Arbitration and should prove useful in many cases.

31. Misconduct by arbitrator. Attention is directed to the definition of "misconduct" in clause 3. This clause is self-explanatory.

32. Partiality and fraud. Parties are entitled to expect from the arbitrator complete impartiality and indifference, both as between themselves and in regard to the matters left to the arbitrator to decide, and they are entitled to expect from him a faithful, honest and disinterested decision.

However, as stated in Russell on Arbitration, 17th Ed. at p. 120: "To disqualify an arbitrator so appointed, it is insufficient to show that he might be suspected of partiality: it must be shown, if not that he actually is biased, at least that there is a strong probability that he will be biased, and to such an extent as to be incapable of fairly and honestly giving a decision (see Eckersley v. Mersey Docks (1894) 2 Q. B. 667). This rule is, however, subject to a statutory exception of great importance. Where an agreement provides for future disputes to be submitted to a named arbitrator, and a dispute duly arises, and a party applies for an injunction to restrain the arbitrator named, or another party, from proceeding with arbitration, or applies for leave to revoke the authority of the arbitrator, then it is not a ground for refusing the application that the party applying knew of the arbitrator's interest when the agreement concerned was made."

Under this clause "the Court will not lightly interfere with an appointment deliberately agreed upon by the parties", and if the parties were fully aware at the date of the arbitrator's appointment, of the latter's interest, this fact will not in general disqualify him (see Cia. Panamena Europea Navigacion v. Leyland & Co. (1947) A. C. 428; 116 L. J. R. 716 and Canterbury Pipelines Ltd. v. Att.-Gen. (1961) N. Z. L. R. 785).

33. Power of Court to appoint. This clause is ancillary to the power of the Court to remove or revoke the power of an arbitrator or umpire.

34. Enforcement of award. Formerly awards could only be directly enforced by means of attachment and then only if the submission was made a rule of Court. This clause enables awards to be enforced in the same manner as a judgment or order, provided that leave of the Court is first obtained.

35. Power to extend time. This clause follows precisely section 27 of the Arbitration Act 1950 (U.K.) which is a re-enactment of section 16(6) of the Arbitration Act 1934 (U.K.).

A clause barring a claim if arbitration is not commenced within a certain time is not absolute in effect: the Court has power to extend the time fixed (notwithstanding that it has already expired) if "undue hardship" would otherwise be caused. Not all hardship, however, is "undue hardship"; it may be proper that hardship caused to a party by his own default should be borne by him, and not transferred to the other party by allowing a claim to be reopened after it has become barred. The mere fact that a claim was barred could not be held to be "undue hardship". (see Hookaway & Co. v. Hooper & Co., (1950) 2 All E.R. 842).

PART VII - GENERAL

36. Costs. This clause enables the Court to award costs in any application under this Bill.

37. Severance. There is no analogous section in the English or Australian Acts and this is an adaptation of section 22 of The United States Model Commercial Code.

38. Exercise of powers by officers. This clause provides machinery for making rules of Court.

39. Penalty for perjury. This clause makes perjury by any person in arbitration proceedings punishable in the same manner as if committed in open Court.

PART VIII - ENFORCEMENT OF FOREIGN AWARDS

Under the Arbitration Act of 1950 the enforcement of foreign awards is made conditional upon reciprocal legislation in the other country. Section 3(1) of "The Reciprocal Enforcement of Judgment Act of 1959" defines "judgment" so as to include an award in proceedings on an arbitration if the award has, in pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a Court in that place. Clause 44 ensures that this part of the Bill does not affect the operation of the latter Act.

Reciprocity legislation gives rise to many problems because one country or State may accept certain conditions and another may not. In order to avoid these problems we consider it preferable to set out in this Bill a code for the enforcement of foreign awards which comply with the strict requirements contained in clause 41. This is the course which has been recommended by the Law Reform Committee of South Australia.

Subject to the U.K. requirements as to reciprocity, clauses 40-44 generally follow the provisions contained in the Arbitration Act of 1950.

