LAW REFORM COMMISSION

NEW SOUTH WALES

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REPORT

on

COMMERCIAL ARBITRATION

L.R.C. 27

1976

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COMMISSION ★ WALES

PREFACE

The Law Reform Commission is constituted by the Law Reform Commission Act, 1967. The Commissioners are—

Chairman: The Honourable Mr Justice C. L. D. Meares

Deputy Chairman: Mr R. D. Conacher

Mr D. Gressier

Professor J. D. Heydon

Mr J. M. Bennett is Executive Member of the Commission.

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This is the twenty-seventh report of the Commission on a reference from the Attorney General. Its short citation is L.R.C. 27.

CONTENTS

	Page
Preface	3
Contents	5
Chief recommendations in brief	7
Tables—	
Cases	9
Statutes	20
References to the draft Bill	31
Abbreviations	34
Report—	
Part 1.—General	37
Part 2.—Arbitration agreement	46
Section 1.—Form of agreement	46
Section 2.—Exempt contracts; contracts of adhesion	52
Section 3.—Revocation of the authority of an arbitrator	60
Section 4.—Death of a party	68
Section 5.—Bankruptcy of a party	70
Section 6.—Setting aside an arbitration agreement	70
Part 3.—The submission as an order of the Court	72
Part 4.—Arbitration agreement as an obstacle to litigation	76
Section 1.—Stay of litigation	76
Section 2.—Award as condition precedent	83
Section 3.—Time limits	88
Part 5.—Arbitrators and umpires	89
Section 1.—Number and appointment of arbitrators	89
Section 2.—Umpire	92
Section 3.—Removal of arbitrator	100
Section 4.—Fees and expenses of arbitrator	104
Section 5.—Liability of an arbitrator	108
Section 6.—Register of arbitrators	110
Part 6.—Conduct of the arbitration	111
Section 1.—General	111
Section 2.—Extent of the reference	112
Section 3.—Sanctions for an arbitrator's directions	113
Section 4.—Interim preservation	115
Section 5.—Security for amount in dispute	119
Section 6.—Admiralty arrest and bail	123
Section 7.—Security for costs	126

Part 6.—Conduct of the arbitration—*continued* Page
Section 8.—Evidence before an arbitrator 130
Section 9.—Third party claims 139
Section 10.—Discovery; inspection etc., of person, property or process 140
Section 11.—Expert assistance 142
Section 12.—Statutory procedures and forms 143

Part 7.—Powers of an arbitrator 143
Section 1.—Basis of determination 143
Section 2.—Majority action 148
Section 3.—Interest on money claimed 150
Section 4.—Specific performance 151
Section 5.—Costs of arbitration 154

Part 8.—Stated cases 158

Part 9.—Award 162
Section 1.—Finality 162
Section 2.—Time for award 163
Section 3.—Writing and signature 166
Section 4.—Reasons for award 169
Section 5.—Interim award.. 171
Section 6.—Setting aside an award 172
Section 7.—Remission 183
Section 8.—Appeal from an award 188
Section 9.—Correction of award 189
Section 10.—Interest on award 194
Section 11.—Enforcement of award 195

Part 10.—Judge-arbitrator 202

Part 11.—Reference by the Court 203

Part 12.—District Court 208

Part 13.—Conflict of laws 211
Section 1.—General 211
Section 2.—Foreign awards 215

Part 14.—Other Acts 222
Section 1.—Statutory arbitrations 222
Section 2.—Sundry enactments 224
Section 3.—Shipowner's lien 226

Part 15.—Conciliation 227

Appendix 1.—Draft Bill 229

Appendix 2.—People who assisted the Commission 278

Index 279

CHIEF RECOMMENDATIONS IN BRIEF

Here accuracy yields to brevity. All our recommendations for change in the law appear in the draft Bill in Appendix 1.

1. There should be a new Arbitration Act.[1]

2. *Scott* v. *Avery* clauses should be made void.[2]

3. The Supreme Court should be given power to extend contractual time limits for arbitration.[3]

4. Agreements for arbitration of future differences should in general be closely regulated.[4]

5. Where a contract of adhesion has a clause for arbitration of future differences, it should be made easier for an adherent party to resist a stay of litigation or to get leave to revoke the authority of an arbitrator.[5]

6. Some arbitration agreements should be excluded from 4 and 5 above and the parties to them should have wide freedom of contract. These agreements are—

   (a) agreements whose parties are government authorities or large corporations;

   (b) agreements relating to overseas trade;

   (c) agreements of classes prescribed by regulation; and

   (d) agreements approved by the Supreme Court.[6]

7. Parties should have wide freedom of contract in an agreement relating to arbitration on an existing difference.[7]

8. The Supreme Court should not set aside or remit an award for error on the face of the award.[8]

9. The Supreme Court should be authorized to set aside or remit an award where it appears to the Court that the award is "grossly wrong", that is, an award which a reasonable arbitrator could not have made.[8]

10. Where the Supreme Court gives a decision at first instance on a stated case or on an application for the setting aside or remission of an award, an appeal should not lie to the Court of Appeal except by leave of the Court of Appeal.[9]

11. The District Court should have powers of reference to arbitration like those of the Supreme Court.[10]

12. The District Court should, where the parties have so agreed, have general powers in an arbitration like those of the Supreme Court.[11]

CHIEF RECOMMENDATIONS IN BRIEF—continued

[1] Report para. 1.17.

[2] Report paras 4.2.1–17. Draft Bill s. 16.

[3] Report paras 4.3.1–6. Draft Bill s. 17.

[4] Report paras 1.11, 2.2.8, 14, 19.

[5] Report paras 1.12, 2.2.15–19, 2.3.14, 16, 4.1.16, 4.1.18. Draft Bill ss. 13 (5) (a), 15 (6) (a).

[6] Report paras 1.10, 2.2.1, 8–12, 14, 19. Draft Bill ss. 11, 12.

[7] Report paras 2.2.1, 3, 7–9, 13, 14, 19. Draft Bill s. 11 (1) (c).

[8] Report paras 9.6.13–17, 23, 24, 9.7.5, 11, 12. Draft Bill ss. 5 (3), 57, 58.

[9] Report paras 8.7, 8, 9.6.23, 24, 9.7.11, 12. Draft Bill Sch. 2, amendment to Supreme Court Act, 1970, s. 101 (2).

[10] Report paras 12.8, 11. Draft Bill ss. 62, 63.

[11] Report paras 12.6, 7, 11. Draft Bill s. 8.

CASES

Case	*Paragraph*
Absalom (F. R.) Ltd *v.* Great Western (London) Garden Village Socy Ltd [1933] A.C. 592	9.6.10
Administration of Papua and New Guinea *v.* Daera Guba (1973) 130 C.L.R. 353	9.1.1
"Agroexport" Entreprise d'Etat pour le Commerce Extérieur *v.* N. V. Goorden Import Cy. S.A. [1956] 1 Lloyd's Rep. 319	6.8.3
Ajzner *v.* Cartonlux Pty Ltd [1972] V.R. 919	1.6
Aktiebolaget Legis *v.* V. Berg & Sons Ltd [1964] 1 Lloyd's Rep. 203	9.7.3
Albeck *v.* A.B.Y.-Cecil Manufacturing Co. Pty Ltd [1965] V.R. 342	9.1.1, 9.11.3, 4
Altco Ltd *v.* Sutherland [1971] 2 Lloyd's Rep. 515	9.6.7
Anderson *v.* G. H. Mitchell & Sons Ltd (1941) 65 C.L.R. 543 ..	4.2.1, 2 4.3.1
Anon (1748) 3 Atk. 644; 26 E.R. 1170	9.9.1
Anon *v.* Mills (1811) 17 Ves. Jun. 419; 34 E.R. 162..	9.6.7
Arenson *v.* Arenson [1972] 1 W.L.R. 1196, [1973] Ch. 346; [1975] 3 W.L.R. 815	1.8 5.5.1, 2 9.6.13
Atlantic Shipping and Trading Co. Ltd *v.* Louis Dreyfus & Co. [1922] 2 A.C. 250	4.3.1
A.-G. *v.* Davison (1825) McCl. & Yo. 160; 148 E.R. 366	6.8.2
A.-G. *v.* Stocks and Holdings (Constructors) Pty Ltd (1970) 124 C.L.R. 262	13.2.9
Aubert *v.* Maze (1801) 2 Bos. & P. 371; 126 E.R. 1333	7.1.1
Auriol *v.* Smith (1823) Turn. & R. 121; 37 E.R. 1041..	9.6.7
Australian Mutual Provident Society *v.* Overseas Telecommunications Commission (Australia) [1972] 2 N.S.W.L.R. 806.. ..	1.6
Bankruptcy Notice, In re a [1907] 1 K.B. 478	9.11.5
Baxters and The Midland Railway Co., In re (1906) 90 L.T. 20 ..	9.7.3
Beddow *v.* Beddow (1878) 9 Ch.D. 89	5.3.2
Berbette Pty Ltd *v.* Hansa [1976] V.R. 385	7.5.7
Bhear *v.* Harradine (1852) 7 Ex. 269; 155 E.R. 947	3.4
Birtley District Co-operative Society Ltd *v.* Windy Nook & District Industrial Co-operative Society [1959] 1 W.L.R. 142	9.6.7
Bjornstad and The Ouse Shipping Co. Ltd, In re [1924] 2 K.B. 673	6.7.1
Blackman (G. W. J.) & Co. S.A. *v.* Oliver Davey Glass Co. Pty Ltd [1966] V.R. 570	4.1.3
Bloemen (F. J.) Pty Ltd *v.* Gold Coast City Council [1973] A.C. 115	9.1.1
Board of Trade *v.* Cayzer, Irvine & Co. Ltd [1927] A.C. 610 ..	7.1.2

CASES—*continued*

Case	*Paragraph*
Boks & Co. and Peters, Rushton & Co. Ltd, In re [1919] 1 K.B. 491	9.11.2, 5
Boodle *v.* Davies (1835) 3 A. & E. 200; 111 E.R. 389	9.6.7
Bowker *v.* Evans (1885) 15 Q.B.D. 565	2.4.4
Bradbee *v.* Christ's Hospital (1842) 4 Man. & G. 714; 134 E.R. 294	8.2
Bremer Oeltransport G.m.b.H. *v.* Drewry [1933] 1 K.B. 753	9.11.2
Brighton *v.* Dungog Municipal Council (1943) 15 L.G.R. 74.. ..	12.4
British Metal Corpn. Ltd and Ludlow Bros. (1913) Ltd, In re [1938] 1 All E.R. 135	5.2.6
British Westinghouse Electric and Manufacturing Co. Ltd *v.* Underground Electric Rlys. Co. of London Ltd [1912] A.C. 673 ..	9.6.10
Broadhurst *v.* Darlington (1833) 2 Dowl. 38	7.1.2
Brown *v.* Brown (1683) 1 Vern. 157; 23 E.R. 384	9.6.3
Bruce (W.) Ltd *v.* Strong [1951] 2 K.B. 447	4.1.6
Buccleuch *v.* Metropolitan Board of Works (1870) L.R. 5 Exch. 221	9.6.7
Bulk Oil (Zug) A.G. *v.* Trans-Asiatic Oil Ltd S.A. [1973] 1 Lloyd's Rep. 129	4.1.17
Cameron *v.* Cuddy [1914] A.C. 651; (1911) 16 B.C.R. 451	4.2.4
Canterbury Pipe Lines Ltd *v.* A.-G. [1961] N.Z.L.R. 785	2.3.8
Carr *v.* Wodonga Shire (1924) 34 C.L.R. 234	9.7.5
Catalina *v.* Norma (1938) 61 Ll.L.Rep. 360	5.3.3
Cayzer, Irvine & Co. Ltd *v.* Board of Trade [1927] 1 K.B. 269 ..	7.1.1
Centrala Morska Importowo Eksportowa *v.* Companhia Nacional de Navigacao S.A.R.L. [1975] 2 Lloyd's Rep. 69	7.5.7
Chandris *v.* Isbrandtsen-Moller Co. Inc. [1951] 1 K.B. 240.. ..	7.1.2 7.3.1, 3
Charles Osenton & Co. *v.* Johnston [1942] A.C. 130	2.3.9
Chicot *v.* Lequesne (1751) 2 Ves. Sen. 315; 28 E.R. 203	9.6.7
Ching *v.* Ching (1801) 6 Ves. Jun. 282; 31 E.R. 1052	7.1.2
City Centre Properties (I.T.C. Pensions) Ltd *v.* Matthew Hall & Co. Ltd [1969] 1 W.L.R. 772	2.3.3, 6, 12, 15
City of Vancouver *v.* Brandram-Henderson of B.C. Ltd (1960) 23 D.L.R. (2d) 161	9.7.6
Cocker *v.* Tempest (1841) 7 M. & W. 502; 151 E.R. 864	4.1.2
Cole *v.* Mosman M. C. (1960) 6 L.G.R.A. 31	9.6.9, 20
Coleman and Royal Insurance Co., Re (1905) 24 N.Z.L.R. 817 ..	5.3.3
Commonwealth *v.* Bogle (1953) 89 C.L.R. 229..	1.18
Compagnie d'Armement Maritime S.A. *v.* Compagnie Tunisienne de Navigation S.A. [1971] A.C. 572	7.1.3, 13.1.2

CASES—*continued*

Case	*Paragraph*
Compagnie des Messageries Maritimes *v.* Wilson (1954) 94 C.L.R. 577	4.1.3
Compagnie du Senegal etc. *v.* Woods & Co. (1883) 53 L.J. Ch. 166 ..	6.4.3
Coombs, In re (1850) 4 Ex. 839; 154 E.R. 1456	5.4.1, 4
Corneforth *v.* Geer (1715) 2 Vern. 705; 23 E.R. 1058..	9.6.3
Crampton & Holt *v.* Ridley & Co. (1887) 20 Q.B.D. 48	5.4.1
Crawford *v.* Prowting Ltd [1973] Q.B. 1	6.3.1
Crooke *v.* Swords (1868) 5 W.W. & a'B 136	1.16
Cuerton, Ex parte (1826) 7 Dow. & Ry. K.B. 774	9.7.2
Curtis *v.* Potts (1814) 3 M. & S. 145; 105 E.R. 565	9.2.1
Czarnikow *v.* Roth, Schmidt & Co. [1922] 2 K.B. 478	2.2.1 7.1.2, 3 8.1
Dalmia Cement Ltd *v.* National Bank of Pakistan [1975] Q.B. 9 ..	13.2.3
Darlington Wagon Co. Ltd *v.* Harding [1891] 1 Q.B. 245	11.1
Darnley *v.* London, Chatham, and Dover Rly. Co. (1867) L.R. 2 H.L. 43	9.2.1
David Taylor & Son Ltd *v.* Barnett Trading Co. [1953] 1 W.L.R. 562	7.1.1
Dawson *v.* Newsome (1860) 2 Giff. 272; 66 E.R. 114..	3.4
Delver *v.* Barnes (1807) 1 Taunt. 48; 127 E.R. 748	7.1.2
Dennis & Sons Ltd *v.* Cork S.S. Co. Ltd [1913] 2 K.B. 393	14.3.3
Deutsche Springstoff A.G. *v.* Briscoe (1887) 20 Q.B.D. 177	2.3.1, 2
Dineen *v.* Walpole [1969] 1 Lloyd's Rep. 261	7.5.1
Dobbs *v.* National Bank of Australia Ltd (1935) 53 C.L.R. 643 ..	9.1.1
Doleman & Sons *v.* Ossett Corpn. [1912] 3 K.B. 257	2.2.1 2.3.2 3.3 4.1.2, 12
Dougan *v.* Ley (1946) 71 C.L.R. 142	7.4.2
Drew *v.* Drew (1855) 25 L.T. (O.S.) 282	2.3.4
Dubois *v.* Medlycott (1737) Barnes 55; 94 E.R. 803	9.6.7
East and West India Dock Co. *v.* Kirk and Randall (1887) 12 App. Cas. 738	2.3.4
Eaton *v.* Eaton [1950] V.L.R. 233	4.1.11 4.2.8 6.4.3 7.4.3
Eckman *v.* Midland Bank Ltd [1973] Q.B. 519	6.4.2
Elliot *v.* Klinger [1967] 1 W.L.R. 1165	6.4.2

CASES—*continued*

Case	*Paragraph*
Emery *v.* Wase (1801) 5 Ves. Jun. 846; 31 E.R. 889	9.6.7
Enoch and Zaretzky, Bock & Co., In re [1910] 1 K.B. 327	5.3.3 6.8.2
Evans *v.* National Pool Equipment Pty Ltd [1972] 2 N.S.W.L.R. 410	7.3.1 9.10.1
Exormisis Shipping S.A. *v.* Oonsoo [1975] 1 Lloyd's Rep. 432 ..	9.7.11
Falk *v.* Sernack Manufacturing Co. Pty Ltd [1965] N.S.W.R. 17 ..	9.9.2
Faure, Fairclough Ltd *v.* Premier Oil & Cake Mills Ltd [1968] 1 Lloyd's Rep. 236	6.8.4
Federated Saw Mill, Timber Yard, and General Woodworkers Employees' Association of Australasia, The *v.* James Moore and Sons Pty Ltd (1909) 8 C.L.R. 465	1.7
Fehmarn, The [1958] 1 W.L.R. 159	4.1.2, 3
Fenwick, In re (1897) 18 L.R. (N.S.W.) 405	1.7
Ferguson *v.* Norman (1837) 4 Bing. N.C. 52; 132 E.R. 708	8.2
Fernley *v.* Branson (1851) 20 L.J.Q.B. 178	5.4.1
Fidelitas Shipping Co. Ltd *v.* V/O Exportchleb [1966] 1 Q.B. 630 ..	9.5.1, 2
Ford *v.* Clarksons Holidays Ltd [1971] 1 W.L.R. 1412	4.1.16
Forsyth *v.* Manton (1820) 5 Madd. 78; 56 E.R. 824	3.4
Foster *v.* Hastings Corpn. (1903) 19 T.L.R. 204	6.4.3
Franz Haniel Ag. *v.* Sabre Shipping Corpn. [1962] 1 Lloyd's Rep. 531	9.7.3
Freame *v.* Pinnegar (1774) 1 Cowp. 23; 98 E.R. 947	9.6.7
Freeman *v.* Kempster, In re [1909] V.L.R. 394	2.3.6 2.5.1
French Government *v.* Tsurushima Maru (1921) 37 T.L.R. 961; 8 Ll.L. Rep. 403	5.2.2
Frota Nacional de Petroleiros *v.* Skibsaktieselskapet Thorsholm [1957] 1 Lloyd's Rep. 1	2.3.6, 7
Fuerst Bros. & Co. Ltd and Stephenson, Re [1951] 1 Lloyd's Rep. 429	5.2.2 5.3.6 9.7.6
Fuller *v.* Fenwick (1846) 3 C.B. 705; 136 E.R. 282	7.1.2
Fussell *v.* Silcox (1814) 5 Taunt. 628; 128 E.R. 836	3.4
Gibbs *v.* Ralph (1845) 14 M. & W. 804; 153 E.R. 701	4.1.2
Golden Trader, The [1975] 1 Q.B. 348	6.6.2, 3, 6
Goode *v.* Bechtel (1904) 2 C.L.R. 121	7.1.2
Gosford Meats Pty Ltd *v.* Queensland Insurance Co. Ltd (1970) 92 W.N. 897	4.3.7 7.5.1
Government of Ceylon *v.* Chandris [1963] 1 Lloyd's Rep. 214 ..	5.2.2 5.4.2, 4, 5 6.8.3 7.5.1

CASES—*continued*

Case	*Paragraph*
Graves *v.* Graves (1893) 69 L.T. 420	3.4
Grech *v.* Board of Trade (1923) 130 L.T. 15	9.11.5
Green *v.* Rozen [1955] 1 W.L.R. 741	3.4
Greville, Ex parte (1868) 8 S.C.R. 27	9.11.4
Hagger *v.* Baker (1845) 14 M. & W. 9; 153 E.R. 367	6.8.2
Hall *v.* Alderson (1825) 2 Bing. 476; 130 E.R. 390	9.9.1
Hall and Hinds, In re (1841) 2 Man. & G. 847; 133 E.R. 987 ..	5.3.5 9.6.7
Halsey *v.* Windham [1882] W.N. (Eng.) 108	6.4.3
Hamilton *v.* Bankin (1850) 3 De G. & Sm. 782; 64 E.R. 703.. ..	9.6.7
Hanessian *v.* Lloyd Triestino S.A. di Navigazione (1951) 68 W.N. 98	4.1.3
Hare, Milne & Haswell, In re (1839) 6 Bing. N.C. 158; 133 E.R. 62	9.6.7
Harrison, In re [1955] Ch. 260	9.9.4
Hartley (R.S.) Ltd *v.* Provincial Insurance Co. Ltd [1957] 1 Lloyd's Rep. 121	8.1
Harvey *v.* Shelton (1844) 7 Beav. 455; 49 E.R. 1141	9.6.7
Hatton *v.* Harris [1892] A.C. 547	9.9.5
Hawke's Bay Electric-Power Board and Napier Borough Council, In re [1930] N.Z.L.R. 162	5.3.3
Henry *v.* Uralla Municipal Council (1934) 35 S.R. 15..	6.2.1
Hodgkinson *v.* Fernie (1857) 3 C.B.N.S. 189; 140 E.R. 712	8.2 9.6.7 9.7.2
Hogge *v.* Burgess (1858) 3 H. & N. 293; 157 E.R. 482	9.7.2
Hopkins *v.* Difrex S.A. (1966) 84 W.N. (Pt. 1) 297	4.1.3
Horrell *v.* St John [1928] 2 K.B. 616	9.6.9
Hosie *v.* Bartley (1906) 6 S.R. 626	7.4.3
Huddart Parker Ltd *v.* The Ship Mill Hill (1950) 81 C.L.R. 502 ..	4.1.3
Huddersfield Corpn & Jacomb, In re (1874) L.R. 17 Eq. 476; (1874) L.R. 10 Ch. App. 92	9.6.7
Hudson Strumpffabrik G.m.b.H. *v.* Bentley Engineering Co. Ltd [1962] 2 Q.B. 587	6.7.3, 6
Hutchins *v.* Hutchins (1738) Andr. 297; 95 E.R. 406..	9.6.6
Hyams *v.* Docker [1969] 1 Lloyd's Rep. 341	4.1.6
Ireland (W. H.) & Co. *v.* C. T. Bowring & Co. Ltd (1920) 2 Ll. L. Rep. 220	5.2.2
Isca Construction Co. Pty Ltd *v.* Grafton City Council (1962) 8 L.G.R.A. 87	1.6 2.2.1 8.1

CASES—*continued*

Case	*Paragraph*
Ithaka, The [1939] 3 All E.R. 630	2.3.6
Ives & Barker *v.* Willans [1894] 2 Ch. 478	4.1.8
Jager *v.* Tolme & Runge [1916] 1 K.B. 939	7.1.2
James Miller & Partners Ltd *v.* Whitworth Street Estates (Manchester) Ltd [1970] A.C. 583	13.1.2
Jephson *v.* Howkins (1841) 2 M. & G. 366; 133 E.R. 787	8.2
Jones & Carter, In re [1922] 2 Ch. 599	9.6.10
Jones *v.* Pembrokeshire County Council [1967] 1 Q.B. 181	9.6.10
Jones *v.* Williams (1839) 11 Ad. & E. 175; 113 E.R. 381	3.4
Jopling *v.* Jopling (1909) 8 C.L.R. 33	7.4.3
Jugoslavenska Oceanska Plovidba *v.* Castle Investment Co. Inc. [1973] 2 Lloyd's Rep. 1	9.10.2 9.11.6
Kay's Leasing Corporation Pty Ltd *v.* Feltcher (1964) 116 C.L.R. 124	13.1.1
Keighley, Maxsted & Co. and Durant & Co., In re [1893] 1 Q.B. 405	9.7.2, 3, 7
Kent *v.* Elstob (1802) 3 East 18; 102 E.R. 502..	7.1.2
King *v.* Joseph (1814) 5 Taunt. 452; 128 E.R. 765	9.6.7
Kleine *v.* Catara (1814) 2 Gall. 61; 14 Fed. Cas. 732	7.1.2 9.6.6
Knowles & Sons Ltd *v.* Bolton Corpn. [1900] 2 Q.B. 253	9.2.1
Knox *v.* Symmonds (1791) 1 Ves. Jun. 369; 30 E.R. 390	9.6.7
Kursell *v.* Timber Operators and Contractors Ltd [1923] 2 K.B. 202	6.1.1 6.10.2
Law *v.* Garrett (1878) 8 Ch. D. 26	6.4.3
Lewis Construction Co. Pty Ltd, In re [1958] V.R. 162	5.1.2
Lewis *v.* Haverfordwest Rural District Council [1953] 1 W.L.R. 1486	7.5.4
Llandidrod Wells Water Co. *v.* Hawkesley (1904) 20 T.L.R. 241; 68 J.P. 242	5.4.1, 4
Lloyds Bank Ltd *v.* Jones [1955] 2 Q.B. 298	9.6.10
London and Overseas Freighters Ltd *v.* Timber Shipping Co. S.A. [1971] 1 Q.B. 268	9.1.1 9.10.2
Lord *v.* Hawkins (1857) 2 H. & N. 55; 157 E.R. 23	9.7.6
Luanda Exportadora S.A.R.L. *v.* Wahbe Tamari & Sons Ltd [1967] 2 Lloyd's Rep. 353	5.2.13
Lucas d. Markham *v.* Wilson (1758) 2 Burr. 701; 97 E.R. 522 ..	3.4 9.6.6
Lyders *v.* Fife & Cumming, In re (1909) 28 N.Z.L.R. 1000	5.3.5
MacCabe *v.* Joynt [1901] 2 Ir. R. 115	3.4
M'Dougal *v.* Robertson (1827) 4 Bing. 435; 130 E.R. 835	2.4.1
Machin *v.* Bennett [1900] W.N. (Eng.) 146	6.4.3

CASES—*continued*

Case	*Paragraph*
McIlwraith McEacharn Ltd *v.* The Shell Co. of Australia Ltd (1945) 70 C.L.R. 175	6.6.6
Mackay, In re (1834) 2 A. & E. 356; 111 E.R. 138	9.6.7
Macpherson Train & Co. Ltd *v.* J. Milhem & Sons [1955] 2 Lloyd's Rep. 59	6.8.2
Marchon Products Ltd *v.* Thornes (1954) Russell (1970) p. 161 ..	6.4.3
Margulies Bros Ltd *v.* Dafnis Thomaides & Co. (U.K.) Ltd [1958] 1 W.L.R. 398	9.7.3 9.9.4 9.11.5
Marinos & Frangos Ltd *v.* Dulien Steel Products Inc. [1961] 2 Lloyd's Rep. 192	5.2.6
Maritime Insurance Co. Ltd *v.* Assecuranz-Union von 1865 (1935) 52 Ll.L.Rep. 16	7.1.3
Marshall & Dresser, In re (1843) 3 Q.B. 878; 114 E.R. 746	9.6.7
Mediterranean and Eastern Export Co. Ltd *v.* Fortress Fabrics (Manchester) Ltd (1948) 81 Ll.L. Rep. 401	6.8.2
Medov Lines S.p.A. *v.* Traelandsfos A/S [1969] 2 Lloyd's Rep. 225	5.1.5
Mello, The (1948) 81 Ll.L. Rep. 230	9.9.4, 5
MEPC Australia Ltd *v.* The Commonwealth [1973] 2 N.S.W.L.R. 848	7.2.1
Metcalf *v.* Ives & Johnson (1737) Cas. temp. Hard. 82; 95 E.R. 248	9.6.7
Meyer *v.* Leanse [1958] 2 Q.B. 371	9.6.7
Miller *v.* Shuttleworth (1849) 7 C.B. 105; 137 E.R. 43	8.2
Mills *v.* Bowyers Society (1856) 3 K. & J. 66; 69 E.R. 1024	9.7.2
Milne *v.* Gratrix (1806) 7 East 608; 103 E.R. 236	2.3.2 3.4
Minister for Works (W.A.) *v.* Civil and Civic Pty Ltd (1967) 116 C.L.R. 273	8.1, 3
Modern Building Wales Ltd *v.* Limmer & Trinidad Co. Ltd [1975] 1 W.L.R. 1281	9.11.5
Montgomery, Jones & Co. *v.* Liebenthal & Co. (1898) 78 L.T. 406 ..	8.1 9.7.3
Montifiori *v.* Montifiori (1762) 1 W. Bl. 363; 96 E.R. 203	9.6.6
Moore *v.* Butlin (1837) 7 A. & E. 595; 112 E.R. 594	9.9.1
Mordue *v.* Palmer (1870) L.R. 6 Ch. 22..	9.9.1
Morphett, In re (1845) 14 L.J.Q.B. 259..	9.10.1
Moscati *v.* Lawson (1835) 4 Ad. & E. 331; 111 E.R. 811	4.1.2
Myron, The [1970] 1 Q.B. 527	5.2.4 6.8.2
Nichols *v.* Chalie (1807) 14 Ves. Jun. 266; 33 E.R. 523	9.6.7
Nichols *v.* Roe (1834) 3 M. & K. 431; 40 E.R. 164	9.6.4, 5, 7

CASES—*continued*

Case	*Paragraph*
Nickalls *v.* Warren (1844) 6 Q.B. 615; 115 E.R. 231	6.8.3, 4 9.7.2
Nils Heime Akt. *v.* G. Merel & Co. Ltd [1959] 2 Lloyd's Rep. 292 ..	9.9.1
Nippon Yusen Kaisha *v.* Karageorgis [1975] 1 W.L.R. 1093	6.4.2 6.5.2
Nixon *v.* Steggal (1953) 54 S.R. 179	4.1.4
North London Railway Co. *v.* Great Northern Railway Co. (1883) 11 Q.B.D. 30	5.3.2
N.V. Vulcaan *v.* A/S Mowinckels [1937] 42 Com. Cas. 200; [1938] 2 All E.R. 152	7.1.2
Olson and Mahony S.S. Co. *v.* The Ship "Thelma" (1913) 14 S.R. 10	4.2.8 6.6.1
Olver *v.* Hillier [1959] 1 W.L.R. 551	7.4.3
Orion Cia. Espanola de Seguros *v.* Belfort Maatschappij voor Algemene Verzekgringeen [1962] 2 Lloyd's Rep. 257	5.2.13 7.1.3, 4 8.3
Owen *v.* Nicholl [1948] 1 All E.R. 707	6.8.2
Palmer & Co. and Hosken & Co., In re [1898] 1 Q.B. 131	9.6.17
Parker, Gaines & Co. Ltd *v.* Turpin [1918] 1 K.B. 358	4.1.8
Pedley *v.* Goddard (1796) 7 T.R. 73; 101 E.R. 861	9.6.7
Percival, Re (1885) 2 T.L.R. 150	2.4.1
Perring & Keymer, In re (1834) 3 Dowl. 98	9.6.7
Persson *v.* Heathwoods Pty Ltd (1967) 68 S.R. 27	6.10.2
Philpot *v.* Thompson (1844) 2 D. & L. 18	4.1.2
Phipps *v.* Ingram (1835) 3 Dowl. 669	6.8.3
Phoenix Timber Co. Ltd's Application, In re [1958] 2 Q.B. 1	4.1.5
Pini *v.* Roncoroni [1892] 1 Ch. 633	6.4.3
Plews *v.* Baker (1873) L.R. 16 Eq. 564	6.4.3
Plews & Middleton, In re (1845) 6 Q.B. 845; 115 E.R. 319	9.6.7
Ponsford *v.* Swaine (1861) 1 J. & H. 433; 70 E.R. 816	5.4.1
Poyser & Mills' Arbitration, In re [1964] 2 Q.B. 467	5.3.2 9.4.2 12.3
Prebble and Robinson, In re [1892] 2 Q.B. 602	5.4.1, 2, 4
Prestige & Co. Ltd *v.* Brettel [1938] 4 All E.R. 346	9.9.1
R. *v.* Northumberland Compensation Appeal Tribunal [1952] 1 K.B. 338	9.6.7
R. *v.* Phillips (1970) 125 C.L.R. 93	13.2.9
R. *v.* Wheeler (1738) 3 Burr. 1256; 97 E.R. 819	9.6.6
Racecourse Betting Control Board *v.* Secretary for Air [1944] Ch. 114	4.1.2, 3 9.6.3, 10