Subject to the conditions set out in these clauses, a foreign award may be enforced in Queensland either by leave of the Court in the same manner as a judgment or order to the same effect, or by action, and may be relied on by any of the parties by way of defence, set off or otherwise, in any legal proceedings in this State.

A Bill to Consolidate the Law Relating to Arbitration.

BE IT ENACTED by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Assembly of Queensland in Parliament assembled, and by the authority of the same, as follows:-

PART I - PRELIMINARY

1. Short Title. This Act may be cited as the Arbitration Act, 1970.

2. Repeal and Saving Clause. (1) The Act mentioned in the Schedule to this Act is repealed to the extent indicated in the Schedule except in relation to arbitration commencing before the commencement of this Act.

cf. U.K. 1950
s. 33 and
s. 44(3).

(2) This Act shall not affect any arbitration commenced before the commencement of this Act, but shall apply to an arbitration so commenced after the commencement of this Act under an agreement to arbitrate made before the commencement of this Act; and any reference in any Act or other document to any enactment hereby repealed shall be construed as a reference to this Act.

3. Interpretation. In this Act unless the context otherwise indicates or requires the following terms shall have the meanings respectively assigned to them, that is to say:-

"Agreement to arbitrate" means a written agreement to submit present or future differences to arbitration whether an arbitrator is named therein or not.

cf. Vict. 1958
s. 3;
U.K. 1950
s. 32.

"Court" means the Supreme Court of Queensland or where the amount in dispute and the subject matter thereof are within the jurisdiction of a District Court the appropriate District Court.

"District Court" - The District Court within the meaning of the District Courts Act 1967-1969.

"Imperfect execution of powers" includes failure to comply with the requirements of section 23 of this Act.

"Judge" means a Judge of the Supreme Court of Queensland or a Judge of the District Court as the case may be.

"Misconduct" includes -

- (1) corruption fraud or undue influence in relation to the umpire or the arbitrators or any of them
- (2) evident partiality or bias in relation to the umpire or the arbitrators or any of them
- (3) any excess of powers or imperfect execution of powers by the arbitrators or the umpire
- (4) failure to make a final and definite award upon the subject matter by the arbitrators or the umpire.

"Party" includes a personal representative or assign of a party.

"Rules of Court" means the Rules of the Supreme Court, or the District Court Rules as the case may be.

"Supreme Court" - the Supreme Court of Queensland.

cf. U.K. 1950
s. 30.

4. Application of Act. Nothing in this Act shall affect the operation of Part V of "The Hire Purchase Act of 1959", Section 21(a) of the "Insurance Acts 1960-1968" or Section 7 of "The Agricultural Holdings Act of 1905".

cf. N. S. W. 5
s. 26.

5. Act to bind Crown. This Act shall bind the Crown.

PART II - GENERAL PROVISIONS AS TO ARBITRATION

cf. U.K. 1950
s. 1.

6. Revocation. (1) The authority of an arbitrator or umpire appointed by or by virtue of an agreement to arbitrate shall, unless a contrary intention is expressed therein, or unless otherwise agreed by all parties concerned, be irrevocable except by leave of the Court or a Judge thereof.

(2) The Court or a Judge thereof may order that an agreement to arbitrate 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) Where it appears to the Court at or before the hearing of any action that by reason of the existence of an agreement to arbitrate 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 agreement to arbitrate shall cease to have effect with regard to that action and the actions shall be heard as if such agreement to arbitrate had not been entered into.

cf. U.K. 1950
s. 2.

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

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

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

cf. U.K. 1950
s. 3.

8. Bankruptcy. Subject to the Bankruptcy Act 1966-1969 and any Act in amendment thereof or in substitution therefor 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 differences.

cf. U.K. 1950
s. 4(1).

9. Power to stay proceedings. (1) If any party to an agreement to arbitrate or any person claiming through or under him commences any legal proceedings in any Court against any other party to the agreement to arbitrate 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 agreement 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.

(2) The powers conferred by subsection (1) of this section shall be exercised to the same extent and in the same manner in cases where there is a provision (whether in an agreement to arbitrate or otherwise) that an award under an agreement to arbitrate shall be a condition precedent to the bringing of an action with respect to any matter to which such agreement applies, as in cases where there is no such provision and such provision shall be read only as an agreement to arbitrate and shall not prevent any cause of action from accruing before arbitration and save as aforesaid shall not affect the institution prosecution or defence of any action or counterclaim.

cf. U.K. 1950
s. 5.

10. Interpleader. Where relief by way of interpleader is granted and it appears to the Court that the claims in question are matters to which an agreement to arbitrate, to which the claimants are parties, applies, the Court may direct the issue between the claimants to be determined in accordance with the agreement to arbitrate.

11. Admiralty proceedings. If the basis of jurisdiction be a cause of action in rem which would otherwise be justiciable in admiralty any party to an agreement to arbitrate 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 agreement.

PART III - ARBITRATORS AND UMPIRES

cf. U.K. 1950
s. 6.

12. Presumption of single arbitrator. Unless a contrary intention is expressed therein every agreement to arbitrate shall, if no other mode of reference is provided, be deemed to include a provision that the reference shall be to a single arbitrator.

cf. U.K. 1950
s. 7.

13. Power of parties in certain cases to supply vacancy. Where an agreement to arbitrate provides that the reference shall be to two arbitrators, one to be appointed by each party, then, unless a contrary intention is expressed therein -

(1) if either of the appointed arbitrators refuses to act, or is incapable of acting, or dies, the party who appointed him may appoint a new arbitrator in his place;

(2) if, on such a reference, one party fails to appoint an arbitrator, either originally, or by way of substitution as aforesaid, for fourteen 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.

cf. U.K. 1950
s. 8.

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

(2) Unless a contrary intention is expressed therein, every agreement to arbitrate shall, where such a provision is applicable to the reference, be deemed to include a provision that if the arbitrators have delivered to any party to the agreement to arbitrate 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.

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

cf. U.K. 1950
s. 9.

15. Agreements for reference to three arbitrators. (1) Where an agreement to arbitrate provides that the reference shall be to three arbitrators, one to be appointed by each party and the third to be appointed by the two appointed by the parties, the agreement to arbitrate shall have effect as if it provided for the appointment of an umpire, and not for the appointment of a third arbitrator, by the two arbitrators appointed by the parties.

(2) Where an agreement to arbitrate provides that the reference shall be to three arbitrators to be appointed otherwise than as mentioned in subsection (1) of this section, the award of any two of the arbitrators shall be binding.

cf. U.K. 1950
s. 10.

16. Power of Court in certain cases to appoint an arbitrator or umpire. In any of the following cases:-

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

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

(3) where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator and do not appoint him, or where two arbitrators are required to appoint an umpire and do not appoint him;

(4) where an appointed umpire or third arbitrator refuses to act, or is incapable of acting, or dies, and the agreement to arbitrate does not show that it was intended that the vacancy should not be 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, umpire or third arbitrator, and if the appointment is not made within fourteen 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, umpire or third arbitrator 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 - CONDUCT OF PROCEEDINGS
WITNESSES

cf. U.K. 1950
s.12.

17. Conduct of proceedings. (1) Unless a contrary intention is expressed therein, every agreement to arbitrate shall, where such a provision is applicable to the reference, be deemed to contain a provision that the parties to the reference, and all persons claiming through them respectively, shall, subject to any legal objections, 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 agreement to arbitrate 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 agreement to arbitrate, have power to administer oaths to, or take the affirmation of, the parties to and witnesses on a reference under the agreement.

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

(5) Such writ of subpoena:-

- (a) shall be issued in accordance with the practice and forms, with such variations as circumstances may require, of the Supreme Court or of the District Court, as the case may be;
- (b) continues to have effect until the disposal of proceedings before the reference at which the attendance of the witness is required;
- (c) must be served personally;
- (d) unless duly served on the person to whom it is directed not less than four days, or such other period as the Court may fix, before the day on which the attendance of that person is required, that person shall not be liable to any penalty or process for failing to obey the writ.