CASES—*continued*

Case	*Paragraph*
Radford *v.* Hair [1971] Ch. 758	2.3.9
Ramdutt Ramkissendass *v.* F. D. Sassoon & Co. (1929) L.R. 56 Ind. App. 128	7.1.2
Reynolds *v.* Askew (1837) 5 Dowl. 682	9.6.7
Richardson *v.* Nourse (1819) 3 B. & Ald. 237; 106 E.R. 648.. ..	9.6.7
Richmond Shipping Ltd *v.* Agro Co. of Canada Ltd [1973] 2 Lloyd's Rep. 145	4.3.5
Ridout *v.* Payne (1747) 3 Atk. 486; 26 E.R. 1080	9.6.7
Riesenberg *v.* Weinberg (1958) 59 S.R. 106	7.1.1
Roach *v.* Truth and Sportsman Ltd (1938) 55 W.N. 77	9.6.9
Robertson (A.C.) Pty Ltd *v.* Costa Brava Investments Pty Ltd [1963] S.R. 152	9.7.3
Rogers *v.* Dallimore (1815) 6 Taunt. 111; 128 E.R. 975	9.9.1
Roke *v.* Stevens [1951] N.Z.L.R. 375	8.1
Rolimpex Centrala Handlu Zagranicznego *v.* Haji E. Dossa & Sons Ltd [1971] 1 Lloyd's Rep. 380	5.4.4, 5
Rose *v.* Commissioner for Main Roads (1936) 12 L.G.R. 174 ..	12.4
Ross & Ross, In re (1847) 4 D. & L. 648	9.6.7
Rotheray, E., & Sons Ltd *v.* Carlo Bedarida & Co. [1961] 1 Lloyd's Rep. 220	9.6.18
Rouse & Co. & Meier & Co., In re (1871) L.R. 6 C.P. 212	3.4 9.6.7
Rown, In re (1903) 20 W.N. 77..	5.1.6
Rushworth *v.* Barron (1835) 3 Dowl. 317	9.6.7
Russell *v.* Russell (1880) 14 Ch. D. 471	2.3.9
Schofield *v.* Allen (1904) 48 Sol. Jo. 68; 116 L.T. Jo. 239	5.3.3
Scott *v.* Avery (1856) 5 H.L.C. 811; 10 E.R. 1121	4.2.1
Selby *v.* Whitbread & Co. [1917] 1 K.B. 736	9.9.1
Simbro Trading Co. Ltd *v.* Posograph (Parent) Corpn Ltd [1929] 2 K.B. 266	2.3.6
Smeaton Hanscomb & Co. Ltd *v.* Sassoon J. Setty, Son & Co. (No. 2) [1953] 2 All E.R. 1588	7.5.4
Smith & Blake, In re (1839) 8 Dowl. 133	9.6.7
Smith, Coney & Barrett *v.* Becker, Gray & Co. [1916] 2 Ch. 86 ..	4.2.2
Smith & Service and Nelson & Sons, In re (1890) 25 Q.B.D. 545 ..	2.1.1 2.3.1 3.1, 4 5.2.6
Smythe *v.* Smythe (1887) 18 Q.B.D. 544	3.4
South Australian Railways Commissioner *v.* Egan (1973) 130 C.L.R. 506	2.3.8

CASES—*continued*

Case	*Paragraph*
South Sea Co. *v.* Bumstead (1734) 2 Eq. Cas. Abr. 80 pl. 8; 22 E.R. 70	9.6.7
Stanton Hayek, Re (1957) 19 A.B.C. 1	9.11.5
Stephens, Smith & Co. and Liverpool and London and Globe Insurance Co., In re (1892) 36 Sol. Jo. 464	5.4.2, 4
Street *v.* Rigby (1802) 6 Ves. Jun. 815; 31 E.R. 1323	3.3 6.10.2
Sutherland & Co. *v.* Hannevig Bros Ltd [1921] 1 K.B. 336	9.9.2, 4
Sutherland Shire Council *v.* Kirby (1960) 6 L.G.R.A. 155	8.1
Sutton *v.* Shoppee [1963] S.R. 853	2.3.15
Swinfen *v.* Swinfen (1856) 18 C.B. 485; 139 E.R. 1459	3.4
Swinford & Horne, In re (1817) 6 M. & S. 226; 105 E.R. 1227 ..	9.6.7
Tandy & Tandy, In re (1841) 9 Dowl. 1044	9.6.7
Taylor *v.* Denny, Mott & Dickson Ltd [1912] A.C. 666	5.2.4
Tebbutt *v.* Potter (1845) 4 Hare 164; 67 E.R. 604	3.4
Templeman and Reed, In re (1841) 9 Dowl. 962	5.2.6
Thomas *v.* Hewes (1834) 2 C. & M. 519; 149 E.R. 866	3.4
Thorburn *v.* Barnes (1867) L.R. 2 C.P. 384	9.11.2
Tribe & Upperton, In re (1835) 3 A. & E. 295; 111 E.R. 425 ..	9.6.7
Tuta Products Pty Ltd *v.* Hutcherson Bros. Pty Ltd (1972) 127 C.L.R. 253	9.4.7 9.6.13 9.7.11
Unione Stearinerie Lanza and Wiener, Re [1917] 2 K.B. 558 ..	6.1.1 6.7.1
United Kingdom Mutual Steamship Assurance Assoc. *v.* Houston & Co. [1896] 1 Q.B. 567	7.2.1
Universal Cargo Carriers *v.* Citati [1957] 1 W.L.R. 979	9.7.3
Varley *v.* Spratt [1955] V.L.R. 403	6.8.3
Veale *v.* Warner (1669) 1 Wms. Saund. (1845 edn.) 326; 85 E.R. 468	3.2 9.6.7
Veritas Shipping Corpn. *v.* Anglo-Canadian Cement Ltd [1966] 1 Lloyd's Rep. 76	5.3.3
Vernon *v.* Oliver (1884) 11 Can. S.C.R. 156	9.9.1
Vincent, Ex parte (1897) 14 W.N. 53	4.1.4
Vynior's Case (1610) 8 Co. Rep. 80a, 81b; 77 E.R. 595, 597.. ..	2.3.2 3.3
Warburton *v.* Storr (1825) 4 B. & C. 103; 107 E.R. 997	2.3.2
Wellington *v.* Mackintosh (1743) 2 Atk. 569; 26 E.R. 741	6.10.2
Wessanen's Koninklijke Fabrikien *v.* Isaac Modiano Brother & Sons Ltd [1960] 1 W.L.R. 1243	5.2.2
Willesden Local Board and Wright, In re [1896] 2 Q.B. 412 ..	9.11.5

CASES—*continued*

Case	*Paragraph*
Willesford *v.* Watson (1871) L.R. 14 Eq. 572	2.3.9
Willesford *v.* Watson (1873) L.R. 8 Ch. App. 473	4.1.1 6.4.3
Williams *v.* Minister for Lands (1901) 18 W.N. 181	5.3.1, 6
Wilson *v.* Barton (1671) Nels. 148; 21 E.R. 812	3.3
Wohlenberg *v.* Lageman (1815) 6 Taunt. 251; 128 E.R. 1031 ..	7.1.1 9.6.7
Wood *v.* Hotham (1839) 5 M. & W. 674; 151 E.R. 286	8.2
Wood *v.* Wilson (1835) 2 C.M. & R. 241; 150 E.R. 105	9.6.7
Woodrow *v.* Trawlers (White Sea and Grimsby) Ltd [1930] 1 K.B. 176	9.5.1, 2
Worthing *v.* Rowell and Muston Pty Ltd (1970) 123 C.L.R. 89 ..	13.2.9
Wrightson *v.* Bywater (1838) 3 M. & W. 199; 150 E.R. 1114.. ..	9.5.1, 2
Young *v.* Walter (1804) 9 Ves. Jun. 364; 32 E.R. 642..	7.1.2

STATUTES

The statute 9 and 10 Will. III, c. 15 (1698) has no short title. For the purposes of this table and in the report it is called the "Arbitration Act 1698".

Short Title	*Paragraph*
Administration of Justice Act 1696 (U.K.)	
s. 7	3.3
Administration of Justice Act 1920 (U.K.)	
s. 12 (1)	5.2.6, 9.11.5, 8
Administration of Justice Act, 1924	13.2.7, 8, 10, 14
s. 3 (1)	9.11.5, 13.2.4
s. 5 (1)	13.2.4
s. 5 (2)	13.2.4
s. 5 (3) (a)	13.2.4
s. 5 (3) (b)	13.2.4
Part II	13.2.4, 5, 14.2.1
Administration of Justice Act 1956 (U.K.)	
s. 51 (a)	9.11.8
Administration of Justice Act 1970 (U.K.)	
s. 4	9.11.14
Sch. 3	9.11.14
Agricultural Holdings Act, 1941	12.5, 12.9, 12.11
s. 17 (1)	12.1
s. 17 (4)	12.1
ss. 17–20	12.3, 14.2.1
Sch. 2	12.3
cl. (10)	12.1
cl. (15)	12.1
cl. (16)	12.1
Agricultural Holdings Act 1948 (U.K.)	
s. 77 (1)	12.3
Arbitration Act 1698 (U.K.)	1.16, 3.3, 9.6.4, 7, 8, 9, 9.9.1
s. 1	2.1.4, 3.3, 9.6.5, 9.11.3
s. 2	3.4, 9.6.5, 6, 10
Arbitration Act of 1867	1.16
s. 3	4.1.8
ss. 2–10, 12–14	1.16
s. 11	1.16
s. 15	1.16
s. 16	1.16
Arbitration Act 1889 (U.K.)	1.16, 1.19, 2.1.5, 2.3.6–7, 3.1, 7.1.5
s. 2	3.4, 9.1.1
s. 7	7.1.3, 8.3
s. 8	6.8.11
s. 10 (1)	9.7.2
s. 11 (1)	5.3.2
s. 11 (2)	9.6.9, 10
s. 18	6.8.11
s. 19	7.1.3, 8.2
s. 26	9.6.9
s. 26 (1)	9.6.6

STATUTES—*continued*

Short Title	*Paragraph*
Arbitration Act 1889 (U.K.)—*continued*	
s. 29	9.6.6, 9
Sch. 1 (h)	9.1.1
Sch. 1 (i)	5.4.4
Arbitration Act, 1891–1974 (S.A.)	
s. 24 (1)	4.2.7, 11
Arbitration Act, 1892	
s. 18	1.16, 6.8.11
s. 19	6.8.11
s. 20	1.16, 6.8.11
Arbitration Act, 1902	1.17, 19, 2.1.5, 7, 2.6.1, 6.4.2, 11.1
s. 3	2.1.1, 2.3.1, 9.11.5
s. 4	2.1.1, 4, 8, 2.2.1, 2.3.1, 3.1, 3.5, 6.3.1, 7.5.1, 9.11.3, 13.2.3
s. 5	2.1.1, 5.1.1, 5.2.1, 3, 5.2.4, 7, 5.4.2, 6.1.1, 6.8.1, 7, 6.10.2, 7.5.1, 9.1.1, 9.2.1, 9.3.1, 4
s. 6	2.1.1, 8, 2.3.4, 4.1.1, 2, 3, 4, 5, 6, 7, 4.2.2, 6.4.3, 7.4.1, 13.1.3
s. 7	5.1.6
s. 7 (a)	2.1.1, 5.1.1, 2, 4
s. 7 (b)	2.1.1, 5.1.1
s. 7 (c)	2.1.1, 5.2.3, 4
s. 7 (d)	2.1.1, 5.2.3
s. 8	5.3.1, 2, 3
s. 8 (a)	2.1.1, 5.3.3
s. 8 (b)	2.1.1, 5.1.1, 2, 4, 6, 7.4.1
s. 9 (a)	2.1.1, 4, 2.2.1, 8.1, 9.3.1
s. 9 (b)	2.1.1, 9.9.2, 4, 5
s. 10	6.8.1, 7, 11
s. 10 (1)	2.1.1
s. 11	2.1.1, 9.2.1, 2
s. 12 (1)	2.1.1, 9.7.1, 2, 6, 7
s. 12 (2)	9.2.1, 2, 4
s. 13 (1)	2.1.1, 2.3.5, 5.3.1, 2, 3
s. 13 (2)	2.1.1, 3.5, 9.6.1, 9, 10, 11, 12, 18
s. 14	2.1.1, 8
s. 14 (1)	3.5, 9.10.1, 9.11.3, 4, 5, 8, 13.2.3
s. 14 (2)	1.16, 9.11.3, 5, 8
s. 15	11.1, 2
s. 16 (1)	11.2
s. 16 (2)	11.2
s. 16 (3)	11.2
s. 17	11.1, 2
s. 19	2.1.1, 4, 8, 2.3.5, 8.1, 9.7.11
s. 21	1.16, 2.1.1, 6.8.1, 7, 10, 11
s. 22	6.8.11, 17

STATUTES—*continued*

Short Title	*Paragraph*
Arbitration Act, 1902—*continued*	
s. 23	1.16, 2.1.1, 6.8.1, 7, 10, 11
s. 24	2.1.1
s. 25	2.1.1, 6.8.1, 13
s. 26	1.18, 2.1.1, 7.5.6
s. 27	12.3, 14.1.1, 3
Sch. 2	2.1.8
cl. (a)	5.1.1
cl. (b)	5.2.1, 3, 4, 7
cl. (c)	9.2.1, 9.3.1, 4
cl. (d)	5.2.3, 9.2.1
cl. (e)	5.2.3, 9.2.1, 9.3.1
cl. (f)	6.1.1, 6.8.1, 2, 7, 6.10.2
cl. (g)	6.8.1, 7
cl. (h)	9.1.1
cl. (i)	5.4.2, 7.5.1
Arbitration Act 1934 (U.K.)	2.3.8, 2.6.2, 5.2.6, 14.1.2
s. 3 (2)	2.3.7
s. 7	7.4.4
s. 8 (1)	6.4.4, 6.8.11, 6.10.3
s. 14 (1)	2.3.8
s. 14 (3)	2.3.8
s. 16 (3)	14.3.1, 2
s. 16 (4)	14.3.1, 2
s. 16 (5)	14.3.1, 2
s. 21 (6), Sch. 1	9.3.2
cl. (1)	6.10.3
cl. (4)	6.8.11
cl. (5)	6.4.4
cl. (7)	6.4.4, 6.10.3
Arbitration Act 1950 (U.K.)	2.1.7, 3.7, 5.1.3, 6.3.1
s. 1	2.3.7
s. 2 (1)	2.4.1, 3, 14.1.2
s. 2 (2)	2.4.2
s. 2 (3)	2.4.4
s. 3	2.5.1, 14.1.2
s. 3 (1)	2.5.2
s. 4 (1)	4.1.15
s. 4 (2)	14.1.2
s. 5	4.1.5, 15, 14.1.2
s. 7	5.3.5
s. 8	5.3.6
s. 8 (1)	5.2.4, 8, 9, 13
s. 8 (3)	5.2.4, 5, 8, 10, 13, 5.3.5, 9.2.2
s. 9 (1)	5.2.6, 11
s. 9 (2)	5.2.6, 7.2.2
s. 10 (c)	5.2.4
s. 12 (1)	6.8.7
s. 12 (2)	6.8.7
s. 12 (3)	6.8.7
s. 12 (4)	6.8.7, 18
s. 12 (5)	6.8.7, 18
s. 12 (6)	3.6, 6.8.10
s. 12 (6) (a)	6.7.2
s. 12 (6) (b)	6.10.3

STATUTES—*continued*

Short Title	*Paragraph*
Arbitration Act 1950 (U.K.)—*continued*	
s. 12 (6) (c)	6.8.7, 9
s. 12 (6) (d)	6.8.7, 11
s. 12 (6) (e)	6.4.4, 6
s. 12 (6) (f)	6.5.2, 4
s. 12 (6) (g)	6.4.4, 6, 6.10.3
s. 12 (6) (h)	6.4.4, 6
s. 13 (1)	9.2.2, 9.3.2
s. 13 (2)	9.2.2
s. 13 (3)	5.3.5, 5.4.5, 9.2.2
s. 14	9.5.3
s. 14 (1)	2.3.7
s. 14 (2)	2.3.7
s. 15	7.4.4, 5
s. 16	9.1.1
s. 17	9.9.2
s. 18 (2)	3.6, 7.5.2
s. 18 (3)	2.2.3, 7, 7.5.2, 14.1.2
s. 18 (4)	7.5.2, 9.9.2, 4
s. 18 (5)	7.5.2, 4
s. 19 (1)	5.4.5
s. 19 (2)	5.4.5
s. 20	9.10.2
s. 21	2.1.5
s. 21 (1)	2.1.8, 8.3
s. 21 (1) (b)	9.3.2, 9.5.3
s. 21 (2)	8.3, 6, 9.2.2
s. 21 (3)	8.3
s. 22 (1)	9.7.2, 9.9.2
s. 22 (2)	9.6.12
s. 23 (1)	5.2.4, 5.3.5
s. 23 (2)	9.9.2
s. 23 (3)	6.5.3, 4, 7
s. 24	14.1.2
s. 24 (1)	2.2.3, 7, 2.3.7, 8
s. 24 (2)	2.2.3, 7, 2.3.7, 9, 2.6.2, 3, 4.2.5
s. 24 (3)	2.2.3, 7, 2.3.8, 9
s. 25	14.1.2
s. 25 (2) (b)	2.6.2, 3, 5, 4.2.5
s. 25 (2)	2.3.7, 5.3.3
s. 25 (4)	2.2.3, 7, 4.2.5
s. 26	9.11.6, 8, 13.2.3
s. 27	2.2.3, 7, 4.3.2, 14.1.2
s. 28	2.6.3, 6.5.4
s. 29	12.1.2, 14.3.1, 2, 3
s. 30	1.18
s. 31 (1)	14.1.2, 3
s. 31 (2)	14.1.2, 3
s. 33	1.17
Arbitration Act 1958 (Vic.)	1.17
s. 4	7.5.6
s. 14	11.8
s. 15, Sch. 2	11.8
cl. (i)	7.5.6
Arbitration Act 1973 (Qld)	1.4
s. 3 (2)	1.17
s. 4	5.3.8, 9.4.2, 9.6.22

STATUTES—*continued*

Short Title	*Paragraph*
Arbitration Act 1973 (Qld)—*continued*	
s. 4 (1)	2.1.12
s. 6	1.18
s. 7 (1)	2.3.13
s. 7 (2)	4.1.17
s. 7 (3)	4.1.17, 4.2.7
s. 8	2.4.6
s. 9	2.5.2
s. 10 (1)	4.1.15
s. 10 (2)	2.2.7, 4.2.7, 12
s. 11	4.1.5
s. 12	6.6.5
s. 13	5.1.8
s. 14	5.1.8
s. 15 (1)	5.2.9
s. 15 (3)	9.2.6
s. 16 (1)	5.2.11
s. 16 (2)	7.2.6
s. 17	5.1.8
ss. 18–26	5.1.10
s. 18 (1)–(4)	6.8.17
s. 18 (5)	6.8.17
s. 18 (6)	6.8.17
s. 18 (7)	6.8.17
s. 18 (8)	6.8.17
s. 18 (9)	6.8.17
s. 18 (10)	6.8.17
s. 18 (11) (a)	6.7.5
s. 18 (11) (b)	6.10.7
s. 18 (11) (c)	6.8.17
s. 18 (11) (d)	6.8.17
s. 18 (11) (e)	6.4.8
s. 18 (11) (f)	6.5.6
s. 18 (11) (g)	6.4.8, 6.10.7
s. 18 (11) (h)	6.4.8
s. 20	9.2.6
s. 20 (3)	5.3.8, 5.4.8
s. 21	9.5.6
s. 22	7.4.7
s. 23	9.1.4
s. 24	7.1.8, 9.4.2, 4, 9.6.22
s. 24 (1)	2.2.7, 9.3.6
s. 25	9.9.7
s. 26 (3)	2.2.7
s. 26 (4)	9.9.7
s. 27	5.4.8
s. 28	9.10.4
s. 29	8.6
s. 30 (1)	9.7.10
s. 30 (2)	9.2.6
s. 31	9.9.8
s. 32 (1)	5.3.8
s. 32 (2)	9.4.2, 9.6.22
s. 33	2.2.7
s. 33 (1)	2.3.13
s. 33 (2)	2.3.13, 2.6.5
s. 34 (2)	2.3.13, 2.6.5
s. 35	9.11.11
s. 36	2.2.7, 4.3.4
ss. 41–44	13.2.13

STATUTES—*continued*

Short Title	*Paragraph*
Arbitrations Act, R.S.O. 1970, c. 25 (Ontario)	
s. 16	9.8.2
Arbitration (Foreign Awards and Agreements) Act, 1973	13.2.8, 12, 14, 17, 14.2.1
s. 3 (1)	2.1.2
s. 4 (1) (a)	13.2.7
s. 4 (2)	13.2.7
s. 4 (4)	13.2.7
s. 5 (1) (a)	13.2.7
s. 5 (1) (b)	13.2.7
s. 5 (4)	13.2.7
s. 5 (5)	13.2.7
s. 6	13.2.7
s. 8	13.2.7
s. 8 (1)	13.2.4
s. 8 (2)	13.2.5, 6
Arbitration (Foreign Awards and Agreements) Act 1974 (Cth)	1.16, 13.2.8
s. 3 (1)	13.2.6
s. 3 (2)	13.2.6
s. 12 (1)	13.2.6
Arbitration (International Investment Disputes) Act 1966 (U.K.)	
Schedule	15.2
Australian Courts Act 1828 (U.K.)	
s. 24	1.16
Bankruptcy Act 1966 (Cth)	
s. 40 (3) (a)	9.11.5, 6, 8
Builders Licensing Act, 1971	
s. 45 (2) (b)	14.2.1
s. 46	14.2.1
Church of England in Australia Constitution Act, 1961	
s. 9	14.1.1, 14.2.1
City of Sydney Improvement Act, 1879	
ss. 62–64	14.2.1
Civil Procedure Act 1833 (U.K.)	
s. 39	1.16, 2.3.3, 9.2.1
s. 40	1.16, 6.8.11
s. 41	1.16
Claims against the Government and Crown Suits Act, 1912	9.11.13
Colonial Courts of Admiralty Act 1890 (U.K.)	6.6.6
s. 4	6.6.6
s. 7 (1)	6.6.6
s. 15	6.6.6
Commercial Causes Act, 1902	
s. 6 (b)	6.8.3
Commercial Transactions (Miscellaneous Provisions) Act, 1974	
s. 3 (e)	4.2.6

STATUTES—*continued*

Short Title	*Paragraph*
Common Law Procedure Act 1854 (U.K.)	9.6.9
s. 5	1.16, 8.2
s. 7	1.16, 3.4, 9.6.7, 10
s. 8	1.16, 9.7.2
s. 11	4.1.1
ss. 11–17	1.16
s. 13	5.3.2
s. 15	9.2.1
s. 17	9.11.3
Common Law Procedure Act 1857	
ss. 2–8	1.16
Commonwealth of Australia Constitution Act 1900	
s. 109	14.1.3
Commonwealth Places (Application of Laws) Act 1970	13.2.9
Companies Act 1948 (U.K.)	
s. 447	6.7.2
Companies Act, 1961	
s. 5 (1)	6.7.3
s. 270 (5)	14.1.1, 14.2.1
s. 363 (1)	6.7.2, 3
Conveyancing Act, 1919	
s. 23B	9.3.1
s. 23C	9.3.1
s. 54A	9.3.1
s. 84 (1) (a)	14.2.1
s. 84A (a)	14.1.1, 14.2.1
s. 89	2.3.15
s. 129	2.3.15
s. 170	5.1.6
Co-operation Act, 1923	
s. 91	14.2.1
Court of Petty Sessions (Civil Claims) Act, 1970	
s. 71	14.2.1
Courts Act 1971 (U.K.)	
s. 25 (1)	11.4
s. 25 (2)	11.4
Credit Union Act, 1969	
s. 70	14.2.1
s. 70 (7)	14.1.1
Crimes Act, 1900	
s. 327	6.8.1
s. 330	6.8.1
s. 339	6.8.1
s. 342	6.8.1
s. 407	6.8.1, 14.2.1
District Court Act, 1973	12.4
s. 63	12.1, 14.1.1, 3, 14.2.1

STATUTES—*continued*

Short Title	*Paragraph*
Evidence Act, 1898	
s. 3 (1)	6.8.1, 14.2.1
Part II	6.8.1
s. 5	6.8.2
s. 13	6.8.11
s. 14	6.8.11
Part IIA	6.8.1
s. 14A	6.8.1, 14.2.1
Foreign Judgments (Reciprocal Enforcement) Act, 1973	13.2.7, 8, 10, 14, 17 14.2.1
s. 4 (1)	9.11.8, 13.2.5, 15
s. 5 (2)	13.2.15
s. 5 (3)	13.2.15
s. 5 (4)	13.2.15
s. 5 (4) (b)	13.2.5
s. 5 (7)	13.2.15
s. 6 (1)	13.2.5
s. 6 (3)	13.2.5
s. 10	9.11.9, 13.2.5
ss. 15–17	13.2.4
Friendly Societies Act, 1912	
ss. 72–74	14.2.1
Hire Purchase Act, 1960	
s. 22 (2)	4.2.6
Hire-purchase Agreements Act, 1941	
s. 17B	4.2.6
Imperial Acts Application Act, 1969	1.16
Imprisonment on Civil Process Amendment Act of 1874	
s. 6	1.16
Instruments Act 1958 (Vic.)	
s. 28 (2)	4.2.7
Insurance Act, 1902	
s. 19	1.16, 4.2.6, 6.10.6, 14.2.1
s. 21	1.16, 4.2.6, 14.2.1
Interpretation Act, 1897	
s. 17	13.1.1
s. 33	6.8.1, 7, 14.2.1
Judgment Creditors' Remedies Act, 1901	
s. 18	3.4
Judgments Act 1838 (U.K.)	
s. 3 (1)	3.4
Land and Valuation Court Act, 1921	
s. 9	14.2.2
Law Reform (Law and Equity) Act, 1972	4.1.4
Law Reform (Miscellaneous Provisions) Act 1934 (U.K.)	
s. 3 (1)	7.3.1

STATUTES—*continued*

Short Title	*Parahragh*
Legal Practitioners Act, 1898	
s. 39A	7.5.2, 14.2.1
Limitation Act, 1969	
s. 69	14.2.1
s. 70	14.2.1
s. 71	14.2.1
s. 72	14.2.1
s. 73	14.2.1
Local Government Act, 1919	12.5
s. 317AN	14.1.1
s. 317X	14.1.1
s. 341K	14.1.1
s. 581	12.1, 4, 10, 14.2.1
Main Roads Act, 1924	
s. 15	14,2.1
Merchant Shipping Act 1894 (U.K.)	14.3.2
s. 91	14.3.3
s. 493 (1)	14.3.3
s. 494	14.3.1, 3
s. 495	14.3.1, 3
s. 495 (2)	14.3.1
s. 496	14.2.1, 14.3.1, 3
s. 496 (1)	14.3.1
s. 496 (2)	14.3.1
s. 496 (3)	14.3.1
s. 497 (2)	14.3.3
s. 509	14.3.3
s. 712	14.3.3
s. 735 (1)	14.3.3
s. 736	14.3.3
Mining Act, 1973	
s. 127	14.2.1
Municipal Council of Sydney Electric Lighting Act, 1896	14.2.1
s. 39	14.1.1
Oaths Act, 1900	
s. 12	6.8.7
s. 13	6.8.1, 7
s. 21 (1)	6.8.1
s. 26 (1)	14.2.1
s. 26B	13.1.5
Permanent Building Societies Act, 1967	
s. 85 (4) (c)	14.2.1
Public Works Act, 1912	
s. 85	14.2.2
s. 107	14.2.1, 2
ss. 109–123	14.1.1, 2.1, 2
Sale of Goods Act 1893 (U.K.)	
s. 52	7.4.2, 4
Service and Execution of Process Act 1901 (Cth)	13.2.8
s. 3 (h)	9.11.5

STATUTES—*continued*

Short Title	*Paragraph*
Solicitors Act 1957 (U.K.)	
s. 72	7.5.2
Statute of Westminster 1931 (U.K.)	6.6.6
s. 6	6.6.6
Supreme Court Act, 1970	6.8.17
s. 7	1.16
s. 51 (5)	10.2
s. 66 (4)	6.4.4, 6, 6.5.2
s. 67	6.4.4, 6
s. 72	6.8.7, 18
s. 74	5.4.1, 4
s. 82 (1) (a)	6.8.3
s. 88	2.3.9
s. 94	7.3.1
s. 94 (1)	9.10.1
s. 96	3.4
s. 96 (1)	9.11.4
s. 98	9.11.8
s. 98 (1)	6.7.3
s. 101 (1) (b)	8.1
s. 101 (2)	8.8, 9.6.24, 9.7.12
s. 118	11.6
s. 121	11.6
s. 124 (1) (a)	6.5.7, 6.8.18, 9.6.20, 9.7.8
s. 124 (1) (n)	6.5.7
s. 124 (1) (s)	11.6
Sch. 2	1.16
Supreme Court of Judicature Act 1873 (U.K.)	
s. 3	9.6.7
s. 83	11.4
Supreme Court of Judicature Act 1875 (U.K.)	
s. 2	9.6.7
Supreme Court of Judicature (Commencement) Act 1874 (U.K.)	
s. 2	9.6.7
Supreme Court of Judicature (Consolidation) Act 1925 (U.K.)	10.1
s. 45	6.5.2
s. 45 (1)	6.4.4
s. 45 (2)	6.4.4
Supreme Court Procedure Act, 1957	
s. 13	1.16
Sch. 1	1.16
Sydney Collieries, Limited Enabling Act, 1924	
s. 4 (5)	14.2.1
Trustee Act, 1925	
s. 49 (1) (d)	14.2.1

STATUTES—*continued*

Short Title	*Paragraph*
Uniform Arbitration Act (U.S.A.)	
s. 1	2.3.10
s. 3	5.1.4
s. 4	7.2.3
s. 8 (a)	9.3.3
s. 8 (b)	9.2.2
s. 9	9.9.3, 4
s. 11	9.11.7, 9
s. 13 (a) (1)	9.9.3
s. 13 (a) (2)	9.9.3
s. 13 (a) (3)	9.9.3, 4
s. 14	9.11.7, 9
United States Code Art. 9	
s. 2	2.3.10
s. 3	6.6.6
s. 8	4.2.8, 6.6.6
s. 10 (a), (b), (d)	5.3.8
s. 11	9.9.8
Water Act, 1912	
s. 64	14.2.1
Wentworth Irrigation Act, (1890)	14.2.1

REFERENCES TO THE DRAFT BILL

Section etc.	*Paragraph*
5 (1)	2.2.19
(2)	9.11.12
(3)	9.7.12
(6)	2.2.19
7	1.18
8 (2)	12.11
9	14.1.6, 14.2.1
11	2.2.19
13 (1)–(5)	2.3.16
(5) (a)	2.2.19
(b)	2.1.13
14	2.4.7
15	4.1.6, 13.1.9
15 (1)	4.1.4, 5, 6, 11
(a)	4.1.18
(3)	2.2.4
(4)	2.2.4
(5)	4.1.18
(6) (a)	2.2.19, 4.1.18
(b)	2.1.13, 4.1.18
(7)	4.1.6, 18
(9)	13.1.9
16	4.2.17, 13.1.9, 14.2.1
(2)	13.1.9
17	2.2.14, 4.3.6
18–26	5.1.10
21	2.6.4
25 (1)	2.6.4
27 (1)	5.3.10
(3)	2.6.4, 5.3.10
28	5.2.14
Part IV	2.2.14
29–34	5.4.9
35 (1)	5.5.7, 6.1.4, 6.11.2
(2)	5.5.7
(4)	6.8.19, 6.11.2, 14.2.1
(a)	6.8.19
36	6.4.9, 6.5.7
37	2.2.14
(1), (2)	6.7.7
38	6.8.19

REFERENCES TO THE DRAFT BILL—*continued*

Section etc.	*Paragraph*
39	13.1.9
(1)	6.11.2
(3)	13.1.9
40	6.8.19, 13.1.9
(5)	13.1.9
41 (1)–(7)	6.3.6
42 (3)	6.3.6
43 (1)	2.2.7, 14, 5.2.14
(2)–(5)	5.2.14
Part VII	2.2.14
44	7.2.8
45	2.2.14
46	7.3.6
47	2.2.14
(1)–(4)	7.5.8
48	8.8
49	13.1.9
(1)	8.8
(2)	13.1.9
(3)	9.7.12
50	8.8
(b)	8.8
52	2.2.14
(1)–(3)	9.2.8
53	9.5.7
54	9.1.5
55	2.2.14, 9.9.9, 13.2.11
56	2.2.14, 9.9.9
57	2.2.14
(1), (2), (5), (7)	9.7.12
58	2.2.14
(1), (3), (5)–(7)	9.6.24
59 (1)–(4)	9.3.8
60 (1), (2), (4)	9.10.6
61	2.2.14, 9.11.13, 13.1.9
(1)	9.11.14
(2)	9.11.4, 14
(3)	9.11.14
(4)	13.1.9, 13.2.17
(c)	9.11.14

REFERENCES TO THE DRAFT BILL—*continued*

Section etc.	*Paragraph*
62	11.10, 12.11
63	11.10, 12.11
(10)	11.10
64	6.2.3
65	2.2.14, 2.3.16
66	7.5.8
(1) (b)	4.1.12
67	4.1.18
68	6.8.19, 13.1.9
(2)	13.1.9
70	2.2.1, 14
72	13.1.9
(1) (a)	6.8.19
(b)	6.5.7, 8
(d), (e)	6.10.8
(f), (g)	6.10.8, 6.11.2
(3)	13.1.9
73 (1)	13.2.7
(d)	6.4.9
(2)	14.2.1
Schedule 1	2.2.9, 10, 11
Schedule 2	8.8, 9.6.24, 9.7.12, 12.11, 13.2.17

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LAW REFORM COMMISSION

NEW SOUTH WALES

To the Honourable F. J. Walker, LL.M., M.L.A.,
Attorney General for New South Wales,
Sydney.

REPORT

on

COMMERCIAL ARBITRATION

PART 1.—GENERAL

1.1 Terms of reference. We make this report under our reference—
"To review the law relating to the arbitration of civil disputes, and incidental matters."

This report takes the law as it was on 1st January, 1976.

1.2 Extent of terms of reference. We regard our terms of reference as not extending to industrial arbitration under such legislation as the Industrial Arbitration Act, 1941. The main concern of our terms of reference is arbitration pursuant to an agreement for abitration, but we take them to extend also to arbitrations under statutes[1] and arbitrations under order of the Supreme Court or of the District Court.

[1] Except industrial arbitrations.

1.3 Working paper and comment. We published a working paper in November 1973 and distributed it widely. We received comment on the working paper and other assistance on the reference from a number of judges and from the people listed in Appendix 2. We are grateful to them. The comment received has had a large influence on our recommendations. We deal particularly with some of the comments but not with all of them. We have, however, considered them all and have attempted to weigh them on their merits. To deal particularly with all of them would unduly lengthen this report.

1.4 Recent Australian reports. In recent years there have been reports on commercial arbitration by law reform agencies in Australia—

in 1969 by the Law Reform Committee of South Australia—the fifth report of the Committee—(the *South Australian report* (1969));

in 1970 by the Law Reform Commission of Queensland—Q.L.R.C. 4—(the *Queensland report* (1970));

in 1974 by the Law Reform Commission of Western Australia—Project No. 18—(the *Western Australian report* (1974));

in 1974 by the Chief Justice's Law Reform Committee in Victoria (the *Victorian report* (1974));

in 1974 by the Law Reform Commission of the Australian Capital Territory (the *Australian Capital Territory report* (1974)).

The *Queensland report* has been adopted by legislation.[1] In our present report we frequently refer to these reports. Sometimes we may have sacrificed accuracy to brevity in referring to the contents of these reports. We have not done so intentionally, but we suggest that a reader of this report who wishes to appreciate fully the recommendations and reasons in these other reports should go to the reports themselves rather than rely on our summaries. We have learned much from all these reports, but we are especially indebted to the Law Reform Commission of the Australian Capital Territory. It is our good fortune that that Commission has in its report subjected our working paper to a sympathetic yet searching criticism.

[1] Arbitration Act 1973 (Qd.).

1.5 The Institute of Arbitrators Australia. This Institute was incorporated in the Australian Capital Territory in 1975 as a company limited by guarantee. The Institute was established for the following objects (amongst others):

(a) To promote, encourage and facilitate the practice of settlement of disputes by arbitration.

(b) To afford means of communicating between professional arbitrators on matters affecting their various interests.

(c) To support and protect the character, status and interests of the profession of Arbitrators generally.

(d) To promote study of the law and practice relating to arbitration.

(e) To diffuse among Members information on all matters affecting arbitration and to print, publish, issue and circulate such periodicals, papers, books, circulars and other literary under-takings, or to contribute articles to magazines and periodicals as may seem conducive to any of these objects.

(f) To form a library for the use of Members and to provide a suitable hall and rooms for the holding of arbitrations, lectures and meetings.

(g) To provide means for training and testing the qualifications of candidates for admission to professional membership of the Institute by examination, and for such purposes to award certificates and to institute and establish scholarships, grants, rewards and prizes.

The pursuit of these objects will tend towards fulfilment of long-felt needs. Commercial arbitration today has many drawbacks. For some of these the law is to blame. Many other drawbacks, however, are the result of a failure to appreciate what cases are fit for arbitration and what cases are not; a failure to draw arbitration agreements with sufficient skill and forethought; the difficulty of finding men to act as arbitrators who combine the qualities of knowledge of the law and practice of arbitration, expert knowledge of the subject matter of the difference, and a judicial temperament; and failure to prepare and conduct cases before arbitrators with due efficiency. It is amongst the objects of the Institute to contribute to the relief of all these problems. The Institute should, we believe, be welcomed by all who are concerned with commercial arbitration.

1.6 What is arbitration? In general, where persons are in difference respecting any matter touching their legal rights, and the difference is one which might be resolved in a legally binding manner by their agreement, and they agree that the difference shall be determined, so as to bind them legally, by another person acting judicially, determination in the manner agreed is determination by arbitration.[1] This description is qualified by "in general" because the common law has not reached a firm definition. A variety of situations arise where persons agree that their rights shall be determined by others, but the situation is not one of arbitration. These include cases of valuation, appraisement and certification, commonly distinguished from arbitration on the basis that there is no "difference" or that the person to make the determination is not required to act judicially.[2] An agreement for arbitration may be made as well in respect of differences which may arise in the future as in respect of existing differences. Arbitration may be required by statute as well as by agreement.

[1] See Hogg (1936) pp. 8–13; *Halsbury on Arbitration* (1973) para. 501; *Australian Mutual Provident Society* v. *Overseas Telecommunications Commission (Australia)* [1972] 2 N.S.W.L.R. 806; *Ajzner* v. *Cartonlux Pty Ltd* [1972] V.R. 919.

[2] *Halsbury on Arbitration* (1973) para. 504; *Isca Construction Co. Pty Ltd* v. *Grafton City Council* (1962) 8 L.G.R.A. 87, 92–94.

1.7 Arbitration on future relations. Sometimes a long-term contract will provide for the determination by arbitration of questions concerning the future conduct of some venture, as where a contract for the supply of some commodity in shipments over a period of many years provides for variations of the price by arbitration. An award in such an arbitration commonly will be, not a determination of the pre-existing rights and liabilities of the parties, but a determination of the future relations of the parties. An award of this kind has affinities with an award in an industrial arbitration[1] and will not be fit for enforcement in the manner contemplated by Arbitration Acts, that is, in the same manner as a judgment or order of the Supreme Court to the same effect. An arbitration agreement of this kind has, however, been held to be within the application of the Arbitration Act.[2]

[1] *The Federated Saw Mill, Timber Yard, and General Woodworkers Em ployees' Association of Australasia* v. *James Moore and Sons Pty Ltd* (1909 8 C.L.R. 465, 521–527.

[2] *In re Fenwick* (1897) 18 L.R. (N.S.W.) 405.

1.8 Should there be a statutory definition? There is some attraction in the idea that an Arbitration Act should specify what it means by arbitration. There are some statutory provisions relating to arbitration which apply notwithstanding contrary agreement by the parties. And we recommend some new provisions which would so apply. What is the use, it may be said, of having these mandatory provisions while leaving the question, what is arbitration, to an unsatisfactory body of case law? Does not this leave it open to the framer of a contract, by some drafting expedient, to contrive an arrangement similar to arbitration, but not arbitration, and thus evade the mandatory provisions? [1] The answer is yes. But the price of evading the mandatory provisions will include the abandondment of the assistance given by statute to arbitrations, for example, means of compelling the attendance of witnesses. There will also be uncertainty in legal result where parties deliberately put their arrangements outside the well-tried laws relating to arbitration. To leave "arbitration" undefined is to allow the continuance of some risk of uncertainty, and some risk of abuse. But the framing of a statutory definition would be difficult and risky in itself. So far as we know, such a definition has not been attempted in any common law country. We think it better not to make the attempt. We believe that evasion is not now a significant evil: if it becomes so legislation can deal with it.

[1] See *Arenson* v. *Arenson* [1973] Ch. 346, 371c; [1975] 3 W.L.R. 815.

1.9 Objectives of the law: general. We approach our consideration of the law relating to arbitration with some general views on what the objectives of the law should be. We formulate these objectives in the light of the general legal background that, as a rule, where persons are in difference on a question of civil rights and liabilities they may, by agreement, determine their difference in any way which they think fit. Arbitration is one way of determining a difference by agreement. The parties, instead of settling their rights directly by agreement, may agree to abide by the determination of another person as arbitrator.

1.10 Objectives of the law: agreement freely made.

(a) An agreement for settlement of a difference, whether by arbitration or not, may be invalid or may be set aside on the general grounds applying to all contracts: fraud, mistake, illegality and so on. Putting aside agreements so tainted, it should be an objective of the law to uphold and aid an arbitration agreement freely negotiated. And the parties should, we suggest, have the freedom to agree effectively to determination by arbitration in such mode as may commend itself to them. Thus, if parties freely negotiating agree for a determination by an arbitrator by reference to considerations of equity and good conscience rather than by reference to law, that agreement should have effect.

(b) We have spoken above of an agreement freely negotiated. Free negotiation involves not only that one party's will is not overborne by another, but also that each party knows, or is in a position to take advice on, the advantages and disadvantages to him of the stipulations in an agreement for arbitration. We think that there is also ground for regarding as freely negotiated an arbitration agreement between businessmen who know that there are or may be risks to them in an arbitration agreement but are willing to take the risks for the sake of getting agreement on some larger transaction to which the arbitration agreement is ancillary. We shall return more than once to this subject later in this report. For the present it is enough to say that under our recommendations agreements of the general nature discussed in this paragraph would be distinguished as "exempt contracts".

1.11 Objectives of the law: control of other agreements. Experience over many years has shown, however, that arbitration agreements are often unwisely made. Thus a building contract commonly has an arbitration clause which provides prospectively that any difference arising under the contract will be referred to arbitration before an arbitrator experienced in the building industry. Good reasons can be seen for referring to arbitration questions of, say, quality of brickwork, but a future difference may be solely on a question of law. A question of law can be determined better and often more quickly and cheaply by a court than by an arbitrator. And arbitration clauses are often enough framed so as to be unduly favourable to one party, or are badly expressed and difficult or impossible to apply. These are real problems, and expensive ones to the parties. Where the arbitration agreement is not an exempt contract in the above sense, it should, we think, be an objective of the law to save the parties from the full rigour of legal enforcement of a contract unwisely made.

1.12 Objectives of the law: contracts of adhesion. There is another kind of case, where the arbitration agreement is not an exempt contract and, further, is a contract virtually imposed by one party (the dominant party) on another party (the adherent party) by a standard form contract made by the dominant party in the course of business. Such a contract we call a "contract of adhesion". Where the arbitration agreement is a contract of adhesion we think that the assent of the adherent party, though real enough for the purposes of the ordinary law of contract, ought not to be treated as such a conscious and deliberate assent as would justify holding him so firmly to the contract as almost automatically to deny him access to the courts. It should, as it seems to us, be an objective of the law to give some relief to an adherent party to a contract of adhesion.

1.13 Objectives of the law: the role of the Court. Parties who agree to arbitration have as a dominant purpose an escape from litigation in the courts. This purpose is more or less disappointed when there are proceedings in the Court on a stated case, or for the setting aside or remission of an award. The disappointment is aggravated when there is an appeal from the Court at first instance. We think that it should be an objective of the law to see that that purpose is not disappointed any further than justice requires. Subject to safeguards, parties should be able to limit recourse to the Court, and appeals from the Court at first instance should be restricted.

1.14 Objectives of the law: serviceable rules. Finally, it should be an objective of the law that a mere agreement to arbitrate should call into operation a set of legal rules which make arbitration both practicable and effective: the law should tend to reduce the wordiness of arbitration agreements.

1.15 Some public drawbacks of arbitration.

(a) We do not attempt here to list and weigh the advantages and disadvantages to the parties of arbitration in comparison to litigation.[1] But there are two consequences of a widespread use of arbitration which are harmful to the community generally, as distinct from the immediate parties to the particular arbitration. One of these consequences arises from the fact that litigation produces a series of reported cases, but arbitration does not. Reported cases are the foundation of the common law. If arbitration displaces litigation to a significant extent in any field of business, the growth of the common law in that field is hampered: so too is the process by which standard forms of contract acquire a settled interpretation.[2] The other consequence arises from the fact that the publicity of litigation gives some insight, absent in arbitration, into the way particular businesses are conducted. It has been said, for example, that the privacy of arbitration makes it impossible to know to what extent oppressive terms in policies of indemnity insurance are used oppressively.[3]

(b) These consequences are drawbacks of arbitration from the point of view of the community at large. We suggest, however, that they ought not to influence the content of the laws relating to arbitration. Publicity of decision in litigation, useful though it is, is a matter collateral to the real business of the courts of hearing and determining differences between parties. Where parties are in difference it is as a rule open to them to settle their difference by agreement in private: to do so offends no public policy. Indeed the

courts frequently try to persuade parties to settle their differences by agreement. Arbitration is one device for settlement of a difference which parties may adopt by agreement. Arbitration ought not to be restricted on the ground that it, like other consensual devices for settlement, does not involve publicity.

[1] There are useful general discussions in Phillips (1934B) and Redfern (1976).

[2] Phillips (1934A) at p. 607, asks how can we build up a unified system of commercial law and practice unless arbitrators' decisions are used? "Without them we have a hodgepodge of nothingness, and business is not helped nor arbitration aided by the mistakes or wisdom of others."

[3] *Fifth Report of the Law Reform Committee (Conditions and Exceptions in Insurance Policies)*, 1957, *Cmmd.* 62, p. 6; *Fourth Report of the Law Reform Committee for Scotland,* on the same subject, 1957, *Cmnd.* 330, pp. 12–14.

1.16 History of the law in New South Wales. The law of England relating to arbitration as it stood in 1828, including the Arbitration Act 1698,[1] was introduced in New South Wales in that year.[2] In 1839 New South Wales adopted the English legislation of 1833.[3] In 1857 New South Wales adopted some of the English legislation of 1854.[4] In 1867 a New South Wales Act was passed whereby the adopting legislation was repealed.[5] The 1867 Act amended and consolidated the former adopting legislation,[6] adopted in a restricted form the provision made in England for remission of awards,[7] and introduced provisions for taking evidence on commission or by deposition for use in arbitrations.[8] In 1874 there was enacted a prohibition on the use of a writ of attachment to enforce the payment of money due under an award but an authority was given to issue writs of execution against the property and person of a debtor under an award.[9] The Act of 1867 was repealed by the Arbitration Act, 1892. The Act of 1892 adopted the substance of the Arbitration Act 1889 (U.K.), but added provisions, taken from the Act of 1867, for taking evidence on commission or by deposition for use in arbitrations.[10] The Arbitration Act, 1892, was itself repealed and replaced by the Arbitration Act, 1902, in the course of Judge Heydon's work of consolidation. The Act of 1902 also repealed and replaced the provisions of the Act of 1874 dealing with the enforcement of awards. The Act of 1902 has been amended twice in minor ways.[11] In the result the law of New South Wales relating to arbitration has special provisions relating to evidence on commission or by deposition,[12] and restricting the means of enforcement of an award,[13] but otherwise is similar to what was the law in England under the Arbitration Act 1889 (U.K.). The Arbitration Act 1698 (U.K.) was superseded and perhaps impliedly repealed for New South Wales by the Arbitration Act, 1892: so far as it was not then repealed it was repealed by the Imperial Acts Application Act, 1969. Australia has acceded to the New York Convention of 1958 and a Commonwealth Act has been passed to give effect to the Convention.[14] Under recent legislation in New South Wales, an agreement for arbitration of differences arising out of a contract of insurance, made before differences have arisen, does not bind the insured.[15]

[1] *Crooke* v. *Swords* (1868) 5 W.W. & a'B. 136.

[2] Australian Courts Act 1828 (U.K.), s. 24.

[3] That is, the reforms made by the Civil Procedure Act 1833 (U.K.), ss. 39–41. The adopting Act was 3 Vic. No. 4: this Act was not given a short title.

[4] The Common Law Procedure Act of 1857, ss. 2–8, adopted by the Common Law Procedure Act 1854 (U.K.), ss. 11–17. The omissions were ss. 5, 7, 8 of the Act of 1854.

[5] 31 Vic. No. 15, s. 17. This Act was not given a short title: we shall call it the Arbitration Act of 1867.

[6] Arbitration Act of 1867, ss. 2–10, 12–14.

[7] Arbitration Act of 1867, s. 16.

[8] Arbitration Act of 1867, ss. 11, 15.

[9] Imprisonment on Civil Process Amendment Act of 1874, s. 6.

[10] Arbitration Act, 1892, ss. 18, 20.

[11] Supreme Court Procedure Act, 1957, s. 13, Sch. 1; Supreme Court Act, 1970, s. 7, Sch. 2.

[12] Arbitration Act, 1902, ss. 21, 23.

[13] Arbitration Act, 1902, s. 14 (2).

[14] Arbitration (Foreign Awards and Agreements) Act 1974 (Cth).

[15] Insurance Act, 1902, s. 19. There is a power to exempt by regulation: s. 21.

1.17 New Arbitration Act. The Arbitration Act, 1902, is out of date in comparison with the legislation of other countries and has many minor defects which ought to be put right. We recommend some substantial changes in the law. We therefore further recommend that a new Arbitration Act should be introduced. We recommend, however, that the Arbitration Act, 1902, should for the time being remain in force so far as concerns arbitration agreements made, and statutory arbitrations commenced, before the commencement of the new Act. We recommend this because the new Act would materially affect private contracts and it is unjust that the Act should be retrospective in the sense of affecting contracts made before its commencement. The Arbitration Act, 1902, might be repealed, after some years in the course of statute law revision.[1]

[1] In South Australia the recommendation is that a new Act should not apply to an arbitration under an agreement made before the commencement of the new Act: *South Australian report* (1969) p. 4 (draft Bill s. 2 (2)); the *Queensland report* (1970) recommends a provision whereby the new Act would apply to an arbitration under a pre-Act agreement if the arbitration is commenced after the commencement of the Act: report p. 16 (draft Bill) s. 2 (2), see now Arbitration Act 1973 (Qd.), s. 3 (2)). This follows the present English law: Arbitration Act 1950 (U.K.), s. 33. In Western Australia there is a recommendation like that in Queensland: *Western Australian report* (1974) draft Bill appendix B s.3 (2). In Victoria the Arbitration Act 1958 does not apply to an arbitration under an agreement made before its commencement and the *Victorian report* (1974) prefers this to the Queensland approach (p. 4).

1.18 The Crown. The Arbitration Act, 1902, applies to an arbitration to which the State Government is a party.[1] In England the corresponding legislation applies to an arbitration to which Her Majesty "either in right of the Crown or of the Duchy of Lancaster or otherwise" is a party.[2] Perhaps the words quoted have the effect that the Crown in right of, say, New South Wales, as a party to an arbitration governed by the law of England is bound by the English legislation. We recommend that a new Arbitration Act should, so far as the legislative power of the State permits, bind the Crown not only in right of New South Wales but also in all other rights.[3]

[1] Arbitration Act, 1902, s. 26.

[2] Arbitration Act 1950 (U.K.), s. 30.

[3] See *Commonwealth* v. *Bogle* (1953) 89 C.L.R. 229, 259, 260. See draft Bill s. 7. All the recent Australian reports recommend that an Arbitration Act should bind the Crown: *South Australian report* (1969) pp. 5 (draft Bill s. 5), 17; *Queensland report* (1974) pp. 5, 17 (draft Bill s. 5: see now the somewhat different provision in the Arbitration Act 1973 (Qd.), s. 6); *Western Australian report* (1974) draft Bill appendix B s. 6; *Victorian report* (1974) p. 5; *Australian Capital Territory report* (1974) p. 23 para. 88.

1.19 Comparative law. We consider in detail the arbitration laws of England and, in some respects, criticize those laws. We do so because the Arbitration Act, 1902, closely follows the Arbitration Act 1889 (U.K.) and much of the judicial authority and learned writings on the English law apply to the law of New South Wales. We occasionally refer to the arbitration laws of the United States of America: these laws are of peculiar interest because they are based on the common law, but pursue a policy of holding parties more firmly to their contracts, and limiting more closely the role of the courts, than do the laws of England or of New South Wales. We have given some attention to the laws of other countries, but have not made them the basis of substantial discussion in this report.

1.20 Draft Bill. The draft Bill in Appendix 1 expresses our recommendations in legislative form. It takes the law as it was on 1st January, 1976.

1.21 Uniformity in Australia. Many commentators have put it to us that there would be great value in having uniform laws relating to commercial arbitration amongst the Australian States and Territories. We agree.

PART 2.—ARBITRATION AGREEMENT

SECTION 1.—FORM OF AGREEMENT

2.1.1 Present law. In the Arbitration Act, 1902, "submission" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named in the agreement or not, but this meaning may be displaced by the context or subject matter.[1] The provisions of the Act which depend on the existence of a submission as defined thus operate only where there is a written agreement. Amongst these provisions are those relating to revocation,[2] stay of litigation in breach of agreement,[3] award in the form of a stated case,[4] and enforcement of the award.[5] Other provisions operating only where there is a written agreement are listed in the footnote.[6] Other provisions of the Act do not use the word "submission": thus the existence of a written agreement is not expressly made a condition of their operation. The context or subject matter may be held to do so[7] but, putting that possibility aside, the provisions not expressly depending on the existence of a written agreement include those relating to consultative stated cases,[8] removal for misconduct[9] and remission of award.[10] Other provisions not expressly depending on the existence of a written agreement are listed in the footnote.[11]

[1] Arbitration Act, 1902, s. 3.

[2] Arbitration Act, 1902, s. 4. "Submission" here does not bear the defined meaning in all respects (*In re Smith & Service and Nelson & Sons* (1890) 25 Q.B.D. 545), but that is beside the point here.

[3] Arbitration Act, 1902, s. 6.

[4] Arbitration Act, 1902, s. 9 (a).

[5] Arbitration Act, 1902, s. 14.

[6] Arbitration Act, 1902, s. 4—Submission to operate as if made an order of the court. See footnote 2.
s. 5—Implied terms in Schedule 2.
s. 7 (a), (b), (d)—Appointment by the Court.
s. 8 (a)—Filling casual vacancies.
s. 8 (b)—Default of appointment.
s. 9 (b)—Correction of slip in award. See Russell (1970) p. 314, note 7.
s. 10 (1)—Subpoenas.

[7] *Cf.* Russell (1970) p. 47.

[8] Arbitration Act, 1902, s. 19.

[9] Arbitration Act, 1902, s. 13 (1).

[10] Arbitration Act, 1902, s. 12 (1).

[11] Arbitration Act, 1902, s. 7 (c)—Default in appointing umpire.
s. 11—Enlargement of time for award.
s. 13 (2)—Setting aside award.
ss. 21, 23—Evidence on Commission.
s. 24—Order on terms.
s. 25—Perjury.
s. 26—State Government as party.

2.1.2 Arbitration (Foreign Awards and Agreements) Act 1974 (Cth). This Act deals with the recognition and enforcement of foreign arbitration agreements and awards pursuant to the New York Convention of 1958. Both the Convention and the Act depend for their operation on the existence of an "arbitration agreement", and that involves an agreement in writing signed by the parties or contained in an exchange of letters or telegrams.[1]

[1] Arbitration (Foreign Awards and Agreements) Act 1974 (Cth), s. 3 (1); Convention Article II (2).

2.1.3 Need for writing criticized. A reading of the law reports and the text books shows that statutory requirements that a submission, or an arbitration agreement, be in writing have not caused any great difficulty: there is a striking contrast here between the arbitration Acts and the Statute of Frauds. Problems may arise in marginal cases,[1] and in cases where a written agreement is followed by an oral agreement or an agreement inferred from conduct,[2] but the reported cases are few. The requirements do, however, have this vice: they permit a man to repudiate his undoubted agreement with impunity, on the ground merely that the agreement is not in proper form. This vice is enough to show that the statutory requirement of writing should not be applied except in cases where there is a demonstrable countervailing advantage.

[1] Russell (1970) pp. 40–45.

[2] Russell (1970) pp. 48, 229, 274.

2.1.4 Reasons for requiring writing.

(a) The requirements for a written agreement can be better explained by history than justified by utility. The expedient of 1698,[1] whereby a submission might be made a rule of court, involved almost necessarily that the submission be in writing. That Act remained in force in England until 1889 and for nearly two hundred years was a basic part of the law of arbitration. Traces of the Act of 1698 can still be seen in the Arbitration Act, 1902.[2] The need for a written agreement as regards some provisions of the Act of 1902 but not as regards others can sometimes be seen as based on questions of substance, but more often seems to be the result of inadvertence in drafting. How else can one explain why there must be a written arbitration agreement before there can be an award in the form of a stated case,[3] but there can be a consultative stated case in an arbitration under an unwritten agreement?[4]

(b) It is of course sensible to put an arbitration agreement in writing, as with any agreement governing future conduct. But in general the law of contract does not impose on parties whatever course of conduct the legislature conceives to be sensible: it is still right that as a rule contracting parties should be left to look after themselves. In

other fields writing is not made mandatory: a partnership agreement need not be in writing, nor need a lease for a term of three years or less. We do not see that the law should require writing merely because it is sensible to have writing.

(c) It is commonly difficult to be sure what are the terms of an oral agreement, at least where the agreement is of any complexity. In one aspect this is but a particular of the lastmentioned reason. Another aspect might be put by asking why the courts should have a duty to ascertain the terms of an agreement when the parties have not taken the trouble to put the terms on record. But it is part of the function of the courts to resolve problems arising out of past conduct which it can be seen, with hindsight, might have been ordered better.

(d) We think that there are no general grounds upon which one can say that all the provisions of an Arbitration Act ought to be confined to cases where there is a written arbitration agreement.

[1] Arbitration Act 1698 (U.K.), s. 1.

[2] For example, Arbitration Act, 1902, s. 4.

[3] Arbitration Act, 1902, s. 9 (a).

[4] Arbitration Act, 1902, s. 19.

2.1.5 Developments in England. The Arbitration Act 1950 (U.K.), insofar as it adopts provisions comparable with those of the United Kingdom Act of 1889 and the New South Wales Act of 1902, follows, with one exception, the pattern of the earlier Acts in requiring a written agreement for the operation of some of its provisions but not for others. The exception is that there can now be an award in the form of a stated case, whether or not the arbitration agreement is in writing.[1]

[1] Arbitration Act 1950 (U.K.), s. 21.

2.1.6 Comparative law: United States of America. In general the Arbitration Acts in the United States apply only where the arbitration agreement is in writing.[1]

[1] Domke (1968) §.6.01.