(6) An application to set aside a writ of subpoena issued in aid of a reference may be heard by a Judge.

(7) The Court or a Judge may order that a writ of subpoena ad testificandum or a writ of subpoena duces tecum shall be issued to compel the attendance before an arbitrator or umpire of a witness.

cf. N.S.W.
1902-1957
s.10

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

cf. N.S.W.
1902-1957
s.22

(9) 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.

(10) The Court or a Judge 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.

(11)

(a) The Court or a Judge shall have, for the purpose of and in relation to a reference, the same power of making orders in respect of:-

- (i) security for costs;
- (ii) discovery of documents and interrogatories;
- (iii) the giving of evidence by affidavit;
- (iv) 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;
- (v) the preservation, interim custody or sale of any goods which are the subject matter of the reference;
- (vi) securing the amount in dispute in the reference;
- (vii) the detention, preservation or inspection of any property or thing which is the subject of the reference or as to which any question may arise therein, and authorising for any of the purposes aforesaid any persons to enter upon or into any land or building in the possession of any party to the reference, or authorising any samples to be taken or any observation to be made or experiment to be tried which may be necessary or expedient for the purpose of obtaining full information or evidence;
- (viii) interim injunctions or the appointment of a receiver; and
- (ix) delivery of pleadings -

as it or he has for the purpose of and in relation to an action or matter in the Court:

Provided that where it is not possible to apply any of The Rules of the Supreme Court or the District Court Rules, as the case may be, or any part thereof because of any difference in procedure, the Court or a Judge thereof shall apply such Rules or part thereof as nearly as possible so as to achieve the same purpose.

cf. U.K. 1950
s.12.

- (b) 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, and any such order may be enforced by the Court or a Judge thereof in the same way and failure to comply therewith shall have the same consequence as if the order had been made by the Court or a Judge thereof.
- (c) If the parties to any reference agree to any of the matters set out in paragraphs (i), (ii), (iii), (vi), (vii) and (ix) of this subsection such agreement shall have the same effect as if it were contained in the order of the Court or a Judge.

18. Duties of Parties. (1) If any party to a reference who has been given reasonable notice of the hearing of such reference shall at any time neglect or refuse to attend on such hearing without having shown to the arbitrator or to a majority of the arbitrators and their umpire, if any, good and sufficient cause for such neglect or failure, it shall be lawful for the hearing of the reference to proceed ex parte and for an award thereon to be made in the same manner as if the party had attended.

(2) The parties to any reference shall at all times do all things which the arbitrator or a majority of the arbitrators and their umpire, if any, may require to enable a just award to be made, and no party shall wilfully or wrongfully do or cause to be done, any act to delay or prevent an award being made.

PART V - AWARDS

cf. U.K. 1950
s.13.

19. Time for making award. (1) Subject to the provisions of subsection (2) of section 29 of this Act and anything to the contrary in the agreement to arbitrate an arbitrator or umpire shall have power to make an award at any time.

(2) The time if any limited for making an award whether under this Act or otherwise may from time to time be enlarged by 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.

cf. U.K. 1950
s.14.

20. Interim awards. Unless a contrary intention is expressed therein, every agreement to arbitrate shall, where such a provision is applicable to the reference, be deemed to contain a provision

that the arbitrator or umpire may, if he thinks fit, make an interim award and any reference in this Act to an award includes a reference to an interim award.

cf. U.K. 1950
s.15.

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

cf. U.K. 1950
s.16.

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

23. Form of award. (1) Notwithstanding anything to the contrary contained in an agreement to arbitrate, every such agreement shall be deemed to include a provision that the arbitrator or umpire shall:-

- (a) make his award in writing; and
- (b) contemporaneously with his award, furnish to the parties a written statement of his reasons for his award.

Provided that the parties may at any time after the dispute has arisen and before the award is made notify the arbitrator or umpire, as the case may be, in writing that the parties do not require that:-

- (a) the arbitrator make his award in writing;
- (b) the arbitrator or umpire, as the case may be, furnish to the parties a written statement of his reasons for his award; or
- (c) either or both of (a) and (b).

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

cf. U.K. 1950
s.17.

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

cf. U.K. 1950
s.18.

25. Costs. (1) Unless a contrary intention is expressed therein, every agreement to arbitrate shall be deemed to include a provision that the costs of the reference and award shall be in the discretion of the arbitrator or umpire who may direct to and by whom and in what manner those costs or any part thereof shall be paid and may tax or settle the amount of costs to be so paid or any part thereof 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) Any provision in an agreement to arbitrate to the effect that the parties or any party thereto shall in any event pay their or his own costs of the reference or award or any part thereof shall be void, and this Part of this Act shall, in the case of an agreement to arbitrate containing any such provision, have effect as if that provision were not contained therein:

Provided that nothing in this subsection shall invalidate such a provision when it is a part of an agreement to submit to arbitration a dispute which has arisen before the making of that agreement.

(4) If no provision is made by an award with respect to the costs of the reference, any party to the reference may within fourteen days of the publication of the award or such further time as the Court 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.

(5) 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. Subject to the provisions of "The Real Property Acts, 1861 to 1963" 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.

cf. U.K. 1950
s. 19.

26. Taxation of arbitrator's or umpire's fees. (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 reference unless the fees demanded have been fixed by a written agreement between him and the arbitrator or umpire.

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

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

cf. U.K. 1950
s. 20.

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

PART VI - SPECIAL CASES, REMISSION
CORRECTION AND SETTING ASIDE OF AWARDS

cf. U.K. 1950
s. 21.

28. Case stated. (1) An arbitrator or umpire may, and shall if so directed by the Court or a Judge, state:-

- (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 to be stated, notwithstanding that proceedings under the reference are still pending.

(3) A decision of the Court under this section shall, for the purpose of an appeal, be an order or judgment of the Court; but no appeal shall lie from the decision of the Court on any case stated under paragraph (a) of subsection (1) of this section without the leave of the Supreme Court or a Judge thereof.

cf. U.K. 1950
s. 22.

29. Power to remit. (1) In all cases of reference to arbitration the Court or a Judge may from time to time remit the matters referred or any of them or any special case with any directions it sees fit to the reconsideration of the arbitrators or umpire.

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

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

(1) 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;

(2) where the arbitrators have awarded upon a matter not submitted to them if it is a matter not affecting the merits of the decision upon the matter submitted;

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

cf. U.K. 1950
s. 23.

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

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

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

cf. U.K. 1950
s. 24.

32. Partiality and fraud. (1) Where an agreement between any parties provides that disputes which may arise in the future between them shall be referred to an arbitrator named or designated in the agreement, 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 agreement knew, or ought to have known that the arbitrator, by reason of his relation towards any other party to the agreement, or of his connection with the subject referred, might not be capable of impartiality.

(2) Where an agreement 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 agreement 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 agreement.

(3) In any case where by virtue of this section the Court or a Judge thereof has power to order that an agreement to arbitrate 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 agreement.

cf. U.K. 1950
s. 25.

33. Power of Court to appoint. (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 agreement to arbitrate appoint a person or persons to act as arbitrator or arbitrators or umpire in place of the person or persons so removed.

(2) Where the authority of an arbitrator or arbitrators or umpire is revoked by leave of the Court or a 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 agreement to arbitrate either -

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

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

cf. U.K. 1950
s. 26.

34. Enforcement of award. An award on an agreement to arbitrate 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.

cf. U.K. 1950
s. 27.

35. Power to extend time. Where the terms of an agreement to refer future disputes to arbitration provide that any claims to which the agreement 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 agreement, and a dispute arises to which the agreement 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.

PART VII - GENERAL

cf. U.K. 1950
s. 28 & Vict.
1958 s. 20.

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

cf. S.A. 1891-
1934 s. 15.

(2) Any person taking proceedings under this Act in the Supreme Court which could have been taken in the District Court 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 the District Court.

37. Severance. 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.

cf. Vict. 1958
s. 21.