2.1.7 Principles for change. In our working paper we suggested that statutory provisions should not be limited to cases where the arbitration agreement was in writing except where there was positive justification for the limitation. We applied this guide as follows. In the first place, we proposed that a new Bill, so far as it picked up the substance of the Act of 1902, should not introduce new requirements of writing. In the second place, we suggested that a provision giving a power to the Court should not depend on the existence of a written agreement:

questions concerning the existence and terms of the agreement could be determined by the Court. In the third place, where a new Bill picked up the substance of a provision of the Arbitration Act 1950 (U.K.), the new Bill should not require writing in any case where the United Kingdom Act did not require writing. These principles overlap to some extent. In our working paper we applied these principles to the Act of 1902 as mentioned in paragraph 39 and we applied them to innovatory provisions in the proposed Bill from place to place as occasion required. We added that particular provisions also attracted special considerations in addition to the rules we had enumerated.

2.1.8 Changes to the Act of 1902.

(a) In our working paper we suggested that the restriction on revocation[1] should apply whether or not the agreement was in writing: revocation had to be by leave of the Court and the Court could have regard to inadequacy or uncertainty in an oral agreement. A serious question whether there was or was not an arbitration agreement might itself be a ground for giving leave to revoke.

(b) We suggested that an action brought in breach of an arbitration agreement should be liable to be stayed whether or not the agreement was in writing.[2] Here again an approach to the Court was necessary. If an agreement to arbitrate was proved, we thought that *prima facie* an action brought in breach of the agreement ought to be stayed, whether the agreement was in writing or not. And there was some ground for saying that an action so brought was liable to be stayed under an inherent jurisdiction of the Court.[3]

(c) We suggested in our working paper that here, as in England,[4] it should be open to an arbitrator to make an award in the form of a stated case, whether or not there was an arbitration agreement in writing, just as he could state, or be required to state, a consultative case, whether or not there was an arbitration agreement in writing.[5]

(d) We suggested that the implied terms in the Second Schedule to the Act of 1902, or provisions to take their place, should apply (subject to contrary agreement) whether the agreement was in writing or not. These implied terms were no doubt framed as being common and sensible provisions for insertion in an arbitration agreement. We could see no reason why they should be confined to cases where the agreement was in writing.

(e) We suggested that the provision for enforcement of the award in the manner of a judgment[6] should apply whether or not the arbitration agreement was in writing. An award was so enforceable only by leave of the Court. The proceedings for leave would provide an opportunity for any necessary determination concerning the existence and terms of the agreement. Further, the remedy for enforcement of

an award on an unwritten arbitration agreement was by proceedings for judgment on the award.[7] Depending on the rules of the Supreme Court, such proceedings need be little different from proceedings for leave to enforce the award in the manner of a judgment. The distinction, as regards enforcement, between an award on a written arbitration agreement and an award on an unwritten arbitration agreement, lacked substance and should be dropped.

(f) The remaining provisions of the Act of 1902 depending for their operation on the existence of a written arbitration agreement are listed above.[8] They are of minor importance and might, we suggested, be extended so as to operate where the agreement was not in writing.

[1] Arbitration Act, 1902, s. 4.
[2] Arbitration Act, 1902, s. 6.
[3] See para. 4.1.2 below.
[4] Arbitration Act 1950 (U.K.), s. 21 (1).
[5] Arbitration Act, 1902, s. 19.
[6] Arbitration Act, 1902, s. 14.
[7] Hogg (1936) p. 160.
[8] Para. 2.1.1 note 6.

2.1.9 Working paper proposal: new provisions. In our working paper we said that in proposing a variety of new provisions for an Arbitration Act elsewhere in the paper, we had considered whether the provisions should be confined to cases where there was a written arbitration agreement. In no instance did we consider that the provisions should be so confined. We therefore suggested that a new Act should not, in any of its provisions, be confined to cases where the arbitration agreement was in writing.

2.1.10 Another approach. But there were, we said, considerations to be weighed one against another. Although the draft Bill in the working paper adopted the conclusion reached in the last paragraph above, we put forward in the working paper for consideration a scheme under which writing would be required for some purposes but not for others. There was something to be said for the view that an arbitration agreement, having as it did the serious consequences of precluding the determination of disputes by the ordinary processes of the courts, ought not to be enforced unless the making of the agreement and its terms were beyond serious dispute. A conversation might be regarded by one party as embodying an agreement to arbitrate which was intended to be binding. The same conversation might be regarded by another party as merely an outline of what might or might not be agreed as a means of resolving a difference if a difference should arise in the future. On this view, the law should require that the arbitration agreement should be firmly established before insisting that an arbitration take place.

Touchstones for showing sufficiently the making of an agreement to arbitrate might be the existence of a written agreement, or conduct consistent only with the existence of an agreement, written or not.[1] The law might be so framed as to require touchstones such as those on an application for a stay of litigation or for the appointment of an arbitrator or perhaps for other purposes.

[1] Compare the law relating to the part performance of an unwritten agreement for the sale of land.

2.1.11 Comment on the working paper. Comment on the conclusion in the working paper was divided. One commentator thought the conclusion good as regards domestic agreements but pointed out that international conventions relating to arbitrations commonly applied only where there was an agreement in writing: to dispense with the need for writing might cause confusion in foreign trade. Another said that, since an arbitration agreement was intended to have the serious consequence of denying the parties access to the courts, the agreement ought to be made with some formality. Problems of uncertainty and difficulties of proof were also seen as more likely if the need for writing were dropped. Yet another commentator said that writing should be required unless the repentant party had taken a step in the arbitration. In total, more commentators favoured our proposal without qualification than were against it or suggested qualifications. The second approach[1] attracted some, but not much, support.

[1] Para. 2.1.10 above.

2.1.12 Recent Australian reports. In South Australia the recommended Bill has many provisions dependent on the existence of a "submission" and "submission" is defined as meaning "an agreement wholly or partly in writing to submit present or future differences to arbitration . . ."[1] In Queensland the recommended Bill has many provisions dependent on the existence of an "agreement to arbitrate" and that expression is defined as meaning "a written agreement to submit present or future differences to arbitration . . ."[2] The Arbitration Act 1973 of Queensland defines "agreement to arbitrate" somewhat more closely: it means "a written agreement that is signed by the parties or is contained in an exchange of letters or telegrams under which or under a clause of which the parties undertake to submit to arbitration . . . all or any present or future differences between them".[3] In Western Australia the recommended Bill has many provisions dependent on the existence of an "agreement to arbitrate" and that expression is defined in a way that does not require writing.[4] In Victoria the Chief Justice's Law Reform Committee saw merit in some aspects of the definition in the Bill which became the Queensland Act of 1973, but did not deal with the requirements of form.[5] In the Australian Capital Territory there is a recommendation that the law relating to arbitration be the same whether the arbitration agreement is in writing or not: the Commission further took the view that our alternative suggestion mentioned in paragraph 2.1.10 had no real weight.[6]

[1] *South Australian report* (1969) p. 4 draft Bill s. 3.

[2] *Queensland report* (1970) p. 16 draft Bill s. 3.

[3] Arbitration Act 1973 (Qd.), s. 4 (1). The definition seems to be inspired by the New York Convention of 1958 (Art. II). It seems that much of the Act would not apply to a policy of indemnity insurance in common form. Such a policy is not signed by the insured and is not contained in an exchange of letters or telegrams.

[4] *Western Australian report* (1974) p. 14 (para. 37 (a)), draft Bill Appendix B s. 5.

[5] *Victorian report* (1974) p. 5.

[6] *Australian Capital Territory report* (1974) p. 21 paras 79–81.

2.1.13 Further consideration.

(a) It is not, of course, a question whether an arbitration agreement not in writing should be void. No one suggests that that should be the law. The question is rather how far the statutory control of and aid to arbitrations should be confined to arbitration agreements in writing. Our answer is, not at all.

(b) We recognize, however, the advantages to all concerned of having an arbitration agreement, if made, made in writing.

As a rule the existence and terms of an agreement in writing can easily be proved. Where the existence or terms of the agreement cannot easily be proved, as where the agreement is not in writing or the agreement, though in writing, is lost, that fact should, as we think, count in favour of giving leave to revoke the authority of the arbitrator and against ordering a stay of litigation.[1]

[1] Draft sections 13 (5) (b), 15 (7) (b).

2.1.14 Recommendation. We recommend that a new Arbitration Act should not in any of its provisions be confined to cases where the arbitration agreement is in writing.

SECTION 2.—EXEMPT CONTRACTS; CONTRACTS OF ADHESION

2.2.1 General. Some rules of the law relating to arbitration apply notwithstanding contrary agreement.[1] Other rules yield to a contrary agreement.[2] Some of the provisions that we recommend should, we think, apply notwithstanding contrary agreement: others should yield to a contrary agreement, at least in some circumstances. But circumstances vary. It may be right to control closely an arbitration clause in a contract to build a house between a major construction company as builder and an ordinary man in the street as owner. It may be mischievous to control to a like extent an arbitration clause in a contract to build an oil refinery between a major construction company as builder and a major oil company as owner. After differences have arisen, that is, after the parties know the nature of the difference and

are in a position to take legal advice, there is room for a wide freedom of contract to arbitrate or otherwise settle their differences as the parties think fit.

[1] For example, the power to stay, or not to stay, litigation (Arbitration Act, 1902, s. 6; *Doleman & Sons* v. *Ossett Corporation* [1912] 3 K.B. 257, 269) and the provisions for consultative stated cases (Arbitration Act, 1902, s. 19 (2); *Czarnikow* v. *Roth, Schmidt & Co.* [1922] 2 K.B. 478; *Isca Construction Co. Pty Ltd* v. *Grafton City Council* (1962) 8 L.G.R.A. 87, 92).

[2] For example, the ineffectiveness of a revocation of the authority of an arbitrator, except by leave of the Court (Arbitration Act, 1902, s. 4) and the provisions for awards in the form of a special case (Arbitration Act, 1902, s. 9 (a)).

2.2.2 Present law. The Arbitration Act, 1902, treats all arbitration agreements alike, whether in the nature of a contract of adhesion or not, and whether made before or after differences have arisen.

2.2.3 Developments in England. The law of arbitration does not distinguish between contracts of adhesion[1] and other arbitration agreements, but does distinguish between agreements made before differences arise and agreements made afterwards. Thus—

(a) after the difference has arisen, the parties may agree that each will bear his own costs;[2]

(b) on an application for leave to revoke the authority of an arbitrator, or for an injunction to restrain proceedings in an arbitration, on the ground of partiality of the arbitrator, the fact that the applicant, before differences arose, agreed on the arbitrator, with knowledge of the partiality, is not a ground for refusing the application;[3]

(c) where there is an agreement for the arbitration of future differences, and an arbitrable difference arises involving a charge of fraud, the Court may order that the agreement cease to have effect, may give leave to revoke the authority of an arbitrator, may refuse a stay of litigation and may set aside a *Scott* v. *Avery* clause;[4]

(d) where there is an agreement for the arbitration of future differences and the agreement fixes a time bar for appointing an arbitrator or taking some other step to commence an arbitration, the Court may, in case of hardship, extend the time bar.[5]

[1] See paras 1.12 above, 2.2.4, 15 below.

[2] Arbitration Act 1950 (U.K.), s. 18 (3) proviso.

[3] Arbitration Act 1950 (U.K.), s. 24 (1).

[4] Arbitration Act 1950 (U.K.), ss. 24 (2), (3), 25 (4).

[5] Arbitration Act 1950 (U.K.), s. 27.

2.2.4 Working paper proposal. In our working paper we proposed a scheme whereby many provisions of the proposed Bill applied notwithstanding anything in a contract of adhesion but might be displaced by other contract. The general concept of a contract of adhesion put forward in the working paper was of a standard form contract used by a dominant party in the course of business, in terms designed for numerous similar transactions, where a reasonable man in the position of the adherent party would not regard the arbitration clause as open to change by negotiation. We proposed that a contract of a class specified in an order made by the Minister should not be treated as a contract of adhesion, and that the parties to a contract or a proposed contract might obtain an order of the Supreme Court excluding the contract from the provisions relating to contracts of adhesion. An agreement relating to arbitration of a difference which had arisen before the agreement was made would not be a contract of adhesion.

2.2.5 Comment on the working paper. Commentators recognized the reality of the problem but in general thought that the proposals were not the answer. They made these points—

(a) The test was hard to apply. In particular, the assessment of the position of the adherent party called for judgment on questions of degree.

(b) The question whether a contract was or was not one of adhesion would call for evidence and would take time and money for its decision.

(c) The question could not be, or at all events should not be, decided finally by the arbitrator. The parties would be driven to a court for determination of the question. Thus one of the objects of an arbitration agreement would be lost.

(d) Contractual documents in like terms would have unlike effects, depending on future decisions by courts or arbitrators. This would be an impediment to business and someone would have to pay for it. The one who would pay for it is the man at the end of the line, for example, the consumer, or the man who sells his goods on a competitive market.

(e) A respondent without a defence on the merits could use the question for the purpose of delay.

Some commentators supported the proposals, either generally or with qualifications. These included several lawyers who perhaps regarded arbitration as almost always a mistake and therefore welcomed strict regulation of arbitration under contracts of adhesion as a step in the right direction, namely, less arbitration.

2.2.6 Recent Australian reports: general. There is much in the recent recommendations which recognizes the difference between an arbitration agreement made before, and one made after, differences have arisen. We deal with this in the next paragraph. We deal in the present paragraph with contracts of adhesion generally. In South Australia there is a recommendation that the Court be given power to order, and be required to order, that an arbitration clause in a contract of adhesion shall not be binding, unless it is proved that the justice of the case requires the arbitration clause to be enforced. A contract of adhesion is a contract for the supply of goods or services made in circumstances in which a person dealing with a supplier of those goods or services cannot ordinarily obtain them from that supplier except by making a contract with the arbitration clause in question.[1] In Western Australia the majority doubted that our proposals would meet the problems in that State; the whole Commission thought that the Court, in deciding whether to order a stay of litigation, should take into account whether or not the agreement to arbitrate was specially negotiated.[2] In the Australian Capital Territory the view was taken that the approach in our working paper was not the best for the Territory: first, restrictions on freedom of contract depended on matters of policy from time to time and did not call for special justification; second, in the Territory contracts of adhesion were the rule and commodity or mercantile contracts the exception, but the approach in our working paper was the other way; third, our scheme would invite evasion or attempts to evade; and finally, little harm would be done by a scheme of statutory regulation common to contracts of adhesion and to other contracts.[3]

[1] *South Australian report* (1969) p. 13 draft Bill s. 33a.

[2] *Western Australian report* (1974) pp. 8–11, paras 21, 24, 25, 29, draft Bill appendix B ss. 8 (3), 11.

[3] *Australian Capital Territory report* (1974) pp. 5–9, paras 18–33.

2.2.7 Recent Australian reports: pre- and post-difference agreements. In South Australia there are recommendations for adoption of the English provisions in case of partiality of an arbitrator,[1] where there is a charge of fraud,[2] and for extension of a contractual time bar.[3] There are generally similar recommendations in Queensland;[4] in addition there are recommendations that the parties may dispense with recommended statutory requirements for reasons for award, and for an award in writing, after, but not before the difference has arisen,[5] and that the English provision about an agreement that each party will bear his own costs should be adopted.[6] In Western Australia there are recommendations that the substance of the English provisions for extension of a contractual time bar[7] and about an agreement that each party will bear his own costs,[8] and the Queensland provision about dispensing with a written award and reasons for award,[9] be adopted.[10] The *Victorian report* distinguishes in a most forceful way an arbitration agreement for future differences and an arbitration agreement for an existing difference; the report recommends adoption of the Queensland provisions about an agreement that each party will bear his own costs, about partiality of the arbitrator and charges of fraud, and about

extension of a contractual time bar.[11] In the Australian Capital Territory stress has again been put on this distinction and most of the provisions of the legislation recommended would yield to an agreement to arbitrate on an existing difference.[12]

[1] Arbitration Act 1950 (U.K.), s. 24 (1). See para. 2.2.3 (b) above.

[2] Arbitration Act 1950 (U.K.), ss. 24 (2), (3), 25 (4). See para. 2.2.3 (c) above.

[3] Arbitration Act 1950 (U.K.), s. 27. See para. 2.2.3 (d) above. *South Australian report* (1969) pp. 12, 13 draft Bill ss. 32, 33 (4), 35.

[4] *Queensland report* (1970) pp. 14 (para. 32), 15 (para. 35), 18 (draft Bill s. 9 (2)), 26 (draft Bill s. 32), 27 (draft Bill s. 35). See now Arbirtation Act 1973 (Qd.), ss. 10 (2), 33, 36.

[5] *Queensland report* (1970) pp. 11 (para. 23), 12–14 (para. 28), 23 (draft Bill s. 23 (1)). See now Arbitration Act 1973 (Qd.), s. 24 (1).

[6] Arbitration Act 1950 (U.K.), s. 18 (3) proviso, see para. 2.2.3 (a) above. *Queensland report* (1970) p. 24 (draft Bill s. 25 (3) proviso). See now Arbitration Act 1973 (Qd.), s. 26 (3) proviso.

[7] Arbitration Act 1950 (U.K.), s. 27, see para. 2.2.3 (d) above.

[8] Arbitration Act 1950 (U.K.), s. 18 (3) proviso, see para. 2.2.3 (a) above.

[9] Arbitration Act 1973 (Qd.), s. 24 (1), see above in this para.

[10] *Western Australian report* (1974) draft Bill Appendix B, ss. 10, 22 (2), 24 (3).

[11] *Victorian report* (1974) pp. 1, 2, 13, 16, 17.

[12] *Australian Capital Territory report* (1974), pp. 8, 9 (paras 32, 33), and numerous later passages in the report.

2.2.8 A new scheme. We think that there should be a scheme which distinguishes "exempt contracts" from other contracts and, amongst contracts not "exempt contracts", distinguishes "contracts of adhesion" from other contracts. Briefly, there should be a large measure of freedom of contract by way of exempt contract, but a large measure of statutory control of other contracts. Where the contract is a contract of adhesion, it should be easier for the adherent party to get leave to revoke the authority of the arbitrator, or to resist a stay of litigation.

2.2.9 Exempt contract: general. In our scheme there are four kinds of exempt contract—

(a) contracts within Schedule 1 to the draft Bill;

(b) contracts of a class exempt by regulation;

(c) contracts exempt by court order; and

(d) contracts made after the relevant difference has arisen.

2.2.10 Exempt contract: schedule cases. In the first schedule to the draft Bill we specify cases where the parties ought to be able to look after themselves and decide for themselves what arrangements they will have for arbitration. Such parties comprise governments, government

instrumentalities and corporations (except proprietary companies not subsidiaries of other corporations). We specify also cases where the contract has a foreign element: contractual arrangements in foreign trade and commerce are, we think, best left in a state of comparative freedom of contract. The categories are intended to be clear-cut, so as to obviate protracted litigation on the question whether a contract is an exempt contract. This precise definition of cases may sometimes lead to inconvenient results, but that is a price which is worth paying for simplicity and certainty in the bulk of cases. Undue narrowness in Schedule 1 can be remedied by regulation or, in special cases, by order of exemption.

2.2.11 Contracts exempt by regulation. We think that there ought to be a power to exempt contracts by regulation. The main purpose of the power should, as we see it, be to exempt particular forms of contract settled by people representing the interests of the parties, or seen by the Minister as having an arbitration clause fair for the kind of transaction for which the form of contract is designed. A subsidiary use for the power to exempt by regulation would be to exempt contracts which are within the spirit, but outside the words, of Schedule 1. We see the latter use as a temporary expedient pending legislation to amend Schedule 1.

2.2.12 Contracts exempt by court order. Cases may arise where the contract is not exempt by any of the other tests but the parties want it to be exempt and are willing to go to some trouble and expense to have it made exempt. The Supreme Court is given power to make an order of exemption where the arbitration clause is put forward by one party and is reasonable as regards the other parties or is accepted after due consideration by them. An order may also be made in relation to a proposed contract.

2.2.13 Contract after differences have arisen. The exemption of contracts made after differences have arisen is an important exemption. The arbitration clauses which experience has shown to be oppressive or otherwise troublesome are clauses for the arbitration of future differences. Commonly these clauses are subsidiary terms of contracts for some other purpose, for example, the erection of a building, the charter of a ship, or the sale of goods. When they make the contract the parties are concerned with the main transaction. The arbitration clause may be adopted without thought of its consequences, or a party will submit to the arbitration clause for fear of putting the main transaction at risk. But where an arbitration agreement is made after differences have arisen, the settlement of the differences is the main transaction, the parties know the nature of the differences, and they are in a position to take legal advice if they need it. At that stage, restrictions on freedom of contract are more likely to obstruct, than promote, a fair and expeditious settlement of the difference.

2.2.14 Exempt contract: effect. Under many provisions of the draft Bill, parties may contract out by exempt contract, but not by other contract. The provisions are these—

Section etc.	*Subject*
15 (4), (5)	Stay of litigation, arbitrator partial
17	Contractual time bar
Pt. IV	Fees and expenses of arbitrator
37	Security for costs
43 (1)	Order for entry by umpire
45	Basis of determination
47	Costs of reference and award
Pt. VII	Stated case
52	Time for award
55	Alteration of award by arbitrator
56	Alteration of award by Court
57	Remission of award
58	Setting aside award
61	Enforcement of award
65	Revocation, etc., arbitrator partial
70	Service of notice

2.2.15 Contracts of adhesion: general. Where the arbitration agreement is a contract of adhesion, we think that an adherent party should be in a special and privileged position so far as concerns getting leave to revoke the authority of an arbitrator and resisting an application for a stay of litigation. The concept of a contract of adhesion has had much discussion in recent years. The name is a translation of the French *contrat d'adhésion* coined by Saleilles in about 1901. It may be derived from the analogy of multilateral treaties, made between a few nations with an invitation to other nations to accede or adhere.[1] Broadly speaking, where a person, such as a seller of goods, is willing to make numerous contracts in the course of business, but only on terms previously fixed by him by means of a standard form, a contract so made is a contract of adhesion.

[1] Patterson (1964) p. 856.

2.2.16 Contracts of adhesion: the evils. In the case of the typical contract of adhesion, the party on one side has goods or services that the other party wants and has the business strength to dictate the terms on which he will do business. He may put in his form of contract an arbitration clause which is deliberately favourable to himself or which, by accident or design, is more or less unworkable. He may so arrange matters that only the adherent party will ever have to have recourse to arbitration. The market for the goods or services in question may be such that one person has a monopoly, or that all suppliers deal in similar terms. If the adherent party is to have the goods or services in question, he must submit to the supplier's form of contract, however one-sided or badly framed it may be. In these transactions there is freedom of contract in form but not in substance.

2.2.17 Contracts of adhesion: a remedy. Where there is an arbitration agreement, a party to the agreement is, as a rule, refused access to the ordinary courts for determination of a difference within the ambit of the agreement. He is refused, that is to say, leave to revoke the authority of an arbitrator, or he fails in his resistance to an application for a stay of litigation. It is a serious step to refuse a man access to the courts, but the refusal may be justified where the parties have freely agreed that arbitration, and not litigation, shall be the means for settling their differences. Where the agreement is a contract of adhesion the refusal to the adherent party of access to the courts has less justification. We therefore recommend that, on an application for leave to revoke the authority of an arbitrator, the fact that the applicant is an adherent party to a contract of adhesion should weigh with the Court in favour of granting leave. We further recommend that it should be a sufficient reason for refusing a stay of litigation that the arbitration agreement is a contract of adhesion and an adherent party to the contract opposes the stay.

2.2.18 Contracts of adhesion: procedural matters. There is a big difference between the proposals in our working paper and the recommendations we now make on the effect of the arbitration agreement being a contract of adhesion. In our working paper we proposed that many provisions in a draft Bill then proposed should not yield to contrary agreement by contract of adhesion. We think that our present recommendations go far towards overcoming objections to the proposals in our working paper.[1] The question whether an agreement is a contract of adhesion can come before the Court, but never before the arbitrator. The determination of the Court will be final, subject only to appeal. As regards the objection that like documents would have unlike effects, we recommend elsewhere in this report that a *Scott* v. *Avery* clause should be deprived of effect. It would follow that the Court might refuse a stay of litigation notwithstanding any arbitration agreement. If the arbitration agreement is a contract of adhesion, that fact would weigh in favour of the adherent party's resistance to a stay, but it would merely add one more consideration to those material in the exercise of what is in any case a discretionary power.

[1] See para. 2.2.5 above.

2.2.19 Recommendations. We recommend that—

(a) a new Arbitration Act should distinguish between "exempt contracts" and other contracts;[1]

(b) to be an exempt contract, a contract must be—

(i) a contract of a kind specified in a schedule to the Act;

(ii) a contract of a kind prescribed by regulation;

(iii) a contract made exempt by order of the Supreme Court; or

(iv) a contract made after the relevant difference has arisen;[1]

(c) the kinds of exempt contracts specified in the schedule should be—

(i) contracts between parties in a position to look after themselves; and

(ii) contracts having a foreign element;

(d) a new Act should allow substantial freedom of contract by way of exempt contract, but less by other contract;[2]

(e) a new Act should distinguish, amongst contracts which are not exempt contracts, between "contracts of adhesion" and other contracts;[3]

(f) "contract of adhesion" should be defined so as to embrace standard form contracts used in business where one party (the adherent party) has a choice only between accepting terms dictated by another party or not contracting at all;[3]

(g) where a party seeks leave to revoke the authority of an arbitrator, it should count in his favour that he is an adherent party to a contract of adhesion;[4] and

(h) it should be a sufficient reason for refusing a stay of litigation that the arbitration agreement is a contract of adhesion and an adherent party to the contract opposes the stay.[5]

[1] Draft Bill s. 11.

[2] See para. 2.2.14 above.

[3] Draft Bill ss. 5 (1), (6).

[4] Draft Bill s. 13 (5) (a).

[5] Draft Bill s. 15 (6) (a).

SECTION 3.—REVOCATION OF THE AUTHORITY OF AN ARBITRATOR

2.3.1 Present law. "A submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the Court."[1] In this provision "submission" is not used in the defined sense of "a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not."[2] Submission here means, rather, the authority given to an arbitrator to hear and determine a difference referred to him.[3]

[1] Arbitration Act, 1902, s. 4.

[2] Arbitration Act, 1902, s. 3.

[3] *In re Smith & Service and Nelson & Sons* (1890) 25 Q.B.D. 545; *Deutsche Springstoff A.G.* v. *Briscoe* (1887) 20 Q.B.D. 177.

2.3.2 Nature of revocation. The authority which a party to a submission gives to the arbitrator is analogous to the mandate given by a principal to his agent and is revocable by the party,[1] except so far as the power of revocation is limited by statute. The revocation here under discussion is the termination of the authority of the arbitrator by voluntary act of a party to the submission and not, for example, termination by death.

[1] *Vynior's Case* (1610) 8 Co.Rep. 81a, 81b; 77 E.R. 595, 597. The act of revocation may, however, constitute an actionable breach of contract (*Doleman & Sons* v. *Ossett Corpn* [1912] 3 K.B. 257), or may render the revoking party liable to attachment (*Milne* v. *Gratrix* (1806) 7 East 608; 103 E.R. 236), or may forfeit a bond (*Vynior's Case* (above), *Warburton* v. *Storr* (1825) 4 B. & C. 103; 107 E.R. 997). For the effect of revocation, see *Deutsche Springstoff A. G.* v. *Briscoe* (1887) 20 Q.B.D. 177.

2.3.3 Leave to revoke. The need for leave to revoke was first introduced in England in 1833.[1] The power to revoke, under judicial supervision, has been a useful safeguard in cases where an arbitration is likely to be unsatisfactory, for example where the arbitrator is disqualified, or exceeds or refuses to exercise his jurisdiction, or otherwise misconducts himself, and where a charge of fraud is made against the party seeking leave to revoke. On the view that a party who has agreed to arbitration ought to be held to his agreement, it might be feared that the statutory provision, even with its requirement of leave, would give a repentant party too easy an escape from his contract, but leave is given only where a strong case is made out.[2]

[1] Civil Procedure Act 1833 (U.K.), s. 39.

[2] *City Centre Properties (I.T.C. Pensions) Ltd* v. *Matthew Hall & Co. Ltd* [1969] 1 W.L.R. 772.

2.3.4 Revocation and stay of litigation. The power of a party to revoke, subject to leave, is in a sense a counterpart of the power of the Court to stay litigation brought in respect of a matter agreed to be referred to arbitration.[1] Where it has been agreed that differences shall be referred to arbitration, but the claimant to some redress repents of his agreement and prefers to go to court, he commences litigation and then the defendant may apply for a stay of the litigation. Where, in an otherwise like case, it is the respondent who repents of his agreement, he may apply for leave to revoke his submission.

[1] Arbitration Act, 1902, s. 6.

2.3.5 Former utility of revocation. Before the Arbitration Act 1889 (U.K.), an application for leave to revoke the submission was an appropriate way of meeting difficulties which may now be met under more specific provisions in the relevant Acts. Thus one case for giving leave to revoke was where the arbitrator was corrupt,[1] another was where he mistook the law.[2] Now the first case would be met by an order for removal[3] and the second by a direction to state a case.[4]

[1] *Drew* v. *Drew* (1855) 25 L.T. (O.S.) 282.

[2] *East and West India Dock Co.* v. *Kirk and Randall* (1887) 12 App. Cas. 738.

[3] Arbitration Act, 1902, s. 13 (1).

[4] Arbitration Act, 1902, s. 19.

2.3.6 Present disuse of revocation. The effect of the legislation based on the United Kingdom Act of 1889 is that leave to revoke a submission is hardly ever given. A search in the text books and digests has brought to light only five reported cases of applications for leave to revoke submissions in England and Australia in the last fifty years. In three of these cases leave was refused:[1] in two leave was granted, in one case by reason of the bankruptcy of a party,[2] in the other on grounds not reported.[3] Russell discusses under four heads the grounds for giving leave to revoke.[4] They are excess or refusal of jurisdiction by the arbitrator (which can be dealt with by stated case); misconduct of the arbitrator (which can be dealt with by his removal); disqualification of the arbitrator (which can also be dealt with by his removal); and exceptional cases (here the reference is to old cases on matters now dealt with by the Acts).[5]

[1] *The Ithaka* [1939] 3 All E.R. 630; *Frota Nacional de Petroleiros* v. *Skibsaktieselskapet Thorsholm* [1957] 1 Lloyd's Rep. 1; *City Centre Properties (I.T.C. Pensions) Ltd* v. *Matthew Hall & Co. Ltd* [1969] 1 W.L.R. 772.

[2] *In re Freeman* v. *Kempster* [1909] V.L.R. 395.

[3] *Simbro Trading Co. Ltd* v. *Posograph (Parent) Corpn Ltd* [1929] 2 K.B. 266.

[4] Russell (1970) pp. 128–130.

[5] Russell (1970) p. 130.

2.3.7 Developments in England: general. English law retains the provision whereby revocation can only take place by leave of the Court.[1] Some case-law restrictions on leave to revoke in case of bias are removed.[2] The Court may give leave to revoke where the difference involves a question of fraud.[3] Where the authority of an arbitrator or umpire is revoked by leave of the Court, the Court may either appoint a sole arbitrator to act in the place of the person or persons removed or may order that the arbitration agreement cease to have effect with respect to the dispute referred.[4]

[1] Arbitration Act 1950 (U.K.), s. 1. The section speaks, not of "a submission", but of "the authority of an arbitrator appointed by or by virtue of an arbitration agreement". This change of wording appears to be merely directed to removing some deficiencies of expression in the Act of 1889: Russell (1970), p. 123; *Halsbury's Statutes,* 3rd edn Vol. 2 (1968) p. 435.

[2] Arbitration Act 1950 (U.K.), s. 24 (1), re-enacting the Arbitration Act 1934 (U.K.), s. 14 (1).

[3] Arbitration Act 1950 (U.K.), s. 24 (2), re-enacting the Arbitration Act 1934 (U.K.), s. 14 (2).

[4] Arbitration Act 1950 (U.K.), s. 25 (2). This subsection was perhaps drawn under a misapprehension of the effect of revocation. Before its original was enacted (Arbitration Act 1934 (U.K.), s. 3 (2)), on revocation the agreement would have ceased to have effect with respect to arbitration on the dispute (paras 2.3.2 above, 5.3.3 below): Presumably in England a revocation to which the subsection applies no longer has that effect unless the Court so orders. And, before 1934, there would have been no question of making a further appointment after revocation: that would call for a fresh agreement. See, for arguments and dicta on the present law, *Frota Nacional de Petroleiros* v. *Skibsaktieselskapet Thorsholm* [1957] 1 Lloyd's Rep. 1, 3, 5.

2.3.8 Developments in England: bias. A man is unfit to be an arbitrator if he has an interest in the result of the arbitration, or is in a position where he might be influenced for or against a party, as where he is a servant of a party. This unfitness is a ground on which the Court may give leave to revoke the submission, or refuse a stay of litigation, or remove the arbitrator, or restrain him from acting, but the Court will not do so if the complaining party agreed to the appointment with knowledge of the facts showing unfitness.[1] Sometimes a contract, for example for the construction of civil engineering works, has a clause for the arbitration of future differences before a specified arbitrator who is a servant of one of the parties. Contracts of this kind, often involving large money sums, can operate, or at least seem to operate, quite unfairly.[2] The MacKinnon Committee pointed out the hardship which a contract of this kind can cause and suggested that where there is one of these contracts the Court might be empowered to remove the arbitrator notwithstanding that the facts were known when the contract was made.[3] The Arbitration Act 1934 (U.K.) introduced in England a provision whereby in such a case the Court might give leave to revoke the submission, or restrain the arbitrator from acting, or refuse to stay litigation.[4] We suggested in our working paper that the principle of the English legislation should be adopted, but only as regards contracts of adhesion, that removal of the arbitrator might be added to the other courses open to the Court, and that in such a case there should be grounds for refusing a stay of litigation in whatever court the litigation is pending.[5]

[1] Russell (1970) pp. 116–118.

[2] See *South Australian Railways Commissioner* v. *Egan* (1973) 130 C.L.R. 506, 512, 513.

[3] *MacKinnon Report* (1927) paras 33–35.

[4] Arbitration Act 1934 (U.K.), s. 14 (1), (3). See now the Arbitration Act 1950 (U.K.), s. 24 (1), (3). *Canterbury Pipe Lines Ltd* v. *A.G.* [1961] N.Z.L.R. 785.

[5] The Arbitration Act 1950 (U.K.), s. 24 (3), applies to a stay of litigation in the High Court only.

2.3.9 Developments in England: questions of fraud. The English provision allowing leave to revoke where the dispute involves questions of fraud[1] is a companion to a case-law rule (now in part statutory)[2] that the existence of questions of fraud or other misconduct may justify refusing a stay of litigation brought in breach of an arbitration agreement.[3] The justifications for the special rules for fraud cases are that a man so charged should be entitled to clear his name in public[4] and that he should not risk a finding of fraud in proceedings where there is no appeal on the facts.[5] It has also been suggested that an arbitration clause in ordinary form does not on its true construction extend to a dispute involving questions of fraud.[6] We apprehend too that there is perhaps an unspoken reason, namely, that the party charged with fraud is commonly an adherent party to a contract of adhesion, that the alleged fraud is in fact irrelevant to the merits of his claim, that he has

the sympathy of the Court, and that the Court thinks that his treatment by a judge or jury in open court will be more indulgent than the private adjudication of an arbitrator.[7] We suggested in our working paper that these considerations ought not to justify revocation. In particular, we suggested that the claim of anxiety to clear oneself in open court of a charge that has not been made in public relied on ideas of sensitivity and personal honour which were as much out of date as the idea that the only honourable way of meeting a personal affront was by challenge to a duel. And we gave little weight to the absence of an appeal on an arbitrator's findings of fact: his finding might be set aside if there is no evidence to support it. In the Supreme Court proceedings of this kind would in some cases be tried with a jury,[8] and there is very limited scope for review of a jury's verdict on appeal. If the arbitration agreement, properly construed, does not extend to differences involving questions of fraud, an arbitrator dealing with such differences goes beyond his jurisdiction. This error can be controlled but by other means, such as declaration by the Supreme Court, stated case to the Supreme Court, or by setting aside an award. As to the suggested unspoken reason, sympathy for the adherent party, we did not disown that sympathy, but we thought that it did not justify a special rule merely for the purpose of securing for him a more indulgent tribunal than the one to which he had agreed. We proposed, therefore, that there should not be a special provision for leave to revoke where questions of fraud arose.

[1] Arbitration Act 1950 (U.K.), s. 24 (2).

[2] Arbitration Act 1950 (U.K.), s. 24 (3).

[3] Russell (1970) pp. 156–159. The rule goes back to the Roman civil law: Kyd (1791) p. 40.

[4] *Russell* v. *Russell* (1880) 14 Ch.D. 471; *Radford* v. *Hair* [1971] Ch. 758.

[5] *Charles Osenton & Co.* v. *Johnston* [1942] A.C. 130; Russell (1970), p. 157.

[6] *Willesford* v. *Watson* (1871) L.R. 14 Eq. 572, 578.

[7] It has been said in the United States that "courts will examine . . . standardised documents and disregard onerous provisions which they deem to be against public policy. Arbitration clauses, on the other hand, may prevent the courts from passing upon and perhaps moderating harsh substantive provisions of a contract. Business arbitrators approach cases from an individual and not from a social viewpoint; and provisions which a court would cast aside are only too readily enforced by them": Phillips (1934B) p. 36. Courts in New South Wales probably have less latitude but the observation nonetheless has a bearing on the position here.

[8] Supreme Court Act, 1970, s. 88.

2.3.10 Comparative law: United States of America. By the Federal Code on Arbitration, an arbitration agreement is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract".[1]

[1] United States Code, Article 9, s. 2. There is a like provision in the Uniform Arbitration Act of 1955, s. 1.

2.3.11 Working paper proposal. Notwithstanding the rarity of applications for leave to revoke, we suggested in our working paper that the power should be retained, subject to the leave of the Court. The power had occasional utility in cases where some supervening event made it unjust that a party should be held to his agreement to arbitrate. The reported cases showed that the Court would not give leave to revoke except on good grounds. The retention of the power, subject to the leave of the Court, was not, we thought, a significant derogation from the principle that contracts ought to be performed.

2.3.12 Comment on the working paper. There was little comment on our proposals on revocation. There was a feeling that leave to revoke should be easier to get, and that the availability or otherwise of legal aid in litigation and in arbitration should be relevant. Commentators in Sydney drew attention to a recent decision in the Court of Appeal in England. The Court of Appeal took the view that facts which would justify a refusal to stay litigation would not necessarily justify giving leave to revoke the authority of the arbitrator: "the power . . . is to be used only in very exceptional circumstances, such, for instance, as misconduct on the part of the arbitrator and the like".[1] These commentators doubted whether the decision was good law, but submitted that, so far as New South Wales was concerned, the decision should be reversed by statute.

[1] *City Centre Properties (I.T.C. Pensions) Ltd* v. *Matthew Hall & Co. Ltd* [1969] 1 W.L.R. 772, 780B.

2.3.13 Recent Australian reports. In South Australia there is a recommendation[1] for adoption of a provision in these terms—

> 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 leave of the Court or a Judge thereof.
>
> (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.

Subsection (1) is a variant of a section of the United States Code on commercial arbitration.[2] In South Australia adoption of the changes made in England in 1934[3] is also recommended.[4] In Queensland there are recommendations for adoption of the present law of England.[5] In Western Australia there are recommendations for provisions generally similar to the present law of England relating to revocation generally, revocation in case the arbitrator is biased, and appointment of a new arbitrator or setting aside the arbitration agreement after revocation.[6] In Victoria the Queensland recommendations have been recommended for adoption.[7] In the Australian Capital Territory there are

recommendations that leave to revoke be necessary, even though revocation is permitted by prior agreement,[8] that leave to revoke for bias in the arbitrator may not be refused on the grounds that the applicant knew or ought to have known of the bias when he made the arbitration agreement or when the arbitrator was appointed.[9]

[1] *South Australian report* (1969) p. 5, draft Bill, s. 7.

[2] See para. 2.3.10 above.

[3] See paras 2.3.7–9 above.

[4] *South Australian report* (1969) p. 12, draft Bill ss. 32 (1), (2), 33 (2).

[5] See paras 2.3.7–9 above. *Queensland report* pp. 17, (draft Bill s. 6 (1)), 26 (draft Bill s. 32 (1), (2), 33 (2)). See now Arbitration Act 1973 (Qd.), ss. 7 (1), 33 (1), (2), 34 (2).

[6] *Western Australian report* (1974), draft Bill appendix B, ss. 7, 8 (5), 32 (2).

[7] *Victorian report* (1974) pp. 5, 6, 16, 17.

[8] *Australian Capital Territory report* p. 18 para. 70.

[9] *Australian Capital Territory report* (1974) pp. 20, 21, paras 77, 78.

2.3.14 Further consideration generally. We adhere generally to the proposals in the working paper. We have discussed the grounds for giving leave to revoke to some extent earlier in this section. We think that amongst the relevant considerations in favour of giving leave should be (a) that the arbitration agreement is a contract of adhesion and the applicant for leave is an adherent party, and (b) that there are difficulties in establishing the existence or terms of the arbitration agreement. The Court should, we think, have regard to the means of the parties, and the availability of legal aid. As we have said above, we think that partiality of the arbitrator should in general be a ground for giving leave, even though the applicant knew or ought to have known of the possibility of partiality at the time when the agreement was made.

2.3.15 Further consideration: City Centre Properties case. We have noted the submission that this case should be reversed by statute.[1] We do not think that the case can be taken as establishing the proposition in the words quoted above.[2] The Court went on to look at the positions of the parties and applied considerations of fairness and convenience in deciding that leave to revoke should not be given. We prefer to read the case in this way rather than to recommend legislation saying that a statutory power is not qualified by considerations which themselves have no basis in the language of the statute.

[1] *City Centre Properties (I.T.C. Pensions) Ltd* v. *Matthew Hall & Co. Ltd* [1969] 1 W.L.R. 772. See para. 2.3.12 above.

[2] Para. 2.3.12.

2.3.16 Further consideration: authority in doubt. We think that there should be a provision to the effect that leave may be given to revoke such authority as a person may have as arbitrator, notwithstanding that the applicant does not admit or does not prove that that person has any authority as an arbitrator. The object is to escape the possibility that a man, doubting that he is bound by an arbitration agreement, but thinking that he has grounds for leave to revoke in case he is bound, may have to admit that he is bound as part of the price for applying for leave to revoke. If he fails on that application he may find himself caught by the admission and thus worse off than if he had not made the application. We do not know whether this has been held to be the result of the present legislation, but a like result has been discovered in other legislation allowing an approach to the Court for a discretionary order.[1] Such a result would be unfortunate and ought to be excluded.

[1] Conveyancing Act, 1919, ss. 89, 129; *Sutton* v. *Shoppee* [1963] S.R. 853, 865; Stuckey (1970) para. 594.

2.3.17 Recommendations. We recommend that—

(a) the arrangement should be retained that, unless otherwise agreed, the authority of an arbitrator is irrevocable except with the leave of the Court;[1]

(b) it should be relevant in favour of giving leave to revoke that—

  (i) the applicant is an adherent party to a contract of adhesion; or

  (ii) there are difficulties in establishing the existence or terms of the arbitration agreement;[2]

(c) on an application for leave to revoke, the Court should have regard to—

  (i) the means of the parties; and

  (ii) the availability of legal aid;[3]

(d) where the arbitrator is or may be biased, it should not matter that the applicant knew of the bias when he agreed to have him as arbitrator;[4] and

(e) leave should be obtainable to revoke such authority as a person may have as arbitrator.[5]

[1] Draft Bill s. 13 (1), (2).

[2] Draft Bill s. 13 (5).

[3] Draft Bill s. 13 (4).

[4] Draft Bill s. 65.

[5] Draft Bill s. 13 (3).

SECTION 4.—DEATH OF A PARTY

2.4.1 Death before appointing arbitrator. Where it is agreed that arbitrators are to be appointed by the parties, and a party dies without appointing, the power and duty of appointing do not, in the absence of special stipulation,[1] devolve on the personal representative of the deceased. This is because the agreement is taken to contemplate the exercise of a personal judgment by the appointor.[2] The presumption should be the other way. In England there is a provision apparently addressed to this problem:[3] "an arbitration agreement 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".[4] We think that this section is not apt to meet the problem: it deals with the consequence, not the cause. We said in our working paper that it would be better to legislate to the effect that, unless otherwise agreed, the powers and so on of a party to an arbitration agreement should, on his death, devolve on his personal representative.

[1] For the origin of the common special stipulation, see *McDougal* v. *Robertson* (1827) 4 Bing. 435, 442, 443; 130 E.R. 835, 838, 839; Amos (1837) p. 699.
[2] *Re Percival* (1885) 2 T.L. R. 150.
[3] Russell (1935) p. 449.
[4] Arbitration Act 1950 (U.K.), s. 2 (1).

2.4.2 Death after appointment of arbitrator. The authority of an arbitrator or umpire is terminated by the death of a party unless, as is usual, it is otherwise agreed.[1] An arbitrator's authority is thus terminated whether or not the arbitrator was appointed by the deceased:[2] this follows from the fact that authority is given by the party, whether the appointment is made by him or by another party or by a stranger pursuant to the arbitration agreement. We said in our working paper that the rule should be the other way: death should not terminate the authority of an arbitrator or umpire unless there was an agreement that it should do so. In England it is enacted that "the authority of an arbitrator shall not be revoked by the death of any party by whom he was appointed".[3] A provision for a new Bill for New South Wales should, we said, extend to an umpire as well as to an arbitrator: in principle his authority was equally liable to termination on death of a party. We preferred "terminated" to "revoked": "revoke" was better kept for termination by the voluntary act of a party. "By whom he was appointed" was unnecessary and, unless construed as meaning "by whom or pursuant to whose authorisation he was appointed", misconceived the previous law.

[1] *Halsbury on Arbitration* (1931) p. 636.
[2] Russell (1935) p. 450.
[3] Arbitration Act 1950 (U.K.), s. 2 (2).

2.4.3 Death in relation to the award. Where a party dies before or after the making of the award, the present law seems to provide in an appropriate way for the extent to which his personal representative is bound by, or may take advantage of, the award.[1] But it seems that a

personal representative is not liable to attachment for non-performance of an award under a submission made by the deceased.[2] It has been enacted in England that an arbitration agreement shall, in the event of the death of any party, "be enforceable by or against the personal representative of the deceased".[3] This enactment seems to render the personal representative liable to attachment.[4] We said in our working paper that we thought that this possible operation was not enough to justify adoption of the enactment: cases for attachment of personal representatives would be exceedingly rare, and there were adequate procedures in the Supreme Court which, in a proper case, would lead to attachment, notwithstanding the absence of such an enactment.

[1] Russell (1970) pp. 297, 298.

[2] Russell (1935) p. 449; Williams and Mortimer (1970) p. 985.

[3] Arbitration Act 1950 (U.K.), s. 2 (1).

[4] Russell (1935) p. 449.

2.4.4 Cause of action extinguished by death. In England there is a provision that the enactments against discharge of an arbitration agreement by death of a party, and against revocation of the authority of an arbitrator by death of a party, are not "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".[1] We said in our working paper that we did not think that the provision should be adopted here. Only restricted classes of rights of action are extinguished by death: they are rights of action for defamation, seduction or for inducing one spouse to leave or remain apart from another.[2] It was, we said, unlikely that rights of action in these classes would be put to arbitration. And we saw no reason why the arbitrator should not give effect to the death in determining the difference put to arbitration.[3]

[1] Arbitration Act 1950 (U.K.), s. 2 (3). See *Bowker* v. *Evans* (1885) 15 Q.B.D. 565.

[2] Law Reform (Miscellaneous Provisions) Act, 1944, s. 2 (1).

[3] If the death occurred between the close of the hearing and the award and the award did not give effect to the death, there would be a case for remission.

2.4.5 Comment on the working paper. There was none.

2.4.6 Recent Australian reports. In South Australia, Queensland, Western Australia and Victoria there are recommendations for adoption of the English legislation.[1] In the Australian Capital Territory there is a recommendation in line with the proposals in our working paper.[2]

[1] *South Australian report* (1969) p. 5, draft Bill s. 9; *Queensland report* (1970) p. 17, draft Bill s. 7 (see now Arbitration Act 1973 (Qd), s. 8); *Western Australian report* (1974) draft Bill Appendix B s. 12; *Victorian report* (1974) p. 6. The Queensland and Western Australian recommendations drop "by whom he was appointed" from the English model: see para. 2.4.2 above.

[2] *Australian Capital Territory report* (1974) p. 25 para. 98.

2.4.7 Recommendation. We recommend that the proposals in our working paper should be adopted.[1]

[1] Draft Bill s. 14.

SECTION 5.—BANKRUPTCY OF A PARTY

2.5.1 General. The bankruptcy of a party does not terminate the authority of an arbitrator, but may be a ground for giving leave to revoke.[1] In England there are special provisions dealing with bankruptcy in relation to arbitration.[2] We said in our working paper that we thought that in Australia the question is one for the federal Parliament. This was questioned by a commentator.

[1] Russell (1935) pp. 450, 451; *Halsbury on Arbitration* (1931), pp. 636, 637; *In re Freeman* v. *Kempster* [1909] V.L.R. 394; McDonald Henry & Meek (1968) para. 751; cf. *MacKinnon Report* (1927) para. 20. There is no reported case on bankruptcy under the Bankruptcy Act 1966, but presumably the position is unchanged.

[2] Arbitration Act 1950 (U.K.), s. 3.

2.5.2 Recent Australian reports. In South Australia there is a recommendation for a variant of the English provision by which, if a trustee in bankruptcy of a party to an arbitration agreement adopts the agreement, the agreement is enforceable by or against him.[1] There are similar recommendations in Queensland[2] and Victoria[3] but not in the reports in Western Australia and the Australian Capital Territory.[4]

[1] *South Australian report* (1969), p. 6, draft Bill s. 10. *Cf.* Arbitration Act 1950 (U.K.) s. 3 (1).

[2] *Queensland report* (1970) p. 17, draft Bill s. 8. See now Arbitration Act 1973 (Qd.) s. 9.

[3] *Victorian report* (1974) p. 6.

[4] *Western Australian report* (1974); *Australian Capital Territory Report* (1974).

2.5.3 Recommendation. We adhere to what we said in our working paper and recommend that a New South Wales Act should not deal with bankruptcy in relation to arbitration.

SECTION 6.—SETTING ASIDE AN ARBITRATION AGREEMENT

2.6.1 Introductory. In this section we deal with statutory powers given to a court to order that an arbitration agreement cease to have effect with respect to a difference, except powers to order that a *Scott* v. *Avery* clause cease to have effect. The difference in effect between such an order and revocation (by leave of the Court) of the authority of an arbitrator is a matter for speculation. The Arbitration Act, 1902, does not give powers of this kind.

2.6.2 Developments in England. The Arbitration Act 1934 introduced powers of this kind in England and they now appear in the Arbitration Act 1950. Where the authority of an arbitrator is revoked or the arbitrator is removed the Court may order that the arbitration agreement shall cease to have effect with respect to the difference referred.[1] Where there is an agreement for the arbitration of future differences and a future difference arises which involves a charge of fraud against a party, the Court may order that the agreement shall cease to have effect, so far as necessary to enable the question of fraud to be determined by the Court.[2]

[1] Arbitration Act 1950 (U.K.) s. 25 (2) (b).
[2] Arbitration Act 1950 (U.K.) s. 24 (2).

2.6.3 Effect of order. An order that an arbitration agreement cease to have effect as regards a difference seems to be generally similar in effect to the revocation of the authority of an arbitrator. Probably the distinctions are these. In the first place, revocation is a matter of all or nothing: a party can revoke an arbitrator's authority altogether or not at all, he cannot revoke it in part. The Court, however, may in one case order that the arbitration agreement cease to have effect with respect to a particular difference, leaving the agreement in effect with respect to other differences,[1] and may in the other case order that the arbitration agreement cease to have effect with respect to a particular issue, fraud, arising in a difference, leaving the agreement in effect with respect to other issues arising in the same difference, and with respect to other differences.[2] And in either case the Court may make its order on terms.[3] In the second place, revocation of an arbitrator's authority, even with the leave of the Court, may in theory lead to a liability in the revoking party for damages for breach of the arbitration agreement.[4] But an order that an arbitration agreement cease to have effect would presumably preclude a liability for damages for breach.

[1] Arbitration Act 1950 (U.K.), s. 25 (2) (b).
[2] Arbitration Act 1950 (U.K.), s. 24 (2).
[3] Arbitration Act 1950 (U.K.), s. 28.
[4] See note 1 to para 2.3.2.

2.6.4 Working paper proposals. In our working paper we did not propose adoption of these English provisions. We did not agree with the policy of the provision in relation to questions of fraud.[1] We dealt with the consequences of removal in another way: the vacancy might, with the leave of the Court, be filled in accordance with any relevant term of the arbitration agreement, or the Court might fill the vacancy.[2] If the vacancy were not filled, the arbitration could not proceed and there was no need for an order that the arbitration agreement cease to have effect. Commentators did not call in question the omission of a power to order that an arbitration agreement cease to have effect.

[1] Working paper para. 89.
[2] Working paper draft Bill ss. 23, 25 (2). See the draft Bill which we now recommend, ss. 21, 25 (1), 27 (3).

2.6.5 Recent Australian reports. In South Australia, there are recommendations for adoption of the English provisions and for another provision whereby a like order can be made if an arbitration agreement impedes the determination in the Court in an action of all relevant issues as between all parties interested.[1] In Queensland and Victoria there are recommendations for adoption of the English provisions.[2] In Western Australia there is a recommendation that the English provision in case of revocation or removal[3] be adopted.[4] We read the Australian Capital Territory report as generally concurring with the proposals in our working paper.[5]

[1] *South Australian report* (1969) pp. 5, 12, 13, 18, draft Bill ss. 7 (2), 32 (2), 33 (2), (5).

[2] *Queensland report* (1970) pp. 14, 26 (draft Bill ss. 32 (2), 33 (2) (see now Arbitration Act 1973 (Qd.), ss. 33 (2), 34 (2)); *Victorian report* (1974) pp. 16, 17.

[3] Arbitration Act 1950 (U.K.), s. 25 (2) (b).

[4] *Western Australian report* (1974) draft Bill appendix B s. 32 (2) (b).

[5] *Australian Capital Territory report* (1974) pp. 14 (paras 54–57), 17, 18 (para. 69), 20, 21 (paras 77, 78).

2.6.6 Recommendation. We adhere to the views embodied in our working paper, that the English provisions for an order that an arbitration agreement cease to have effect should not be adopted. We deal below with the problem of claims by and against strangers to the agreement.[1]

[1] Part 6 section 9.

PART 3.—THE SUBMISSION AS AN ORDER OF THE COURT

3.1 Present law. "A submission, unless a contrary intention is expressed therein . . . shall have the same effect in all respects as if it had been made an order of Court."[1] This is a piece of legislative shorthand. It means that the submission is to have effect as if it had been made an order of the Court under the previous law.[2]

[1] Arbitration Act, 1902, s. 4. Sometimes "rule of Court" is used instead of "order of Court". There is no difference in substance between the two expressions for the present purpose. "Rule" was apt for the order of one of the superior courts of common law and the legislation before 1875 spoke of a rule rather than an order. "Order" was used in the Court of Chancery and the Arbitration Act 1889 appears to proceed on the view that "order" was the appropriate term for all Divisions of the High Court of Justice. In New South Wales there was probably some incongruity in the use of "order" in section 4 of the Act of 1902, but the matter is unimportant.

[2] *In re Smith & Service and Nelson & Sons* (1890) 25 Q.B.D. 545, 550.

3.2 History: reference in a cause. In the seventeenth century a practice arose by which the parties to a cause in a court of common law might agree that the matter in difference between them in the cause[1] be referred to arbitration and that the submission to arbitration be made a rule of court. The court would then make a rule ordering (amongst other things) that the matters in difference be referred to the award of named arbitrators and that the parties perform fulfil and keep such award.[2] Amongst the consequences of the making of the rule was the availability of attachment as a sanction against revoking the authority of the arbitrator and as a sanction for compelling performance of the award.[3]

[1] And, if they so agreed, other matters in difference between them.

[2] We take this description of the rule from Tidd's *Forms* (1819), p. 342.

[3] *Veale* v. *Warner* (1669) 1 Wms. Saund. 326, 327 (n); 85 E.R. 468, 471.

3.3 History: Arbitration Act 1698 (U.K.). This practice having proved useful, and difficulties having arisen in the enforcement of submissions by consent out of court,[1] the Arbitration Act 1698 was passed with a view (amongst other things) to enabling the parties to a submission by consent out of court to have benefits similar to those flowing from a submission by consent in a cause. Briefly, where there was a difference which might have been litigated by personal action at law or by suit in equity, and the parties submitted the difference to arbitration, they might agree that their submission should be made a rule of one of the superior courts. Thereupon the Court was to make a rule that the parties should submit to, and be concluded by, the award. In case of disobedience to the award, the party in default was liable to punishment as for contempt.[2]

[1] Submissions by consent out of court were commonly supported by penal bonds naming a penal sum far in excess of the value of the matter in difference. For a time the full penal sum was recoverable on breach of the condition of the bond (*Vynior's Case* (1610) 8 Co.Rep. 80a, 81b; 77 E.R. 595, 597), but during the 17th century the Court of Chancery began to relieve against the penalty in an arbitration bond and restricted the obligee to so much of the penalty as represented his loss flowing from the breach (*Wilson* v. *Barton* (1671) Nels. 148; 21 E.R. 812; Yale (1961) pp. 7–30; Simpson (1966) pp. 415–418). As a rule it was not possible to prove substantial loss (beyond the costs of the arbitration) flowing from a revocation of the authority of an arbitrator: the obligee, if claimant in respect of the original difference, might still sue in the ordinary courts so that, in theory, he suffered no other loss (*Doleman & Sons* v. *Ossett Corpn.* [1912] 3 K.B. 257, 268). See also *Street* v. *Rigby* (1802) 6 Ves.Jun. 815, 817, 818; 31 E.R. 1323, 1324. The Administration of Justice Act 1696 (8 & 9 Will. 3, c. 11), s. 7, applied the substance of the practice in Chancery to all courts of record.

[2] Arbitration Act 1698 (U.K.), s. 1. On this Act see also paras 1.16 above and 9.6.2–9 above.

3.4 Effect of rule of court. What were the consequences of making the submission a rule of court under the Act of 1698? There is an old practice by which parties compromising an action in a superior court might stipulate that their agreement of compromise be made a rule of the Court. We have not traced the origin of this practice, but it was well established early in the nineteenth century,[1] and its origin was, without doubt, much earlier. Where the agreement of compromise had been made a rule of court, failure to perform the agreement was punishable as contempt.[2] The position was similar where there was a reference to arbitration by consent by rule of court in a cause and where a submission was made a rule of court under the Act of 1698.[3] Thus a breach of the terms of the submission was punishable as contempt. In particular, the revocation of the authority of the arbitrator was such a breach[4] and so was a failure to perform the award.[5] There was, however, this limitation: it was only a "submission" which might be made a rule of court, and this involved that an identified difference had been referred to an identfied arbitrator. Breach of an agreement to appoint an arbitrator was therefore not punishable by attachment.[6] Apart from enforcement of the submission by attachment, making the submission a rule of court enabled the taxation in the Court of the costs of the arbitration,[7] was a step towards obtaining execution in satisfaction of the award,[8] and was a necessary preliminary to a summary application for the setting aside of the award.[9]

[1] *Fussell* v. *Silcox* (1814) 5 Taunt. 628; 128 E.R. 836. Other instances of, or references to, the practice include *Forsyth* v. *Manton* (1820) 5 Madd. 78; 56 E.R. 824; *Thomas* v. *Hewes* (1834) 2 C. & M. 519; 149 E.R. 866; *Tebbutt* v. *Potter* (1845) 4 Hare 164; 67 E.R. 604; *Swinfen* v. *Swinfen* (1856) 18 C.B. 485; 139 E.R. 1459; (1857) 1 C.B.N.S. 364; 140 E.R. 150; *Dawson* v. *Newsome* (1860) 2 Giff. 272; 66 E.R. 114; *Smythe* v. *Smythe* (1887) 18 Q.B.D. 544; *Graves* v. *Graves* (1893) 69 L.T. 420; *MacCabe* v. *Joynt* [1901] 2 Ir.R. 115; *Green* v. *Rozen* [1955] 1 W.L.R. 741. See also Jowitt (1959) p. 1574 col. 2. It may be that the practice of making a reference by consent in a cause, with such a stipulation, is but an example of the practice for compromise generally.

[2] See, for example, *Swinfen* v. *Swinfen* (above).

[3] Most of the cases arise on references by consent by rule of court (or by order of a judge or of *nisi prius* afterwards made a rule of court) in a cause. But the practice under the Act of 1698 was similar. See *Lucas d. Markham* v. *Wilson* (1758) 2 Burr. 701; 93 E.R. 522; Common Law Procedure Act 1854 (U.K.), s. 7; *In re Rouse & Co. and Meier & Co.* (1871) L.R. 6 C.P. 212.

[4] *Milne* v. *Gratrix* (1806) 7 East 608; 103 E.R. 236; *In re Rouse & Co. and Meier & Co.* (1871) L.R. 6 C.P. 6 C.P. 212; *In re Smith & Service and Nelson & Sons* (1890) 25 Q.B.D. 545.

[5] Russell (1882) pp. 596 & fol.