38. Exercise of powers by officers. The Judges of the Supreme Court or any three or more of them may make rules of Court for conferring on any officer of the Court all or any of the jurisdiction conferred by this Act on the Court or a Judge and for regulating the procedure under this Act in all Courts in Queensland.

cf. Vict. 1958
s. 22.

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

PART VIII - ENFORCEMENT OF FOREIGN AWARDS

cf. U.K. 1950
s. 36.

40. Effect of foreign awards. (1) A foreign award shall, subject to the provisions of this Part of this Act be enforceable in Queensland either by action or in the same manner as the award of an arbitrator is enforceable under 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 Queensland, 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.

cf. U.K. 1950
s. 37

41. Conditions for enforcement of foreign awards. (1) In order that a foreign award may be enforceable under this Part of this Act it must have -

- (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 Queensland -

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

(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.

cf. U.K. 1950
s. 38

42. Evidence. (1) The party seeking to enforce a foreign award must produce -

- (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 Queensland.

cf. U.K. 1950
s. 39

43. Meaning of final award. 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.

cf. U.K. 1950
s. 40

44. Saving. Nothing in this Part shall prejudice any right which any person would have had to enforce any award or of availing himself in Queensland of any award if this Act had not been enacted and in particular nothing in this Part shall affect the operation of "The Reciprocal Enforcement of Judgments Act of 1959".

SCHEDULE

Reference to Act	Title of Act	Extent of Repeal
31 Vic. No. 11	Interdict Act of 1867	Sections 2-21 inclusive

This Report was circulated to the following:-

1. The Attorney-General
2. The Hon. Sir William G. Mack
3. The Hon. Mr. Justice Sheehy
4. The Hon. Mr. Justice M. Hanger
5. The Hon. Mr. Justice C.G. Wanstall
6. The Hon. Mr. Justice N.S. Stable
7. The Hon. Mr. Justice G.L. Hart
8. The Hon. Mr. Justice G.A.G. Lucas
9. The Hon. Mr. Justice J.A. Douglas
10. The Hon. Mr. Justice M.B. Hoare
11. The Hon. Mr. Justice R.H. Matthews
12. The Hon. Mr. Justice J.P.G. Kneipp
13. The Hon. Mr. Justice R.W. Skerman
14. The Hon. Mr. Justice D.M. Campbell
15. Judge D.G. Andrews
16. Queensland Law Society Inc.
17. Bar Association of Queensland
18. University Law School
19. Under Secretary, Department of Justice
20. Solicitor General
21. Parliamentary Draftsman
22. Public Curator
23. Under Secretary, Treasury Department
24. Under Secretary, Local Government Department
25. Under Secretary, Department of Works
26. Co-ordinator General of Public Works
27. Commissioner for Railways
28. State Government Insurance Office
29. Harbours and Marine Department
30. Irrigation and Water Supply Commission
31. Main Roads Department
32. State Electricity Commission
33. City Solicitor, Brisbane City Council
34. Royal Australian Institute of Architects
35. Master Builders Association
36. Institution of Engineers of Australia (Qld.)
37. Fire and Accident Underwriters Association (Qld.)
38. Non-Tariff Insurance Association (Qld.)
39. Mr. A.A. Simmonds, Solicitor
40. The Hon. Mr. Justice H.T. Gibbs (Sydney)
41. The Law Commission, London
42. The Law Reform Commission, New South Wales
43. The Law Reform Committee, Western Australia
44. The Law Reform Committee, South Australia
45. Parliamentary Draftsman, Victoria

Comments were received from the following:-

1. The Hon. Mr. Justice M.B. Hoare
2. Queensland Law Society Inc.
3. Mr. T.G. Matthews, University of Queensland
4. Under Secretary, Department of Works
5. Director, Department of Harbours and Marine
6. Secretary, Department of the Co-ordinator General of
Public Works (on behalf of some other Government Depts.)
7. Fire and Accident Underwriters Association (Qld.)
8. Institution of Engineers of Australia (Qld.)
9. Mr. C.R. Tranberg, Consulting Engineer.
10. The Law Reform Commission, New South Wales.