[6] *In re Smith & Service and Nelson & Sons* (above).

[7] *Bhear* v. *Harradine* (1852) 7 Ex. 269; 155 E.R. 947; *In re Smith & Service and Nelson & Sons* (1890) 25 Q.B.D. 545, 552.

[8] Where the award was for the payment of money, a further rule might have been obtained for payment in accordance with the award and execution might have been had on that further rule as if it were a judgment: Judgments Act 1838 (U.K.), s. 3 (1) (*cf.* Judgment Creditors' Remedies Act, 1901, s. 18; Supreme Court Act, 1970, s. 96); *Jones* v. *Williams* (1839) 11 Ad. & E. 175; 113 E.R. 381.

[9] Arbitration Act 1698 (U.K.), s. 2.

3.5 Utility supplanted. Much of the work done by the provision that the submission shall have effect as if made an order of the Court,[1] is duplicated or made unnecessary by other provisions of the Arbitration Act, 1902. Thus the inability of a party to revoke the authority of the arbitrator except by leave of the Court[2] makes it unnecessary that revocation in breach of the submission should be punishable by attachment. And the provision for the enforcement of awards[3] would permit enforcement by attachment in appropriate cases and renders the notional order of the Court under section 4 unnecessary. Further, all necessary power to set aside an award on summary application is regarded as flowing from section 13 (2).[4]

[1] Arbitration Act, 1902, s. 4.

[2] Arbitration Act, 1902, s. 4.

[3] Arbitration Act, 1902, s. 14 (1).

[4] See paras 9.6.1–11.

3.6 Residual utility. The consequences of a submission having effect as if made an order of the Court which are not covered adequately elsewhere in the Act are, firstly, the power of attachment for enforcement of the terms of the submission generally, and, secondly, the facility for taxing costs. In England the Arbitration Act 1950 meets the first of these to a limited extent[1] and deals fully with the second.[2]

[1] Arbitration Act 1950 (U.K.), s. 12 (6).

[2] Arbitration Act 1950 (U.K.), s. 18 (2).

3.7 Working paper proposal. The scheme of the provision that a submission have effect as if made a rule of court is defective in that it requires reference to repealed Acts and to a mass of inaccesible case-law. We proposed in our working paper that new legislation should abandon the scheme. This was a course already taken in England by the Arbitration Act 1950. A new Bill should, we said, enable the Court to punish disobedience to a direction of an arbitrator as if it were disobedience to an order of the Court, and should provide for taxation in the Court of costs payable under an award.

3.8 Comment on the working paper. There was none.

3.9 Recent Australian reports. None of the recent reports recommends continuance of the provision that a submission shall have effect as if made a rule of court.

3.10 Recommendation. We recommend that the provision be dropped. We deal below with the questions of punishment of a party disobedient to a direction of an arbitrator[1] and taxation of costs.[2]

[1] See paras 6.3.1–6 below.

[2] See paras 7.5.1–8 below.

PART 4.—ARBITRATION AGREEMENT AS AN OBSTACLE TO LITIGATION

SECTION 1.—STAY OF LITIGATION

4.1.1 Present law. "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 such 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 if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, 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."[1] A similar provision was first enacted in England in 1854.[2]

[1] Arbitration Act, 1902, s. 6.

[2] Common Law Procedure Act 1854 (U.K.), s. 11. The expression of this section was criticized by Lord Selborne in *Willesford* v. *Watson* (1873) L.R. 8 Ch. App. 473, 480.

4.1.2 Inherent jurisdiction. Apart from this enactment, the Court, both before and after 1854, would sometimes stay litigation brought in breach of an agreement for some other means of determining the difference,[1] particularly where the agreed means was arbitration and the agreement had been so far performed that the difference had actually been referred to an arbitrator.[2] So far as the reported cases go, the main recent exercise of this jurisdiction has been to stay litigation commenced in breach of an agreement that the matter in difference be litigated in a foreign court.[3] The principle is that the Court makes people abide by their contracts and, therefore, stays litigation commenced in breach of an agreement with the defendant that the matter in difference shall be otherwise determined. The statutory provision[4] only applies this principle to one type of such an agreement.[5]

[1] *Moscati* v. *Lawson* (1835) 4 Ad. & El. 331; 111 E.R. 811; *Cocker* v. *Tempest* (1841) 7 M. & W. 502; 151 E.R. 864; *Philpot* v. *Thompson* (1844) 2 D. & L. 18; *Gibbs* v. *Ralph* (1845) 14 M. & W. 804; 153 E.R. 701; Kyd (1791) pp. 8–10; *Chitty's Archbold* (1866) Vol. 2 p. 1386; *cf. Doleman & Sons* v. *Ossett Corpn* [1912] 3 K.B. 257, 262, 268.

[2] *Chitty's Archbold* (1866) Vol. 2 p. 1645; Russell (1882) p. 44. But arbitration stood in a special position because of a public policy in favour of ready access to the ordinary courts.

[3] *Racecourse Betting Control Board* v. *Secretary for Air* [1944] Ch. 114, 126; *The Fehmarn* [1958] 1 W.L.R. 159.

[4] Arbitration Act, 1902, s. 6.

[5] *Racecourse Betting Control Board* v. *Secretary for Air* [1944] Ch. 114, 126; *The Fehmarn* [1958] 1 W.L.R. 159.

4.1.3. Divergence of authorities. In paragraph 4.1.2 we have stated the principle as it appears to have been recently settled in England[1] and as it has been taken to be at first instance in New South Wales.[2] But there is authority in the High Court of Australia[3] followed by the Full Court in Victoria,[4] that the only jurisdiction to stay litigation where the parties have agreed to go to some other tribunal is the statutory jurisdiction.[5] In discussing the statutory provision, we have adopted the result of the recent English decisions because the result is manifestly rational and has some support in the textbooks discussing the practice before 1854.[6] The divergence of the authorities is, however, a ground for retaining the statutory power rather than relying on the inherent jurisdiction.

[1] *Racecourse Betting Control Board* v. *Secretary for Air* [1944] Ch. 114, 126; *The Fehmarn* [1958] 1 W.L.R. 159.

[2] *Hanessian* v. *Lloyd Triestino S.A. di Navigazione* (1951) 68 W.N. 98; *Hopkins* v. *Difrex S.A.* (1966) 84 W.N. (Pt. 1) 297.

[3] *Huddart Parker Ltd* v. *The Ship Mill Hill* (1950) 81 C.L.R. 502, 507; *Compagnie des Messageries Maritimes* v. *Wilson* (1954) 94 C.L.R. 577, 585.

[4] *Blackman (G.W.J.) & Co. S.A.* v. *Oliver Davey Glass Co. Pty Ltd* [1966] V.R. 570.

[5] For example, Arbitration Act, 1902, s. 6.

[6] Para. 4.1.2 above.

4.1.4 Inadequacy of the inherent jurisdiction. The inherent jurisdiction, at least in 1854, had not evolved a clear doctrine that litigation in breach of an agreement to arbitrate ought to be stayed unless good reason to the contrary were shown. Further, there is no suggestion that the inherent jurisdiction is exercisable by any court but a superior court such as the Supreme Court. The present statutory provision[1] gives jurisdiction to the District Court as well as to the Supreme Court.[2] This is, we think, a useful arrangement. Indeed, we think that any court should have power to stay litigation on a matter agreed to be referred to arbitration.[3]

[1] Arbitration Act, 1902, s. 6.

[2] *Nixon* v. *Steggall* (1953) 54 S.R. 179.

[3] See draft section 15 (1). Compare the general power of all courts to give effect to equitable defences given by the Law Reform (Law and Equity) Act, 1972. The present provision does not give jurisdiction to a court of petty sessions: *Ex parte Vincent* (1897) 14 W.N. 53. At all events there ought to be some means of getting a stay of court proceedings, or restraint of court proceedings, where the proceedings are in a court other than the Supreme Court or the District Court.

4.1.5 Nature of the litigation. The present provision for stay of litigation[1] only applies where the party bringing the litigation is bound by the arbitration agreement. In England there is an additional power to stay litigation where a question agreed to be referred to arbitration arises in proceedings for interpleader.[2] These are no doubt the common procedural situations where a clash is likely between an arbitration agreement and ordinary curial remedies, but other situations are possible.

It is possible, for instance, for a question on an arbitrable difference to arise between defendants to proceedings for a declaration. We think that a provision for stay of litigation should be so expressed as to cover all cases where such a clash is possible, without regard to the capacity in which the parties to the arbitration agreement are parties to the litigation.[3]

[1] Arbitration Act, 1902, s. 6.

[2] Arbitration Act 1950 (U.K.), s. 5. See *In re Phoenix Timber Co. Ltd's Application* [1958] 2 Q.B. 1.

[3] See draft section 15 (1).

4.1.6 Extent of the stay. Where the present section applies, the court "may make an order staying the proceedings".[1] The order may be made on such terms as the court thinks just.[2] The power is not confined to ordering an absolute stay or refusing a stay altogether: for example, an interlocutory injunction can be granted or a receiver appointed, but the proceedings otherwise stayed;[3] and where the litigation is in respect of matters some only of which are agreed to be referred, the stay may be granted as to the matters agreed to be referred but refused as to the residue;[4] and where a cross-claim is made in respect of a matter agreed to be referred, the stay may be confined to the proceedings on the cross-claim;[5] and the court may allow the litigation to go on as regards part of the matter agreed to be referred (for example, determination of a question of law) yet otherwise stay the litigation so that other questions (for example, the measure of damages) will be left for determination by the arbitrator.[6] The scheme of the draft section we recommend differs somewhat from that of the present section: where the case is one to which the draft section applies, the court must stay the proceedings as between the parties to the arbitration agreement so far as concerns a question in respect of a difference arbitrable under the agreement, except to the extent to which the court is satisfied that there is sufficient reason why the difference should not be referred in accordance with the agreement.[7] This scheme is, we think, apt to accommodate special cases of the kind mentioned earlier in this paragraph. If the draft section stopped there, however, it would not authorize a stay of the proceedings otherwise than between the parties to the arbitration agreement and in relation to an arbitrable matter. Justice and convenience will sometimes be served by a more extensive stay. Thus suppose A and B have an arbitration agreement, A sues B on an arbitrable difference, and B cross-claims against C for an indemnity: it may be both just and convenient that, on application by B,[8] the proceedings be stayed not only as between A and B but also as between B and C, pending arbitration between A and B. The draft section therefore further provides that where a court stays proceedings as between any parties to the proceedings so far as concerns any question, the court may stay the proceedings to any further extent or generally, pending determination by arbitration of the arbitrable difference, so far as necessary for the purpose of doing justice.[9]

[1] Arbitration Act, 1902, s. 6.

[2] Arbitration Act, 1902, s. 24.

[3] See para. 4.2.8 below.

[4] Russell (1970) p. 163.

[5] *W. Bruce Ltd* v. *Strong* [1951] 2 K.B. 447.

[6] *Hyams* v. *Docker* [1969] 1 Lloyd's Rep. 341.

[7] Draft section 15 (1), (2).

[8] The draft section 15 drops the requirement of the Arbitration Act, 1902, s. 6, that the applicant must not have taken any step in the proceedings. See para. 4.1.8 below.

[9] Draft section 15 (8).

4.1.7 Conditions of the power generally. We think that the conditions of the statutory power should be simplified. Amongst these conditions are the following:

(a) the application must be made before delivering any pleadings or taking any other steps (except appearance) in the litigation;

(b) the applicant must have been, at the time when the litigation was commenced, ready and willing to do all things necessary to the proper conduct of the arbitration, and must remain so.[1]

We think that the statutory imposition of these conditions is at best unnecessary and at worst mischievous and unjust.

[1] Arbitration Act, 1902, s. 6.

4.1.8 No other steps taken. Condition (a) in paragraph 4.1.7 is harsh in that there is no power to relieve against it. Thus where a defendant did not know that there was an arbitration clause until after applying for and getting discovery, he was held to be precluded from applying for a stay of litigation.[1] The object of the condition appears to be that the defendant should not be allowed to reprobate the litigation by applying for a stay after having approbated the litigation by taking a step in it. The vice of the condition is that it looks to the surface, namely, taking a step in the litigation, and does not look to the substance, namely, electing to go ahead with the litigation rather than rely on the agreement for arbitration.[2] We think that the condition should be dropped. The question of substance, has the defendant elected for litigation and not arbitration, is a question of a type which commonly bears on a judicial discretion. There is no need to legislate about it.[3]

[1] *Parker, Gaines & Co. Ltd* v. *Turpin* [1918] 1 K.B. 358.

[2] See *Ives & Barker* v. *Willans* [1894] 2 Ch. 478.

[3] The condition did not appear in the Arbitration Act of 1867 (31 Vic. No. 15), s. 3.

4.1.9 Readiness and willingness to arbitrate. Condition (b) in paragraph 4.1.7, readiness and willingness to arbitrate, ought also to be dropped. It is a matter which, in the absence of statutory statement, would be relevant to a judicial discretion. The statutory statement is unnecessarily rigid, and perhaps unjustly rigid. Suppose, for example, that the defendant does not, at the time when the court proceedings are commenced, know of the existence of the agreement for arbitration (he may be, for example, executor of the will of a deceased party): how can he be ready and willing to arbitrate?

4.1.10 Overlapping powers. There is this further consideration in favour of dropping conditions (a) and (b) in paragraph 4.1.7. Where an inherent jurisdiction and a statutory jurisdiction overlap, there is a tendency to regard the statutory jurisdiction as not ousting or diminishing the inherent jurisdiction.[1] Having regard to the attention given in England in recent years to the inherent jurisdiction to stay litigation brought in breach of an agreement to go to some other tribunal,[2] it is possible that the inherent jurisdiction will be found to extend to cases within the statutory power to stay court proceedings.

[1] See generally Jacob (1970).
[2] Para. 4.1.2 above.

4.1.11 General onus. There remains a further condition to the statutory power. This condition is expressed by the words "if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission". This wording is awkward and has led to much judicial discussion.[1] Many paraphrastic formulas have been proposed: a recent one is that "Once the party moving for a stay has shown that the dispute is within a valid and subsisting arbitration clause, the burden of showing cause why effect should not be given to the agreement to submit is upon the party opposing the application to stay".[2] We recommend what we hope will be a clearer provision.[3]

[1] See for example *Eaton* v. *Eaton* [1950] V.L.R. 233.
[2] Russell (1970) p. 153.
[3] Draft section 15 (2).

4.1.12 Effect of refusal. There is one piece of untidiness about the statutory provision for stay of court proceedings. Suppose that there is an agreement for the arbitration of differences of some description, that such a difference arises, and that a party commences court proceedings with respect to the difference. It seems that if the defendant does not apply for a stay of the court proceedings, or if he applies for a stay but fails to get it, the agreement for arbitration becomes inoperative as regards that difference,[1] the arbitrator, if one has been appointed, is deprived of his authority, and an award made after the commencement of the court proceedings has no effect on the result of the court proceedings.[2] These are matters on which the Act is silent.

On the face of it there is room for trouble. At what time does the agreement for arbitration cease to be operative? If an arbitration has commenced, at what time does the authority of the arbitrator terminate? What about the costs of the arbitration? These questions are unanswered. In fact these questions do not appear to have caused trouble but we think that the Court should have power to deal with the costs of an arbitration where a stay of litigation is refused.[3]

[1] Except so far as concerns an action for damages for its breach.

[2] *Doleman & Sons* v. *Ossett Corpn* [1912] 3 K.B. 257.

[3] Draft section 66 (1) (b).

4.1.13 Privacy where stay refused. It may be possible to maintain one advantage of an arbitration agreement notwithstanding that a stay of litigation is refused. Proceedings concerning a matter agreed to be referred to arbitration might, at the discretion of the Court, but perhaps only with the consent of the parties, be heard in the absence of the public. We suggested in our working paper that the public policy by which litigation was as a rule disposed of in public had little or no bearing on a case where the parties had lawfully agreed to submit their differences to determination in private by arbitration.

4.1.14 Working paper and comment. Our working paper dealt with stay of litigation generally along the lines of the foregoing paragraphs.[1] There was some comment which raised questions of drafting and which need not be further noticed here. There was a body of opinion in favour of reversing the onus, that there should not be a stay of litigation unless the court was satisfied that there was good reason why the difference should go to arbitration, others thought that the onus should stay where it is, that it should be heavy in all cases and very heavy in international trade cases. On the question of privacy where a stay is refused, the weight of opinion was in favour of our proposal.

[1] We do not repeat here the discussion in paras 114 (Is the onus too light?) and 115 (Contracts of adhesion) of the working paper.

4.1.15 Recent Australian reports. In South Australia, Queensland and Victoria there are recommendations in favour of the present English provisions.[1] In Western Australia there is a recommendation that the onus be reversed.[2] In the Australian Capital Territory there are recommendations which accord generally with the proposals in our working paper.[3]

[1] That is, the Arbitration Act 1950 (U.K.), ss. 4 (1), 5. *South Australian report* (1969) p. 6, draft sections 11, 12; *Queensland report* (1970) p. 18, draft Bill ss. 9 (1), (10) (see now Arbitration Act 1973 (Qd.) ss. 10 (1), 11); *Victorian report* (1974) pp. 6, 7.

[2] *Western Australian report* (1974) pp. 5–12, draft Bill appendix B ss. 8 (1)–(3), 11.

[3] *Australian Capital Territory report* (1974) pp. 18, 19, paras 71–74.

4.1.16 Further consideration. In general we adhere to the views put in our working paper, but think that the legislation should expressly deal with some matters relevant to the decision to stay or not to stay litigation. These are similar to the matters which we have mentioned in relation to revocation. It should weigh against a stay that the stay is opposed by an adherent party to a contract of adhesion,[1] or that there is difficulty in establishing the existence or terms of the arbitration agreement. The means of the parties, and the availability of legal aid, should be considered. Where the arbitrator may be partial, a stay might be withheld on that ground, even though the party opposing the stay knew or should have known of the risk of partiality when he made the arbitration agreement. Where a stay is refused, the court should be empowered to order that the proceedings be heard in the absence of the public.

[1] *Cf. Ford* v. *Clarksons Holidays Ltd* [1971] 1 W.L.R. 1412, 1414, 1415.

4.1.17 Further consideration: related differences. Suppose A sells goods to B under a contract with an arbitration clause and B sells the goods to C under a contract without an arbitration clause. C sues B for damages, alleging that the goods were not of merchantable quality. B join A as a third party and claims damages against him. A applies for a stay of proceedings on the third party claim, relying on the arbitration clause. The outlook for B is an embarrassing one: it may be decided in the action between C and B that the goods were not of merchantable quality but decided the other way in an arbitration between B and A. Further, if there is an arbitration as well as an action, costs will be greater. On the cases, these matters are relevant to the question whether the third party claim in the action should be stayed. "Where there are disputes under two related agreements of which one only contains an arbitration clause the Court will exercise its discretion to allow both disputes to proceed to litigation together if (among other reasons relevant to the discretion) a stay of the litigation relating to one of these disputes would be liable to cause substantial injustice to the party which wants them to be litigated together. In this connection the Court will take into consideration whether or not the party seeking to litigate both disputes together is in some way to be held responsible for the dilemma in which he finds himself."[1] We think that these principles do not require alteration by, or statement in, legislation. We hold this view notwithstanding the treatment of the matter in some of the recent Australian reports.[2]

[1] *Bulk Oil (Zug) A.G.* v. *Trans-Asiatic Oil Ltd S.A.* [1973] 1 Lloyd's Rep. 129, 137.

[2] *South Australian report* (1969) p. 5 (draft Bill s. 7 (2)), 13 (draft Bill s. 33 (5)), 18; *Queensland report* (1970) pp. 6, 17 (draft Bill s. 6 (2), (3)), see now Arbitration Act 1973 (Qd.) s. 7 (2), (3); *Victorian report* (1974) p. 6.

4.1.18 Recommendations. We recommend that—

(a) the legislation should be recast so as to be easier to understand;

(b) the power to stay should be available wherever an arbitrable difference arises in litigation between parties to the arbitration agreement;[1]

(c) where a stay is granted as between parties to an arbitration agreement, the Court should have power to stay the litigation as regards other parties, temporarily pending award in an arbitration under the agreement;[2]

(d) the procedural restrictions, and the requirement of readiness and willingness to arbitrate, should be dropped;

(e) the onus should remain on the party who litigates in breach of the arbitration agreement;

(f) it should be relevant to see how far legal aid is available in the litigation and in an arbitration;[3]

(g) where—

(i) the arbitration agreement is a contract of adhesion and an adherent party opposes the stay;[4] or

(ii) the existence or terms of the arbitration agreement are difficult or expensive to prove[5]—

it should be open to the Court to treat those facts as sufficient reason for withholding the stay;

(h) where a stay is refused, the court may order that the litigation proceed in the absence of the public.[6]

[1] Draft section 15 (1).
[2] Draft section 15 (7).
[3] Draft section 15 (5).
[4] Draft section 15 (6) (a).
[5] Draft section 15 (6) (b).
[6] Draft section 67.

SECTION 2.—AWARD AS CONDITION PRECEDENT

4.2.1 *Scott* **v.** *Avery* **clause described.** Where there is an agreement for the arbitration of future differences, it may be stipulated that the obtaining of an award shall be a condition precedent to a cause of action in respect of a matter to which the arbitration agreement applies.[1] Such a stipulation is called a *Scott* v. *Avery* clause.[2] A *Scott* v. *Avery* clause, as ordinarily understood, is a stipulation of an agreement made before an arbitrable difference arises. As will appear, however, legislative restraints and most recommendations elsewhere, and our own recommendations, extend to a stipulation made in respect of an existing difference.

[1] See generally *Anderson* v. *G. H. Mitchell & Sons Ltd* (1941) 65 C.L.R. 543.

[2] *Scott* v. *Avery* (1856) 5 H.L.C. 811; 10 E.R. 1121.

4.2.2 Effect of the clause. A person having the benefit of a *Scott* v. *Avery* clause may waive that benefit or may lose the benefit by repudiation.[1] Otherwise, the clause is effective and prevents the establishment of a cause of action in respect of a difference within the arbitration agreement.[2] The existence of a *Scott* v. *Avery* clause is a ground on which the Court will stay litigation brought in respect of a matter agreed to be referred.[3]

[1] Russell (1970) p. 170; *Halsbury on Arbitration* (1973) paras 544, 553.

[2] *Anderson* v. *G. H. Mitchell & Sons Ltd* (1941) 65 C.L.R. 543.

[3] Under the Arbitration Act, 1902, s. 6. *Smith, Coney & Barrett* v. *Becker, Gray & Co.* [1916] 2 Ch. 86, 101.

4.2.3 Evils of the clause. A *Scott* v. *Avery* clause may be oppressive to a claimant. It severely curtails his rights where things go wrong in the arbitration. It is useless for him to seek leave to revoke the submission because, if he revoked, he would lose all prospect of perfecting his cause of action. However unfit the case may be for arbitration, he cannot successfully bring an action on his claim: either the action will be stayed or the clause will be relied on in the defence. A respondent "who proposes to rely on a technically valid by unmeritorious defence may, by insisting on arbitration, avoid the damaging publicity which would attend such tactics if they were employed in court".[1] However inartificial or one-sided the arbitration agreement may be, he must still depend on it for the assertion of his rights. Where A's rights against B and A's rights against C depend on a common question of fact or law, and there is an arbitration agreement with a *Scott* v. *Avery* clause between A and B but C is not a party to the agreement, A faces the prospect of arbitration with B and litigation with C,[2] with the risk of inconsistent decisions, both adverse to A.

[1] *Fifth Report of the Law Reform Committee* (Conditions and Exemptions in Insurance Policies), 1957 (*Cmnd.* 621), p. 6.

[2] Or perhaps arbitration with C before a different arbitrator.

4.2.4 Award as condition of defence. It is also possible to stipulate that an award be a condition of a defence.[1] Such a stipulation has evils analogous to those of a stipulation that an award be a condition precedent to the accrual of a cause of action.

[1] *Cameron* v. *Cuddy* [1914] A.C. 651, and see the judgment of Irving *J.A.* in the same case in the British Columbia Court of Appeal (1911) 16 B.C.R. 451, 456.

4.2.5 Developments in England. If it is agreed that an award under an arbitration agreement shall be a condition precedent to the bringing of an action with respect to any matter to which the agreement applies, and the Court orders under statutory powers that the agreement shall cease to have effect as regards a particular difference, the Court may further order that the provision making an award a condition precedent shall also cease to have effect as regards that difference.[1] The Court

has such statutory powers in three cases. The first is where the agreement is for the arbitration of future differences and a difference arises involving a charge of fraud against a party.[2] The second is where the authority of an arbitrator is revoked by leave of the Court.[3] The third is where the Court removes the arbitrator.[4] It is to be noted that, except where there is a charge of fraud, the power to set aside the condition precedent is not limited to cases where the arbitration agreement is for the arbitration of future differences.

[1] Arbitration Act 1950 (U.K.), s. 25 (4).

[2] Arbitration Act 1950 (U.K.), s. 24 (2). There is a verbal difficulty in regarding the power under s. 24 (2) as a power to order that the agreement shall cease to have effect "as regards any particular dispute", but "any other enactment" in s. 25 (4) can only refer to s. 24 (2).

[3] Arbitration Act 1950 (U.K.), s. 25 (2) (b).

[4] Arbitration Act 1950 (U.K.), s. 25 (2) (b).

4.2.6 Legislative restraint in New South Wales. From 1957 to 1974 a *Scott* v. *Avery* clause in certain policies of insurance on goods under hire purchase was either void or not binding on the hirer.[1] These provisions have been replaced by a more general provision whereby an arbitration clause in a contract of insurance does not bind the insured.[2]

[1] Hire-purchase Agreements Act, 1941, s. 17B; Hire-purchase Act, 1960, s. 22 (2), repealed by the Commercial Transactions (Miscellaneous Provisions) Act, 1974, s. 3 (e).

[2] Insurance Act, 1902, ss. 19, 21.

4.2.7. Legislative restraints elsewhere in Australia. In Queensland, where there is a clause making an award a condition precedent to a cause of action, the clause is to be read only as an agreement to arbitrate and not so as to impose a condition precedent to a cause of action.[1] As in England, the provision is not limited to an agreement for arbitration of future differences. In Victoria a *Scott* v. *Avery* clause in a policy of insurance does not impose a condition precedent to a cause of action.[2] In South Australia there is general legislation avoiding, amongst other things, a stipulation making an award a condition precedent to a cause of action: it is not limited to a stipulation made before differences arise.[3]

[1] Arbitration Act 1973 (Qd.), s. 10 (2). This follows a recommendation in the Queensland Report (1970) pp. 6, 18 (draft Bill, s. 9 (2)). See also draft Bill s. 6 (3), Act s. 7 (3).

[2] Instruments Act 1958 (Vic.), s. 28 (2).

[3] Arbitration Act, 1891–1974 (S.A.), s. 24 (a) (1).

4.2.8 Interim preservation and security. Where a difference arises to which an arbitration agreement applies, but the claimant seeks measures for interim preservation, for example, an interim injunction or the appointment of a receiver, or for securing the amount in dispute, for example by arrest of a ship in Admiralty, he may commence litigation on the difference and pursue these interim measures in the litigation.

The litigation is liable to be stayed so far as concerns determination of the arbitrable difference, but may be kept on foot for the purposes of the interim measures.[1] There is a difficulty, however, in proceeding in this way where there is a *Scott* v. *Avery* clause, because then there is no cause of action on the arbitrable difference and the interim measures are only available in aid of a claim to substantive final relief in the litigation. The *Scott* v. *Avery* clause may lead the Court to withhold the interim measures or may put the claimant at risk of paying damages to the respondent, for example, under an undertaking given on the grant of an interim injunction or for maliciously procuring the arrest of a ship.[2] A like difficulty has been recognized and met in the United States so far as concerns Admiralty proceedings.[3] We deal later with arrest and bail in Admiralty.[4]

[1] See for example *Eaton* v. *Eaton* [1950] V.L.R. 233. For the position in Admiralty, see McGuffie, Fugeman and Gray (1964) paras 27–30.

[2] *Halsbury on Malicious Prosecution and Procedings* (1958) p. 374; *Olson and Mahony S.S. Co.* v. *The Ship "Thelma"* (1913) 14 S.R. 10.

[3] United States Code, Article 9, s. 8—

Proceedings begun by libel in admiralty and seizure of vessel or property.

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

[4] Paras 6.6.1–7 below.

4.2.9 Working paper proposals.

(a) We suggested that a *Scott* v. *Avery* clause in a contract of adhesion be made void unless, in relation to a particular difference, it was confirmed by the adherent party after the difference had arisen.

(b) We suggested also that in cases not involving contracts of adhesion the Court should be authorized to order that a *Scott* v. *Avery* clause should cease to have effect as imposing a condition precedent where the arbitration proves abortive. We suggested consequential provisions relating to statutes of limitation.

(c) We further suggested that measures for interim preservation, or for arrest of property in Admiralty, should be available notwithstanding a *Scott* v. *Avery* clause.

4.2.10 Comment on the working paper. The weight of comment was in favour of avoiding *Scott* v. *Avery* clauses altogether, or giving the courts a discretion to set aside such a clause.

4.2.11 South Australian report. In South Australia there was a recommendation for provisions to the effect that the Court might order that an arbitration agreement should cease to have effect with respect to a difference—

(a) where the matter in difference was part of a transaction or series of transactions which were the subject of litigation in the Court;

(b) where the authority of an arbitrator was revoked by leave of the Court; or

(c) where the arbitrator was removed by the Court.[1]

There was a further recommendation that, if the Court made an order under the above provisions, it might order that a provision making an award a condition precedent should cease to have effect with respect to that difference.[2] Again, the recommendation was not limited to an agreement for the arbitration of future differences. As we have noted above, there is now legislation avoiding *Scott* v. *Avery* clauses.[3]

[1] *South Australian report* (1969) pp. 5 (draft Bill s. 7 (2)), 12 (draft Bill s. 33 (2) (b)). See also the draft Bill ss. 32 (2), 33 (5), 33A (Report pp. 12, 13).

[2] *South Australian report* (1969) pp. 12, 13 (draft Bill s. 33 (4)).

[3] Arbitration Act, 1891–1974 (S.A.), s. 24 (a) (1), para. 4.2.7 above.

4.2.12 Queensland report. As we have noted above, there is a recommendation that a clause making an award a condition precedent be read only as an agreement to arbitrate and not as imposing a condition precedent to a cause of action.[1]

[1] *Queensland report* (1970) p. 18, draft Bill s. 9 (2). See now Arbitration Act 1973 (Qd.), s. 10 (2).

4.2.13 Western Australian report. In Western Australia the recommendation is that a clause making an award a condition precedent should be avoided.[1] It is not limited to an agreement for the arbitration of future differences.

[1] *Western Australian report* (1970) p. 12 (para. 30, 31), draft Bill appendix B s. 9.

4.2.14 Victorian report. The Chief Justice's Law Reform Committee concurred with the Queensland Law Reform Commission.[1]

[1] *Victorian report* (1974) p. 6.

4.2.15 Australian Capital Territory report. In the Australian Capital Territory there are recommendations that a *Scott* v. *Avery* clause with respect to future differences shall be read only as an agreement to arbitrate and shall not prevent a cause of action from accruing before arbitration nor affect the institution, prosecution or defence of an action or counterclaim, and that where there is a *Scott* v. *Avery* clause with respect to an existing difference, and an arbitration proves abortive, the Court should have power to set aside the clause.[1]

[1] *Australian Capital Territory report* (1974) pp. 10, 11 (paras 38–43).

4.2.16 Further consideration. There is a power in the courts to allow litigation to continue in breach of an ordinary arbitration agreement.[1] In our opinion that power is justified by sound policy. That policy has no less force in a case where the arbitration agreement is joined with a *Scott* v. *Avery* clause, or a like clause making an award a condition of a defence.

[1] See paras 4.1.1–18 above.

4.2.17 Recommendation. We recommend that legislation should avoid a contractual stipulation whereby an award or other step in an arbitration is a condition of a cause of action or a defence.[1]

[1] Draft Bill s. 16.

SECTION 3.—TIME LIMITS

4.3.1 Atlantic Shipping clause. An agreement for the arbitration of future differences may contain a stipulation that a claim must be made and an arbitrator appointed within a limited time, failing which the claim is to be barred.[1] If time runs from the arising of a difference and the time is not too short, such a stipulation need not be oppressive. But it is oppressive indeed where time runs, say, from the arrival of a ship and the time limited is very short: the claimant may be barred before he knows that he has a claim.

[1] *Atlantic Shipping and Trading Co. Ltd* v. *Louis Dreyfus & Co.* [1922] 2 A.C. 250. See *Anderson* v. *G. H. Mitchell & Sons Ltd* (1941) 65 C.L.R. 543.

4.3.2 Developments in England. Where there is an agreement for the arbitration of future differences, and it is a term of the agreement that an arbitrable claim shall be barred unless an arbitration on the claim is commenced within a limited time, and an arbitrable difference arises, the Court may extend the time limit "if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused".[1]

[1] Arbitration Act 1950 (U.K.), s. 27.

4.3.3 Working paper proposal and comment. In our working paper we suggested that such a power should be confined to contracts of adhesion and that the words quoted above about the opinion of the Court need not be adopted. Commentators generally favoured adoption of the English provision, without restriction to contracts of adhesion.

4.3.4 Recent Australian reports. All the recent Australian reports recommend adoption of the English provision.[1]

[1] *South Australian report* (1969) p. 13, draft Bill s. 35; *Queensland report* (1970) pp. 15, 27 (draft Bill s. 35, see now Arbitration Act 1973 (Qd), s. 36); *Western Australian report* (1974) p. 13 (para. 34), draft Bill appendix B s. 10; *Victorian report* (1974) p. 17; *Australian Capital Territory report* (1974) pp. 11, 12, paras 44, 45.

4.3.5 Further consideration. Impressed by the comment on our working paper and by the legislation and recommendations elsewhere in Australia we favour adoption of the substance of the English provision. The words about the opinion of the Court should be adopted: they have been discussed in several English cases and involve a significant restraint on what might in their absence be too unrestrained a discretion.[1]

[1] *Richmond Shipping Ltd* v. *Agro Co. of Canada Ltd* [1973] 2 Lloyd's Rep. 145.

4.3.6 Recommendation. We recommend that the Supreme Court be enabled to extend the time fixed by an *Atlantic Shipping* clause.[1]

[1] Draft section 17.

4.3.7 Time limit for action. A time limit on bringing an action is often found in arbitration clauses. Thus common forms of indemnity insurance policy, after setting out a *Scott* v. *Avery* clause stipulate that "if such action be not commenced within one year of the making of an award, the right of action shall be deemed to be abandoned and released".[1] We do not consider that we should, on our present terms of reference, recommend any legislation altering the effect of a stipulation such as this. Stipulations of this character are not confined to arbitration clauses: they are part of the general law of contract.

[1] For example, *Gosford Meats Pty Ltd* v. *Queensland Insurance Pty Ltd* (1970) 92 W.N. 897.

PART 5.—ARBITRATORS AND UMPIRES

SECTION 1.—NUMBER AND APPOINTMENT OF ARBITRATORS

5.1.1 Present law. The parties may agree as they please on the number and manner of appointment of arbitrators. Subject to contrary agreement, the reference is to a single arbitrator,[1] to be appointed by the parties concurrently.[2] The Act makes provision for various cases where the agreed arrangements do not work, such as failure by a party to appoint,[3] and a refusal of an appointed arbitrator to act.[4]

[1] Arbitration Act, 1902, s. 5, Sch. 2 (a).

[2] Arbitration Act, 1902, s. 7 (a).

[3] Arbitration Act, 1902, s. 8 (b).

[4] Arbitration Act, 1902, s. 7 (b).

5.1.2 Criticism of the present law. The statutory provisions do not, however, cover all the possibilities and sometimes an arbitration fails because the legislation or the agreement does not provide for an unexpected event.[1] Indeed, the legislation does no more than deal with a number of specific cases. The approaches to some of the problems differ in principle. Thus where the reference is to a single arbitrator to be appointed by the parties, and one party appoints an arbitrator but the other party withholds his concurrence, there must be an application to the Court.[2] But where the reference is to two arbitrators, one to be appointed by each party, and one party appoints but the other party does not appoint, the first party may appoint his man as sole arbitrator, subject to a power in the Court to set aside the appointment.[3]

[1] E.g., *In re Lewis Construction Co. Pty Ltd* [1958] V.R. 162.
[2] Arbitration Act, 1902, s. 7 (a).
[3] Arbitration Act, 1902, s. 8 (b).

5.1.3 Developments in England. Some minor changes were made in 1934 and remain in the Act of 1950, but in general the arrangements in England are similar to those in New South Wales.

5.1.4 Working paper proposals. An approach to the Court should, we said, be a last resort. The principle of section 8 (b) should be applied as far as possible to the situation of section 7 (a): where there was to be a single arbitrator and one party named his candidate, that candidate should be the arbitrator unless the other party objected, subject to a power in the Court to set aside the appointment. The Act should legislate in a general way upon the principles behind the specific instances already covered. We suggested also that there should be a reserve power of appointment in the Court in case the agreed arrangements for appointment break down.[1] We further suggested that, where an arbitrator had been removed by the Court, an appointment to fill the vacancy ought not to be made except by leave of the Court.[2]

[1] Compare the Uniform Arbitration Act (U.S.A.), s. 3.
[2] Working paper draft Bill s. 25 (2).

5.1.5 Appointment by the Court under agreement. The parties may agree that in some event an arbitrator may be appointed by the Court. In England, in the presence of such an agreement, a Judge of the High Court may, as the High Court, make the appointment, just as, say, the President of the Law Society might do so if the parties so agreed.[1] "In making the appointment the Court is acting as an independent authority to whom resort is had by the parties consensually, rather than as a Court acting by virtue of its statutory or inherent jurisdiction."[2] In our working paper we said that this seemed to be a convenient arrangement and one which should be recognized by statute. But we thought that it would be better for the Court to act in the ordinary way as a court, not as an independent authority acting merely on the agreement of the parties. The latter situation risked too many problems: what was the procedure, was there an appeal, and so on.

[1] *Medov Lines S.p.A.* v. *Traelandsfos A/S* [1969] 2 Lloyd's Rep. 225.
[2] [1969] 2 Lloyd's Rep. 227.

5.1.6 Service of notice. The Arbitration Act, 1902, speaks of service of notice,[1] but does not make any provision concerning the manner of service. It has been held that the Act requires personal service and service in New South Wales: personal service in Victoria is not good service.[2] In our working paper we suggested the adoption of a provision allowing service in or out of New South Wales and allowing service by means other than personal delivery: the suggested provision was based on section 170 of the Conveyancing Act, 1919.

[1] Arbitration Act, 1902, ss. 7, 8 (b).
[2] *In re Rown* (1903) 20 W.N. 77.

5.1.7 Comment on the working paper. This section of the working paper brought little comment. There was some support and no dissent. A commentator remarked that if the agreement was for an arbitrator with special qualifications, a substitute should have those qualifications: another said that the law should perhaps provide a means for avoiding an even number of arbitrators and referred to the European Proposed Uniform Law on Arbitration.[1]

[1] This was appendix I to our working paper. That proposed law requires that there be an uneven number of arbitrators (Article 5.1) and that, if the arbitration agreement provides for an even number of arbitrators, an additional arbitrator shall be appointed (Article 5.2).

5.1.8 Recent Australian reports. In South Australia, Queensland, Western Australia and Victoria there are recommendations in favour of the English provisions, with minor changes.[1] In the Australian Capital Territory there are recommendations generally similar to the suggestions in our working paper, but the parties might make other arrangements by any contract.[2]

[1] *South Australian report* (1969) pp. 6, 7 (draft Bill ss. 14, 15, 17), 19; *Queensland report* pp. 18–20, draft Bill ss. 12, 13, 16, see now Arbitration Act 1970 (Qd.), ss. 13, 14, 17; *Western Australian report* (1974) draft Bill appendix B ss. 13 (a), 15, 16; *Victorian report* (1974) pp. 7, 8.
[2] *Australian Capital Territory report* (1974) pp. 25, 26, paras 99, 100.

5.1.9 Further consideration. We see the force of the comment that a substitute arbitrator should have like qualifications to those required for the original arbitrator. We think that that would ordinarily be the effect of the provisions we recommend where the appointment is made by a party or other person authorized by agreement. Where the substitute appointment is made by the Court it is to be expected that, if possible, the substitute would have the qualifications agreed for the original. On the question of ensuring that there is an uneven number or arbitrators, we think that while some such provision is no doubt appropriate enough in a system which has no place for umpires, it is inappropriate here, where it is common to agree to have two arbitrators and an umpire. On the whole, we adhere to the suggestions in our working paper, but concur with the Law Reform Commission of the Australian Capital Territory in thinking that there ought to be a general power of contracting out of the statutory provisions.

5.1.10 Recommendations. We recommend that the law should be as proposed in our working paper, save that the parties should have a general power to make their own arrangements by contract. Our scheme does not admit of a brief but useful summary: we refer therefore to the relevant sections of the draft Bill.[1]

[1] Draft Bill ss. 18–26.

SECTION 2.—UMPIRE

5.2.1 General. Where there is an agreement for a reference to two or more arbitrators it is common to provide for an umpire in case the arbitrators disagree.[1] To have more than one arbitrator, and to have an umpire, is generally unnecessarily costly, but nonetheless an agreement for two arbitrators and an umpire is probably the most common form of arbitration agreement for future differences. Such an agreement has at least this merit, that, since it does not require the concurrence of the parties after differences have arisen, it should enable the arbitral tribunal to be constituted without an approach to the Court. The expense and trouble attendant on a multiple tribunal are such that, we suggested in our working paper, an arbitration under a contract of adhesion ought to be before a single arbitrator: we thought that more often than not the expense of a tribunal of at least three (two arbitrators and an umpire) would exceed the possible expense of an application to the Court for appointment of an arbitrator in case the parties did not concur.[2]

[1] Arbitration Act, 1902, s. 5, sch. 2 (b).

[2] See the *MacKinnon Report* (1927), paras 23, 24; Amos (1837) p. 698.

5.2.2 Arbitrators as advocates. There is a practice in England whereby an arbitrator has a role as advocate after a difference has been brought before an umpire. As we understand it, the arbitrators do not attempt to agree on an award. They may attempt a conciliation, that is to say, they may attempt to agree on terms of settlement for acceptance or rejection by the parties. Failing settlement in this way, the arbitrators give notice of disagreement and the case goes to the umpire. Before the umpire, each arbitrator acts as an advocate for the party who appointed him unless the party arranges other representation.[1] The practice is no doubt useful and seems harmless so long as the parties have agreed to it or know what is happening and waive objection.[2] There must be either agreement or waiver, for otherwise such conduct by an arbitrator would surely be misconduct. The legislation should not prevent the adoption of this practice.

[1] See *W. H. Ireland & Co.* v. *C. T. Bowring & Co Ltd* (1920) 2 Ll.L. Rep. 220; *French Government* v. *Tsurushima Maru* (1921) 37 T.L.R. 961; 8 Ll.L. Rep. 403; *Re Fuerst Bros & Co. Ltd and Stephenson* [1951] 1 Lloyds Rep. 429; *Wessanen's Koninklijke Fabriekien* v. *Isaac Modiano, Brother & Sons Ltd* [1960] 1 W.L.R. 1243; *MacKinnon Report* (1927), paras 23, 24.

[2] *Cf. Government of Ceylon* v. *Chandris* [1963] 1 Lloyd's Rep. 214, 221.

5.2.3 Law relating to umpires. Generally the law relating to umpires is similar to that relating to arbitrators. The Arbitration Act, 1902, has the following special provisions relating to umpires. Unless otherwise agreed, if the reference is to two arbitrators, they may appoint an umpire at any time within the period during which they have power to make an award.[1] Unless otherwise agreed, if the arbitrators do not make an award within due time, or if they give notice of disagreement, the umpire may enter upon the reference in lieu of the arbitrators.[2] Unless otherwise agreed, the umpire has a month to make this award after the time allowed to the arbitrators, but he may extend the time.[3] There are provisions for appointment by the Court to fill a vacancy in the office of umpire.[4] Many provisions of the Act applying to arbitrators apply also to umpires.

[1] Arbitration Act, 1902, s. 5, Sch. 2 (b).
[2] Arbitration Act, 1902, s. 5, Sch. 2 (d).
[3] Arbitration Act, 1902, s. 5, Sch. 2 (e).
[4] Arbitration Act, 1902, s. 7 (c), (d).

5.2.4 Developments in England: time for appointment. In England, unless otherwise agreed, where there are two arbitrators, they are to appoint an umpire immediately after they are themselves appointed.[1] Presumably the prescription of a time for appointment is intended, not to invalidate an appointment made later, but to open the way for an appointment by the Court,[2] or possibly to furnish a case of misconduct, and thus a ground for removal of the arbitrators, if they do not appoint an umpire immediately.[3] But we said in our working paper that we did not see a difference in substance. Under the Arbitration Act, 1902, even though the arbitrators have a mere power, not a duty, to appoint an umpire, and, even though that power is expressed to endure for as long as the arbitrators have power to make an award,[4] the machinery for appointment by the Court can be invoked if the arbitrators do not appoint,[5] and a party need not wait until the arbitrator's power expires before he can make a case that the arbitrators "do not appoint".[6] So too, if arbitrators acting under the Arbitration Act, 1902, refused a reasonable request to appoint an umpire, we did not, we said in our working paper, see that there would be any less case of misconduct than there would be under the English law. We went on that we therefore did not see what advantage (except uniformity) was to be gained by adopting the present English law on this subject. If other things were equal, the advantage of uniformity might tip the balance in favour of adoption. But other things were not equal. The law should not impose a duty unless a need to do so could be seen. We did not see the need. We suggested, therefore, that the English law on this subject be not adopted.

[1] Arbitration Act 1950 (U.K.), s. 8 (1). The subsection adopts a recommentation in the *MacKinnon Report* (1927), para. 26 (a). But some people experienced in arbitration still prefer not to appoint an umpire until there is a clear prospect of disagreement: *The Myron* [1970] 1 Q.B. 527.

[2] Arbitration Act 1950 (U.K.), s. 10 (c). And perhaps an order under s. 8 (3) that the umpire so appointed enter upon the reference as sole arbitrator. See para. 5.2.5 below.

[3] Arbitration Act 1950 (U.K.), s. 23 (1).

[4] Arbitration Act, 1902, s. 5, Sch. 2 (b).
[5] Arbitration Act, 1902, s. 7 (c).
[6] *Taylor* v. *Denny, Mott & Dickson Ltd* [1912] A.C. 666.

5.2.5 Developments in England: umpire as sole arbitrator. In England, if there are arbitrators and an umpire, the Court may order that the umpire enter upon the reference in place of the arbitrators as if he were a sole arbitrator: and may do so notwithstanding contrary agreement.[1] This provision adopts a recommendation in the MacKinnon Report.[2] The ground of the recommendation was the wastefulness, in time and money, of having both arbitrators and an umpire.[3] In our working paper we said that we did not question the truth of the ground of the recommendation, but we thought that the recommendation, and the enactment, went too far. We did not see why parties freely negotiating at arms' length should not effectively agree that they would have both arbitrators and an umpire. We had suggested earlier in the working paper that an arbitration under a contract of adhesion should be before a single arbitrator, with no umpire.[4] We suggested, therefore, that this enactment[5] ought not to be adopted.

[1] Arbitration Act 1950 (U.K.), s. 8 (3).
[2] *MacKinnon Report* (1927), para. 26 (b).
[3] Paras 23, 24.
[4] Para. 5.2.1 above.
[5] Arbitration Act 1950 (U.K.), s. 8 (3).

5.2.6 Developments in England: three arbitrators. In England, an agreement for a reference to three arbitrators, one to be appointed by each party and the third to be appointed by the two appointed by the parties, has effect as an agreement for a reference to two arbitrators, one to be appointed by each party, and for the appointment of an umpire by the arbitrators.[1] This provision adopts a recommendation of the MacKinnon Committee.[2] It has been said that the intent of the provision was to meet a difficulty which emerged in 1890,[3] that in the case to which the section applies the Court was not authorized to appoint a third arbitrator on default of appointment in accordance with the agreement.[4] But that difficulty was met in 1920, by authorizing the Court to appoint in the case in question.[5] It is not clear what led the MacKinnon Committee to abandon the solution of 1920 and to recommend the draconic provision now in force. The present provision is draconic because it remedies a gap in the legislation, not by filling the gap, but by altering the effect of agreements so that the gap will not be troublesome. We do not see that there is anything wrong with a tribunal of three arbitrators so appointed, except the drawbacks of any multiple tribunal, and the English law expressly recognizes a tribunal of three arbitrators appointed by other means.[6] We suggested in our working paper that this enactment[7] ought not to be adopted.

[1] Arbitration Act 1950 (U.K.), s. 9 (1).
[2] *MacKinnon Report* (1927), para. 21. Possibly the Committee was influenced by the condemnation by Coleridge *J.* of arrangements of this kind as "senseless and mischievous, founded on a totally wrong principle, expensive in their operations, and constantly ending in failure and disappointment": *In re Templeman and Reed* (1841) 9 Dowl. 962, 966. See also Russell (1923) p. 423.

[3] *In re Smith & Service and Nelson & Sons* (1890) 25 Q.B.D. 545.

[4] *In re British Metal Corpn Ltd and Ludlow Bros* (1913) *Ltd* [1938] 1 All E.R. 135; *Marinos & Frangos Ltd* v. *Dulien Steel Products Inc.* [1961] 2 Lloyd's Rep. 192.

[5] Administration of Justice Act 1920 (U.K.), s. 16. The section was repealed by the Arbitration Act 1934 (U.K.).

[6] Arbitration Act 1950 (U.K.), s. 9 (2).

[7] Arbitration Act 1950 (U.K.), s. 9 (1).

5.2.7 Working paper proposals. In the result, we suggested in our working paper that a provision in a contract of adhesion for the appointment of more than one arbitrator should be deprived of effect. We had suggested earlier in the working paper reframing of the legislation relating to the appointment and removal of umpires.[1] Otherwise we did not propose any material change in the law relating to umpires. In general it was, we said, unwise to agree for more than one arbitrator, or for an umpire. But the Courts and those concerned with arbitration seem to manage tolerably well with the law as it is, and it seemed better not to offer further aid or hindrance by legislation. In the draft Bill appended to the working paper we had a section enabling arbitrators to appoint an umpire where the reference is to "two or more arbitrators",[2] not just to "two arbitrators" as in the present Act.[3]

[1] Paras 5.1.4, 5 above.

[2] Working paper draft Bill s. 26.

[3] Arbitration Act, 1902, s. 5, Sch. 2 (b).

5.2.8 Comment on the working paper. Some concern was expressed at the proposal to require an arbitration under a contract of adhesion to be before a single arbitrator. A responsible body in Japan suggested that all provision for umpires be dropped: international conventions made no provision for umpires. There was support for adoption of the English provisions for the immediate appointment of an umpire,[1] and for power in the Court to order that the umpire enter on the reference in place of the arbitrators.[2] A commentator said that it might be useful to enable an umpire to sit with the arbitrators, so as to avoid the trouble, expense and hazards of a repetition of the evidence, and that provision might be made by which the arbitrators could refer to the umpire particular questions arising in the arbitration, rather than the whole difference. Another commentator said that the statutory provision for the appointment of an umpire should be limited, as at present, to the case where there are two arbitrators, and that the powers and functions of an umpire should be elaborated.

[1] Arbitration Act 1950 (U.K.), s. 8 (1). See para. 5.2.4 above.

[2] Arbitration Act 1950 (U.K.), s. 8 (3). See para. 5.2.5 above.

5.2.9 Recent Australian reports: time for appointment. The reports in South Australia, Queensland, Western Australia and Victoria recommend adoption of the English provision.[1] The Australian Capital Territory report did not so recommend.[2]

[1] Arbitration Act 1950 (U.K.), s. 8 (1), para. 5.2.4 above. *South Australian report* (1969) p. 7 draft Bill s. 16 (1), (2); *Queensland report* p. 19 draft Bill s. 14 (1) (see now Arbitration Act 1973 (Qd), s. 15 (1)); *Western Australian report* draft Bill appendix B s. 14 (1) (a); *Victorian report* (1974) p. 7.

[2] See *Australian Capital Territory report* (1974) pp. 26, 27, paras 101–103.

5.2.10 Recent Australian reports: umpire as sole arbitrator. The reports in South Australia, Queensland, Western Australia and Victoria recommend adoption of the English provision.[1] The *Australian Capital Territory report* is against adoption.[2]

[1] Arbitration Act 1950 (U.K.), s. 8 (3). *South Australian report* (1969) p. 7 draft Bill s. 16 (4); *Queensland report* (1970) p. 19 draft Bill s. 14 (3) (see now Arbitration Act 1973 (Qd), s. 15 (1)); *Western Australian report* (1974) draft Bill appendix B s. 14 (2); *Victorian report* (1974) pp. 7, 8, 24.

[2] *Australian Capital Territory report* (1974) p. 27 para. 103 (3).

5.2.11 Recent Australian reports: three arbitrators. The English provision[1] has been recommended for adoption, and has been adopted, in Queensland.[2] In South Australia, Western Australia and the Australian Capital Territory the reports did not recommend adoption.[3] The *Victorian report* was against adoption.[4]

[1] Arbitration Act 1950 (U.K.), s. 9 (1).

[2] *Queensland report* (1970) p. 19 s. 15 (1); Arbitration Act 1973 (Qd), s. 16 (1).

[3] *South Australian report* (1969), *Western Australian report* (1974), *Australian Capital Territory report* (1974) pp. 26, 27, paras 101–103.

[4] *Victorian report* (1974) p. 8.

5.2.12 Recent Australian reports: general. The *Victorian report* suggested that consideration might be given to some provision requiring the umpire to sit in the arbitration proceedings from the date of his appointment. If he did there might be savings of time and expense.[1] The Law Reform Commission of the Australian Capital Territory thought that the statutory power to appoint an umpire should be limited to the case where there are two arbitrators: it was not worth while to legislate about larger numbers.[2]

[1] *Victorian report* (1974) p. 8.

[2] *Australian Capital Territory report* (1974) pp. 26, 27, para. 102.

5.2.13 Further consideration.

(a) We think that there is much to be said for the comment from Japan that there should be no provision for umpires. Parties would often be better off with a single arbitrator, or with three arbitrators, than with two arbitrators and an umpire. The practice is, however, deeply ingrained in England and countries which have taken their law and practice from Englnd. It is rather, we think, a matter for better-considered drafting of arbitration agreements than for legislative prohibition.

(b) We do not pursue the suggestion in our working paper that an arbitration under a contract of adhesion should be required to be before a single arbitrator. As we said in our working paper, agreements for two arbitrators, one to be appointed by each party, and for the arbitrators to appoint an umpire, are very common and have at least the merit that applications to the Court are not encouraged. Comments on the working paper, and the recent reports, persuade us that in this respect the law should remain as it is.[1]

(c) We remain of the view that New South Wales should not adopt the English provision for appointment of an umpire immediately after the arbitrators are appointed.[2] We so remain notwithstanding the weight the other way of comment and of opinion in the recent Australian reports. The question is not important. If such a provision were adopted, however, we think that its drafting should make it clear that it did not invalidate an appointment made later.

(d) In our working paper we suggested that the English provision for an umpire to act as sole arbitrator[3] ought not to be adopted. We made this suggestion in the context of another suggestion that an arbitration under a contract of adhesion ought to be before a single arbitrator. We do not now maintain the latter suggestion. It is to be expected that arbitration agreements will be common which call for two arbitrators and an umpire. Sometimes it will be clear that the parties face the wastefulness noted by the MacKinnon Committee:[4] then it will be useful to let the Court order that the umpire enter upon the reference to the exclusion of the arbitrators. Influenced by the weight of comment and of opinion in the recent Australian reports, we think that the English law should be adopted, but subject to a power to contract out by exempt contract.

(e) We see force in the suggestions that an umpire be enabled or required to sit with the arbitrators, but we have decided not to recommend the adoption of such a provision. Either such a provision would be self-operating (i.e., not dependent on a court order), and then it may be quite inappropriate to the terms of the arbitration agreement or to the nature of the difference referred, or it would involve yet another occasion for interference by the Court with the agreed arrangements. The problem is, we think, sufficiently met by the power of the Court to order that the umpire enter in place of the arbitrators and as sole arbitrator.

(f) We agree with the Law Reform Commission of the Australian Capital Territory, and with a commentator, that the statutory power to appoint an umpire should be limited to the case where there are two arbitrators. Arbitration agreements providing for three or more arbitrators are uncommon, may have parties in three or more interests, and

call for special drafting. A statutory rule would be as often wrong as right. The power of majority decision would lessen the need for an umpire. The Acts in England and in all the Australian States give the power only where there are two arbitrators, and none of the recent Australian reports recommends otherwise.

(g) We turn to the question whether there is a need to spell out any more fully in the Act the powers and functions of an umpire. In general we think that there is not. The present Act, and the draft Bill we recommend, provide for the appointment of an umpire and his entry on the reference, and apply many provisions to umpires as well as to arbitrators. In general, once he has entered he is in a position similar to that of a single arbitrator. We say "in general" because there are problems, or at least undecided questions, how far the umpire is bound to act on, or may act on, decisions of the arbitrators, without exercising his own judgment. These questions have been discussed, but not wholly resolved, in England.[5] We think that an award made by the arbitrators before entry by the umpire should be as binding on him and on the parties as it would be binding on the parties had there not been an entry by the umpire: this appears to be the present law.[5] But there may have been decisions by the arbitrators not embodied in an award, for example, on amendment of pleadings or admissibility of evidence. We think that an umpire should be authorized, but not required, to adopt such decisions as these without applying his own judgment to the questions decided. The problem arises, what if the arbitrators' decision adopted by the umpire was the product of misconduct in the arbitrators, not known to the umpire or the injured party before the umpire's final award? The statutory power to set aside awards for misconduct would not enable the Court to set aside the umpire's award for the arbitrators' misconduct.[6] Perhaps the equitable powers of the Court would do so, but it is doubtful. The proper, and we think sufficient, remedy for what would be a very rare case is remission of the umpire's award.

(h) We turn to the suggestion that provision be made by which the arbitrators might refer to the umpire particular questions arising in the arbitration, rather than the whole difference. The suggestion is an interesting one but we do not recommend its adoption. In the Supreme Court there are procedures for the separate decision of particular questions.[7] Even though administered by experienced judges, these procedures can easily lead to undue expense and delay. "Piecemeal litigation is rarely satisfactory and usually expensive and unproductive."[8] There may well be arbitrations where the suggested procedure would be useful.

We think, however, that it would be better for the parties to deal with the matter by agreement than for the legislature to provide for such a reference in any arbitration in which there is an umpire. In some cases a somewhat similar result could be achieved by the arbitrators making an interim award on the issues on which they agree, and giving notice of disagreement as regards the residue of the difference before them.

[1] See especially the *Australian Capital Territory report* (1974) p. 26, paras 101, 102.

[2] Arbitration Act 1950 (U.K.), s. 8 (1), see para. 5.2.4 above.

[3] Arbitration Act 1950 (U.K.), s. 8 (3).

[4] Para. 5.2.5 above.

[5] *Orion Compania Espanola de Seguros* v. *Belfort Maatschappij voor Algemene Verzekgringeen* [1962] 2 Lloyd's Rep. 257, 267.

[6] *Luanda Exportadora S.A.R.L.* v. *Wahbe Tamari & Sons Ltd* [1967] 2 Lloyd's Rep. 353, 369.

[7] Supreme Court Rules, 1970, Pt 31, and see Pt 12 s. 2 (1) (a).

[8] *Victorian report* (1974) p. 10, on interim awards.

5.2.14 Recommendations. We recommend legislation to the following effect:

(a) where there is a reference to two arbitrators, they may, unless otherwise agreed, appoint an umpire;[1]

(b) the Court may, on application by a party, order that the umpire enter upon the reference in place of the arbitrators, unless otherwise agreed by exempt contract;[2]

(c) where the arbitrators do not make their award in an agreed time, or they give notice of disagreement, the umpire may enter upon the reference in place of the arbitrators, unless otherwise agreed;[3]

(d) where arbitrators make an interim award and afterwards an umpire enters upon the reference, the award shall be binding on the umpire;[4] and

(e) where in the course of a reference arbitrators make a decision on any question otherwise than by award and afterwards an umpire enters upon the reference, the umpire may adopt and act on the decision without applying his own judgment to the question.[5]

[1] Draft Bill s. 28.

[2] Draft Bill s. 43 (1), (2).

[3] Draft Bill s. 43 (3).

[4] Draft Bill s. 43 (4).

[5] Draft Bill s. 43 (5).

SECTION 3.—REMOVAL OF ARBITRATOR

5.3.1 Present law. Where there are to be two arbitrators, one to be appointed by each party, and under the statutory power[1] a substitute arbitrator is appointed in place of an arbitrator failing to act, or one party appoints his arbitrator as sole arbitrator on default of appointment by the other party, the Court may set aside the appointment.[2] "Where an arbitrator has misconducted himself the Court may remove him."[3]

[1] Arbitration Act, 1902, s. 8.

[2] Arbitration Act, 1902, s. 8, proviso. See *Williams* v. *Minister for Lands* (1901) 18 W.N. 181.

[3] Arbitration Act, 1902, s. 13 (1).

5.3.2 History. The original of the present section 8 was enacted in England in 1854.[1] The original of the present section 13 (1) was enacted in England in 1889.[2] Apart from these statutory provisions there was, and is in New South Wales, no power to remove an arbitrator. In case of misconduct of an arbitrator, a party might, and may, with the leave of the Court, revoke his submission or might, and may, have applied for an injunction to restrain the arbitrator from acting, or might, and may, apply to have the award set aside. There are some references in the cases before 1889 to the removal of an arbitrator,[3] but these should be treated as references to the revocation of a submission, or to the grant of leave to revoke. It has been said that where the Court sets aside an award the Court has an inherent power to remove the arbitrator.[4]

[1] Common Law Procedure Act 1854 (U.K.), s. 13. There the wording was that the court or judge might "revoke such appointment". The present "set aside" no doubt avoids confusion with the revocation of a submission.

[2] Arbitration Act 1889 (U.K.), s. 11 (1).

[3] For example, *Beddow* v. *Beddow* (1878) 9 Ch. D. 89, 94; *North London Railway Co.* v. *Great Northern Railway Co.* (1883) 11 Q.B.D. 30, 37.

[4] *In re Poyser & Mills' Arbitration* [1964] 2 Q.B. 467, 479.

5.3.3 Effect of removal. So far as our researches go, the effect of the removal[1] of an arbitrator has not received close consideration in the reported cases or in the text books or journals.[2] Probably the effect is merely to create a vacancy in the office of arbitrator. The arbitration agreement or the legislation[3] may enable the vacancy to be filled, or may enable the arbitration to go on notwithstanding the vacancy. Otherwise the arbitration agreement breaks down and there will be no case for a stay of litigation brought in respect of a matter agreed to be referred to arbitration. The effect of removal is thus different from the effect of revocation. If a submission is revoked, the agreement for arbitration is at an end so far as concerns arbitration on the difference submitted: there is no question of appointing another arbitrator.[4]

[1] We have found no cases on the effect of setting aside an appointment under the Arbitration Act, 1902, s. 8, proviso. Probably it is the same as removal under section 13 (1). We shall so assume.

[2] The reported cases furnish instances of practices rather than reasoned analyses of the law. See *Schofield* v. *Allen* (1904) 48 Sol. Jo. 68, 176; 116 L.T. Jo. 239; *Re Coleman and Royal Insurance Co.* (1905) 24 N.Z.L.R. 817; *In re Enoch and Zaretzky, Bock & Co.* [1910] 1 K.B. 327; *In re Hawke's Bay Electric–Power Board and Napier Borough Council* [1930] N.Z.L.R. 162; *Catalina* v. *Norma* (1938) 61 Ll.L. Rep. 360; *Veritas Shipping Crpn* v. *Anglo–Canadian Cement Ltd* [1966] 1 Lloyd's Rep. 76.

[3] For example, the grounds established in support of the application for removal may show that the removed arbitrator "is incapable of acting" within the meaning of the Arbitration Act, 1902, s. 8 (a); *Re Coleman and Royal Insurance Co.* (1905) 24 N.Z.L.R. 817; *In re Hawke's Bay Electric–Power Board and Napier Borough Council* [1930] N.Z.L.R. 162.

[4] It is possible to conceive an agreement so framed as to enable another appointment to be made (that is, another submission to be made) in case a submission is revoked, but we have not seen any instance. On the view put here, the reference to revocation in the Arbitration Act 1950 (U.K.), s. 25 (2), implies a departure from the former concept of revocation. The view put here dissents from that put in Russell (1970) at p. 115 that revocation is exactly equivalent to removal.

5.3.4 "Misconduct". The Acts in England and New South Wales do not define misconduct, nor have the courts. Putting aside trivial errors, it is misconduct—

(a) to fail to comply with the arbitration agreement or the Arbitration Act;

(b) to do anything in denial of natural justice;

(c) otherwise to make an award which on grounds of public policy ought not to be enforced.

These are only examples. "Misconduct" of an arbitrator includes not only what is misconduct by any standard, such as being bribed or corrupted, but also mere "technical" misconduct, such as making a mistake on the scope of his authority.[1]

[1] See generally *Halsbury on Arbitration* (1973) para. 622; Russell (1970) pp. 377, 378.

5.3.5 Developments in England. England retains a power to set aside an appointment similar to that in section 8 of the Arbitration Act, 1902.[1] Where an umpire has been appointed the Court may order that he enter upon the reference in place of the arbitrators as sole arbitrator:[2] there is here an implied power to remove an arbitrator. Where an arbitrator or umpire has delayed in entering on or proceeding with the reference or in making an award, the Court may remove him and, if he is so removed, he is not entitled to any fees.[3] England retains the general power to remove an arbitrator where he has misconducted himself, and adds "or the proceedings".[4]

[1] Arbitration Act 1950 (U.K.), s. 7 proviso.

[2] Arbitration Act 1950 (U.K.), s. 8 (3). This provision is directed against the wasteful practice of arbitrators sitting with the umpire but doing little or no work; *MacKinnon Report* (1927), paras 23, 24, 26 (b).

[3] Arbitration Act 1950 (U.K.), s. 13 (3). This provision is directed against cases where a debtor with no defence would persuade his arbitrator to delay; *MacKinnon Report* (1927), para. 5. It seems to cover a clear case of misconduct and, so far as concerns removal, to add nothing to the general power to remove for misconduct. So far as concerns fees, the provision appears to be both draconic and partial: draconic because he may not have been in culpable default; partial because it does not deal with fees in other cases of removal for misconduct. *Cf. In re Hall and Hinds* (1841) 2 Man. & G. 847, 853; 133 E.R. 987, 989; *In re Lyders* v. *Fife and Cuming* (1909) 28 N.Z.L.R. 1000, 1006. We do not recommend its adoption, but in paras 5.1.4–9 below we recommend more general control on the fees of an arbitrator.

[4] Arbitration Act 1950 (U.K.), s. 23 (1). The added words are intended to allay the feeling of grievance suffered by lay arbitrators guilty of only technical error: *MacKinnon Report* (1927), para. 22. The added words are treated as being in substance declaratory: Russell (1970) p. 349.

5.3.6 Working paper proposals.

(a) We suggested in our working paper that a new Bill should not have in it anything to take the place of the proviso to section 8 of the Act of 1902 (under which the Court may set aside an appointment made under the section). The original of this proviso was enacted when the Court did not have a power to remove for misconduct. Judging by the lack of reported cases the proviso had been practically a dead letter. We thought that the general power to remove for misconduct was sufficient.[1]

(b) We proposed that a new Bill should not adopt the English provision for removal of a dilatory arbitrator or umpire. The general power to remove for misconduct is enough.

(c) In general we thought that the general power to remove for misconduct was adequate. We would, however, adopt the verbal addition to the English provision, the ground that the arbitrator or umpire has misconducted the proceedings. We would do so because we think that there is value in uniformity in the expression of this essential provision of the law of arbitration.[2]

(d) We suggested that the parties should be competent, by agreement other than contract of adhesion, to limit the grounds for removal, or to exclude the Court's power to remove. It might be, we said, that this competency should arise only after an arbitrable difference had arisen, or perhaps only in respect of a named arbitrator. Such a restriction might be justified, we suggested, on the ground that when an agreement was made for the arbitration of future differences, the parties were commonly not in possession of sufficient facts to make a wise decision on the questions whether the grounds for removal should be limited or the power to remove should be excluded.

[1] See *Williams* v. *Minister for Lands* (1901) 18 W.N. 181.

[2] See *In re Fuerst Bros & Co. Ltd and Stephenson* [1951] 1 Lloyd's Rep. 429, 431; *MacKinnon Report* (1927), para. 22.

5.3.7 Comment on the working paper. There was little comment. Two commentators said that the proposals allowing parties to contract out went too far. One would have made six month's delay in making an award evidence for misconduct for the purpose of an application for removal.

5.3.8 Recent Australian reports. In South Australia there are recommendations for adoption of the present English provisions, supplemented by a definition of "misconduct" as including—

(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.[1]

The definition is based on provisions of the United States Federal Code on Commercial Arbitration.[2] In Queensland there are like recommendations.[3] In Western Australia there are recommendations for a power of removal in cases of delay and misconduct, and for a definition of misconduct as including "corruption, fraud, evident partiality or bias".[4] In Victoria the Chief Justice's Law Reform Committee generally favoured the recommendations in Queensland.[5] The Law Reform Commission of the Australian Capital Territory made recommendations generally along the lines in the proposals in our working paper, but we do not think that its recommendations extend to our suggestion in relation to contracting out.[6]

[1] *South Australian report* (1969) pp. 4, 9, 11, draft Bill ss. 3, 20 (3), 31 (1).

[2] *South Australian report* (1969) p. 17. See section 10 (a), (b), (d) of the United States Code, Article 9 (Commercial Arbitration), which section deals with vacating (or, as we would say, setting aside) the award.

[3] *Queensland report* (1970) pp. 5, 16, 22, 25, draft Bill ss. 3, 19 (3), 31 (1). See now Arbitration Act 1973 (Qd.), ss. 4, 20 (3), 32 (1). In Queensland "mutual" is omitted from paragraph (d) and "imperfect execution of powers" includes failure to comply with the statutory requirements for a written award and reasons for award.

[4] *Western Australian report* (1974) draft Bill appendix B, ss. 21 (3), 31 (1), (5).

[5] *Victorian report* (1974) pp. 4, 5, 10, 15.

[6] *Australian Capital Territory report* (1974) p. 14, paras 54–57.

5.3.9 Further consideration.

(a) We do not favour fixing a period of delay in making an award which would be evidence of misconduct. Some people might see in such a provision a statutory licence to put off the award until near the end of the period. We think that under the law as it is a lengthy delay would be evidence of misconduct, especially if requests for an award had been unheeded.

(b) We do not recommend a definition of misconduct in either of the forms which have found favour in other States.[1] We think that the definitions do not make any material difference to the law, save that some trivial transgressions would fall within the definition, transgressions which are not now, and ought not to be, dealt with as misconduct.

(c) We do not pursue the suggestion in the working paper that parties might exclude by agreement (except by contract of adhesion) the power of the Court to remove an arbitrator for misconduct. The suggestion went too far: there would be too great a risk of serious injustice going unremedied because of an agreement unwisely made without foreseeing misconduct which afterwards happens. We think that after the parties know of some particular misconduct they ought to be able to agree effectively that the arbitrator shall not be removed on that account, but that is as far as we would go. It must be borne in mind that the question of contracting out in relation to removal for misconduct involves a nice distinction. Suppose that the alleged misconduct is that the arbitrator has interviewed one party in the absence of the other. If the arbitration agreement expressly authorizes such an interview, the fact that he has done so is not misconduct, there is no case for removal, nor is there any question of a contract excluding the power to remove. However, if the arbitration agreement does not authorize the interview, but does stipulate that the arbitrator is not to be removed for misconduct, that is a stipulation which would, we think, be void under the present law and would be void under our recommendations.

[1] See para. 5.3.8 above.

5.3.10 Recommendations. We recommend that—

(a) there should be a power in the Court to remove an arbitrator who misconducts himself or the proceedings;[1]

(b) the parties should be able to exclude this power in relation to particular misconduct by agreement made with knowledge of the misconduct, but not otherwise.[2]

[1] Draft Bill s. 27 (1).

[2] Draft Bill s. 27 (3).

SECTION 4.—FEES AND EXPENSES OF AN ARBITRATOR

5.4.1 Present law: general. In this paragraph we consider the position where the fee of the arbitrator is not fixed by award. The parties may agree with the arbitrator for payment to him of a fee. Unless otherwise

agreed, there is an implied agreement to pay a reasonable fee.[1] An arbitrator has a right of action for his fee, and he has a lien on his award for his fee.[2] Usually an arbitrator relies on his lien and withholds delivery of his award until payment of the sum nominated by him for his fee. Presumably the parties, or one of them, may bring proceedings against the arbitrator in detinue for delivery of the award, and the proper amount of fees might be determined in those proceedings.[3] If an arbitrator demands an excessive sum for his fees as a condition of the delivery of the award, and a party pays the sum demanded, the party paying may sue the arbitrator to recover the excess,[4] but the onus is on the party suing to show that the fees are unreasonable and extortionate.[5] Where, under the award, the party paying the fee demanded by the arbitrator is to be paid his costs by another party, the amount demanded by the arbitrator is not binding as between the parties: the reimbursement for the arbitrator's fee may be allowed on taxation at a figure less than that paid to the arbitrator.[6]

[1] *Crampton & Holt* v. *Ridley & Co.* (1887) 20 Q.B.D. 48. The circumstances may exclude the implication, as where friends ask a mutual friend to settle some difference (same case at p. 52). It is not settled whether there is an enforceable agreement where the arbitrator is a barrister, but the view has been expressed that there is: *Halsbury on Arbitration* (1973) para. 576.

[2] *In re Coombs* (1850) 4 Ex. 839; 154 E.R. 1456; *Ponsford* v. *Swaine* (1861) 1 J. & H. 433; 70 E.R. 816.

[3] Supreme Court Act, 1970, s. 74.

[4] *Fernley* v. *Branson* (1851) 20 L.J.Q.B. 178.

[5] *Llandidrod Wells Water Co.* v. *Hawkesley* (1904) 20 T.L.R. 241; 68 J.P. 242.

[6] *In re Prebble and Robinson* [1892] 2 Q.B. 602.

5.4.2 Present law: fee fixed by award. Where the arbitration agreement is in writing, the arbitrator may, unless otherwise agreed, fix the amount of his fee by award.[1] Unless set aside, an award fixing the fee is in this respect binding both as between the parties and as between the arbitrator on the one hand and the parties on the other hand.[2] In such a case the law discussed above[3] is modified in that, where the fee is excessive, the party paying the excessive fee to the arbitrator cannot recover the excess from the arbitrator unless the award is set aside, and a party liable to another party for costs under the award must reimburse the full amount fixed by the award, again unless the award is set aside. There is a case for setting aside the award, so far as concerns the fixing of the fee of the arbitrator, if it appears to the Court that the fee is excessive and is assessed on a wrong principle.[4]

[1] Arbitration Act, 1902, s. 5, Sch. 2 (i); *In re Prebble and Robinson* [1892] 2 Q.B. 602. The arbitrator has a discretion to exercise or not to exercise the power: *Government of Ceylon* v. *Chandris* [1963] 2 Q.B. 327, 338.

[2] *In re Stephens, Smith & Co. and Liverpool and London and Globe Insurance Co.* (1892) 36 Sol. Jo. 464.

[3] Para. 5.4.1 above.

[4] *Government of Ceylon* v. *Chandris* [1963] 2 Q.B. 327; [1963] 2 W.L.R. 1097.

5.4.3 Present law: expenses of the arbitrator. Unless otherwise agreed, there is an implied agreement that the parties will reimburse the arbitrator expenses reasonably incurred by him for the purposes of the arbitration.[1] The discussion in the last two paragraphs applies as well to the expenses of the arbitrator as it does to his fees.

[1] See note 1 to para. 5.4.1 above.

5.4.4 Criticism in our working paper.

(a) In the case where the fee was not fixed by award, the law was, we suggested, defective in two ways. In the first place, where a party had paid the fee demanded by the arbitrator as a condition of delivery of the award, and the party sued to recover what he claimed to be an excessiveness in the amount demanded, the onus was on the party suing to show that the fee was unreasonable and extortionate.[1] A procedure should be available by which it would lie on the arbitrator to justify his demand. Proceedings in detinue for delivery of the award, and for determination of the amount for which the arbitrator had a lien,[2] were not the answer, because (apart from the want of precedent for such proceedings) a question of excessiveness might not arise until after payment of the fee and delivery of the award: for example, where only part of the fee was allowed on a taxation of costs between parties.

(b) In the second place, the present common law remedies called for somewhat elaborate and inappropriate procedures: procedures analogous to what was formerly called an action at law. We suggested that there should be a statutory procedure for taxation of fees of arbitrators in the Supreme Court, with power to secure the amount claimed by the arbitrator in case he was required to deliver the award before payment.

(c) There were, we said, added difficulties where the fee was fixed by award. Before 1889 an arbitrator was not usually authorized to fix his fee by award[3] and the danger of the arbitrator being judge in his own interests was recognized.[4] The change was made by statute.[5] It is possible that the change was inadvertent: the wording does not suggest a deliberate intention that the arbitrator should be judge of the amount of his own fee. The reported cases record several expressions of judicial uneasiness.[6]

(d) Apart from the unsatisfactory arrangement of the arbitrator being judge in his own interests, there was, we said, the substantive change in the position of a party complaining of an excessive fee. It was not just a matter of requiring the arbitrator to justify his fee in proceedings for detinue or, under the change we suggested, on taxation: the complaining party had the onus of showing that the award was so wrong that it ought to be set aside. We suggested that this put the arbitrator in too advantageous a position.

[1] *Llandidrod Wells Water Co.* v. *Hawkesley* (1904) 20 T.L.R. 41; 68 J.P. 242.

[2] Supreme Court Act, 1970, s. 74.

[3] *In re Prebble and Robinson* [1892] 2 Q.B. 602, 605.

[4] *In re Coombs* (1850) 4 Ex. 839, 841; 154 E.R. 1456, 1457.

[5] Arbitration Act, 1889 (U.K.), Sch. 1 (i).

[6] *In re Prebble and Robinson* [1892] 2 Q.B. 602, 604; *Re Stephens, Smith & Co. and Liverpool and London and Globe Insce Co.* (1892) 36 Sol. Jo. 464; *Government of Ceylon* v. *Chandris* [1963] 2 Q.B. 327; *Rolimpex Centrala Handlu Zagranicznego* v. *Haji E. Dossa & Sons Ltd* [1971] 1 Lloyd's Rep. 380, 384, 385.

5.4.5 Developments in England.

(a) Where an arbitrator demands payment of his fee before delivering his award, the Court, on application by a party, may order delivery on payment into Court by the applicant of the amount demanded.[1] The Court may further order taxation of the fee, payment to the arbitrator of the amount allowed and payment of the balance if any to the applicant.[1] This procedure is not available to a party if the fee demanded has been fixed by a written agreement between him and the arbitrator.[2] These arrangements are consequent on a recommendation of the MacKinnon Committee, on the view that there was no very practical way of controlling the amount of the fee of an arbitrator.[3] These arrangements are an improvement on the previous law, but they do not meet the case where, pursuant to the arbitration agreement, a sum on account of the fee has been paid before the making of the award,[4] nor the case where the successful party pays the sum demanded by the arbitrator and, obtaining an award for payment of his costs by a losing party, relies on the award fixing the fee for the purpose of quantifying to that extent the amount of costs recoverable from the losing party.[5] In the latter case the losing party must have the award set aside (so far as concerns the amount of the fee) before he can dispute that amount.

(b) Where the Court removes an arbitrator for delay under the statutory power directed to that case, the arbitrator is not entitled to a fee.[6]

[1] Arbitration Act 1950 (U.K.), s. 19 (1).

[2] Arbitration Act 1950 (U.K.), s. 19 (2).

[3] *MacKinnon Report* (1927), paras 25, 26 (c).

[4] *Rolimpex Centrala Handlu Zagranicznego* v. *Haji E. Dossa & Sons Ltd* [1971] 1 Lloyd's Rep. 380, 384, 385.

[5] *Government of Ceylon* v. *Chandris* [1963] 2 Q.B. 327, 333, 334.

[6] Arbitration Act 1950 (U.K.), s. 13 (3). See para. 5.3.5 above.

5.4.6 Working paper proposals.

(a) We suggested that the Court be given statutory power to order delivery of an award on payment into Court of a sum to cover the amount demanded by the arbitrator for his fee and expenses plus an amount for interest and costs, and to tax the arbitrator's fees and expenses as amongst all persons interested.

(b) We suggested further that the law be changed so that an award was not binding so far as concerned the amount of the fees and expenses of an arbitrator.

(c) Provisions to achieve the foregoing results should, we said, have effect subject to contrary agreement, but should have effect notwithstanding anything in a contract of adhesion.

5.4.7 Comment on the working paper. There was no comment on this section of the working paper.

5.4.8 Recent Australian reports. Each of the recent Australian reports has recommended adoption of the substance of the present English arrangements, or retention of similar arrangements.[1] The *Australian Capital Territory report* (1974) is generally in line with the proposals in our working paper, but would allow contracting out after differences have arisen and not otherwise.

[1] *South Australian report* (1969) pp. 9, 10, 11 draft Bill ss. 20 (3), 26; *Queensland report* (1970) pp. 22, 24 draft Bill ss. 19 (3), 26, see now Arbitration Act 1973 (Qd.), ss. 20 (3), 27; *Western Australian report* (1974) draft Bill appendix B ss. 21 (3), 25; *Victorian report* (1974) pp. 10, 13, 14.

5.4.9 Recommendation. In general we adhere to the proposals in our working paper, but would allow contracting out by exempt contract and not otherwise. We so recommend.[1]

[1] Draft Bill ss. 29–34.

SECTION 5.—LIABILITY OF AN ARBITRATOR

5.5.1 Present law. "An action will not lie against an arbitrator for want of skill, or for negligence in making his award, . . . provided that he acts honestly, without 'fraud or collusion'."[1]

[1] Russell (1970) p. 93; *Arenson* v. *Arenson* [1972] 1 W.L.R. 1196, 1207.

5.5.2 Criticism of the present law. In comment on a recent case,[1] the question has been asked whether this immunity is worth retaining. "Why should disputants be thought to intend that their quasi-arbitrator, particularly if they are paying him, need not be careful? Surely the immunity does not ensure a better 'adjudication'. The point is perhaps underlined by Brightman *J.*'s dilemma: 'It has sometimes been said that an arbitrator or quasi-arbitrator has no duty of care. Although no doubt technically correct, that method of expressing the legal position does not appeal to me at all. Of course an arbitrator or quasi-arbitrator ought to exercise care. I prefer to say that, short of fraud, he cannot be sued if he fails to perform that part of his duty.' Is not the law deficient in not giving effect to the moral duty and commercial expectation which exist with respect to this matter?"[2]

[1] *Arenson* v. *Arenson* [1972] 1 W.L.R. 1196. See the same case in the Court of Appeal [1973] Ch. 346 and in the House of Lords [1975] 3 W.L.R. 815.

[2] (1973) 47 *A.L.J.* 96, 97.

5.5.3 Comparative law: United States of America. In the United States an arbitrator has an immunity at least as extensive as that under the law of England and of New South Wales. "The concept of immunity of the judiciary from civil liability is firmly rooted in legal doctrine. Resting upon consideration of public policy, its purpose is to preserve the integrity and independent thought required by members of the judiciary. This immunity is not limited to judges but extends also to arbitrators acting in a quasi-judicial capacity. Inasmuch as the function of arbitration tribunals is similar to the courts', and the duties of the arbitrator require the exercise of his independent judgment, arbitrators enjoy immunity from court actions for their activities in arriving at their award. Were the law otherwise, the losing party could in every case expose an arbitrator to the vexation and hazards of a lawsuit. Any such action could only be destructive to the arbitrator's independence and to the discharge of his duties."[1]

[1] Domke (1968) § 23.01.

5.5.4 Support of the present law. In addition to the considerations mentioned by Domke,[1] there are the points that a liability in negligence would make it harder to get a man to act as arbitrator and would justify an increase in fees.[2] We said in our working paper that we were inclined to think that the present law should be maintained.

[1] Domke (1968) § 23.01.

[2] He would no doubt want to insure against his liability.

5.5.5 Comment on the working paper. All the commentators on this section thought that the law should stay as it is. One raised the question whether our proposal for a general statement of the powers of an arbitrator[1] might be read as putting a statutory duty on an arbitrator and thus expose him to a new liability to damages.

[1] Working paper draft Bill s. 33 (1).

5.5.6 Recent Australian reports. None of the recent Australian reports deals with the question.

5.5.7 Recommendation. We recommend that the law relating to the liability of an arbitrator should not be changed; and that our recommended legislation giving a general statement of the powers of an arbitrator[1] should be supplemented by a statement that that legislation does not impose a liability for breach, except in the case of fraud on his part.[2]

[1] Draft Bill s. 35 (1).
[2] Draft Bill s. 35 (2).

SECTION 6.—REGISTER OF ARBITRATORS

5.6.1 Proposals. Several commentators on our working paper said that it was hard to find qualified men to act as arbitrators; often a man was willing to act only if hearings could be fixed, and interrupted, so as not to clash with his other commitments. Further, it was often the case that the arbitrator was inexperienced and lacked confidence. All these problems would be relieved, so it was said, if a statutory register of arbitrators was set up. The names of men able and willing to act, and their expert qualifications would be readily available, and professionalism amongst arbitrators would be promoted.

5.6.2 Australian Capital Territory report. The Law Reform Commission of the Australian Capital Territory recommended the establishment by Ordinance of such a register.[1] The object of the register would be to reduce delay by having readily available details of persons of experience, expertise and trade or professional qualifications willing to act and prepared to deal with cases without delay.[2]

[1] The Commission contemplated that the register would cover conciliators and experts as well as arbitrators. See Pt 15 below on conciliators.
[2] *Australian Capital Territory report* (1974) pp. 23, 24, paras 89, 90.

5.6.3 Consideration. There is much to be said for the setting up of a register or panel of men willing to act as arbitrators. Comment on our working paper showed a widespread dissatisfaction with arbitration, and the problems mentioned in paragraph 5.6.1 were seen as major contributors to the dissatisfaction. Registers or panels are maintained by Chambers of Commerce and by some trade and professional associations, but we have the impression that, save in the building industry, the existence of the registers or panels is not widely enough known amongst parties to arbitration agreements or their advisers. Had we dealt with this question before the establishment of the Institute of Arbitrators Australia we might well have recommended the establishment of a statutory register. But that Institute has objects which extend to the setting up of such a register.[1] We think that the Institute should have an opportunity to do so and that for the present at least a statutory register should not be set up.

[1] See para. 1.5 above.

5.6.4 Recommendation. We recommend that, for the present at least, there should not be a statutory register of arbitrators.

PART 6.—CONDUCT OF THE ARBITRATION

SECTION 1.—GENERAL

6.1.1 General powers of an arbitrator. We deal with a number of particular matters elsewhere.[1] Here we deal with the general powers of the arbitrator in the course of the reference. Unless otherwise agreed, and subject to any legal objection, a party to the reference and any person claiming through him must do all things which the arbitrator may require during the proceedings on the reference.[2] Pursuant to this provision the arbitrator may make a variety of procedural directions, on such matters as the delivery of points of claim and of defence, discovery and inspection of documents, and interrogatories.[3] He may also do a variety of things not aptly regarded as requirements addressed to the parties. Thus he may make arrangements for inspection of property, he may appoint times and places for hearing, he may adjourn the hearing, and he may take the assistance of experts. His power to do these things is not expressed in the Act and is not, we believe, usually expressed in an arbitration agreement. The power is probably an instance of the incidental power with which the law clothes an express grant of power.[4] The power comes to this, that subject to the Act, subject to any agreement between the parties, and subject to the requirement that he act fairly between the parties, the arbitrator may conduct the reference in such manner as he thinks fit. Should power so to do be expressly given by an Arbitration Act? In our working paper we suggested that it should, for two reasons. In the first place, we thought that the incidental power as we stated it was the fair result of a multitude of cases, but there was nowhere an authoritative statement to that effect. A short statement of the law would, we said, tend to lessen the need to go back through the cases, many of which were inaccessible and some contradictory. In the second place, the Act was, we thought, unbalanced in that it made no reference to this aspect of the general powers of the arbitrator, yet stated in the widest terms his power to require things to be done by the parties.

[1] See the section headings.

[2] Arbitration Act, 1902, s. 5, Sch. 2, para. (f).

[3] As to discovery of documents and interrogatories see *Kursell* v. *Timber Operators and Contractors Ltd* [1923] 2 K.B. 202.

[4] *Cf.* Russell (1935) p. 327. *Quando lex aliquid alicui concedit, concedere et illud videtur sine quo res ipsa valere non potest.* See *Re Unione Stearinerie Lanza and Wiener* [1917] 2 K.B. 558.

6.1.2 Comment on the working paper. The few who commented on this section of the working paper approved the proposal.

6.1.3 Recent Australian reports. None of the recent reports in the States dealt with the question. The Law Reform Commission of the Australian Capital Territory made a recommendation similar to the proposal in the working paper.[1]

[1] *Australian Capital Territory report* (1974) pp. 29, 30 para. 114.

6.1.4 Recommendation. We recommend that it be enacted that an arbitrator must act fairly between the parties but, subject to that, and subject to the Act and any agreement between the parties, he may conduct the arbitration as he thinks fit.[1]

[1] Draft Bill s. 35 (1).

SECTION 2.—EXTENT OF THE REFERENCE

6.2.1 The problem. Suppose that there is an agreement between A and B that in case any difference arises between them in relation to some transaction the difference will be referred to arbitration, that each will appoint an arbitrator and that the arbitrators will appoint an umpire. Suppose that a relevant difference does arise, that it is referred to arbitration, and that X and Y are appointed arbitrators and that Z is appointed umpire in accordance with the agreement. Suppose then that A or B wants to refer to arbitration under the agreement another difference between them to which the agreement applies. The parties are not bound to refer the second difference to the same arbitrators and umpire.[1] There may be sound reasons why they, or one of them, should oppose such a reference. The differences may call for different expert qualifications for their determination: the first difference may be on a question of the quality of goods, the second on a question of law. On the other hand, A or B may oppose a reference of the second difference to the original arbitrators and umpire for sinister reasons: if he insists on appointing a different arbitrator, he may put such obstacles of time, trouble and expense in the way of the other party that the latter will abandon his claim. The incidence of this problem is lessened by the common practice of referring, not a specified difference, but all differences of the relevant kind, to arbitrators. But this practice would not overcome the problem in relation to a difference arising after the original reference.

[1] *Henry* v. *Uralla Municipal Council* (1934) 35 S.R. 15, 23.

6.2.2 Working paper and comment. This matter was not raised in our working paper nor in any of the recent Australian reports. It was raised by a body of commentators and they referred to an attempt to deal with the matter by contract.[1]

[1] Form of sub-contract (SCE. 3 May, 1971), issued by the Master Builders' Association of N.S.W. and the Building Industry Sub-Contractors' Organization of N.S.W., cl. 39 (c).

6.2.3 Recommendation. As we have said, the reasons for not referring a second difference to the original arbitrators may be sound or may be sinister. Where they are sinister, the law should allow their frustration. We therefore recommend that in such a case the arbitrator should have power to direct that the submission be extended so as to include the second difference, but that the Court should have power to set aside such a direction.[1]

[1] Draft Bill s. 64.

SECTION 3.—SANCTIONS FOR AN ARBITRATOR'S DIRECTIONS

6.3.1 Sanctions wanting. The sanctions to secure obedience to an arbitrator's procedural directions are undeveloped. Possibly, since a submission has effect as if made an order of the Court,[1] disobedience to a direction of the arbitrator might be punished as contempt.[2] But over the centuries during which a submission might have been made a rule or order of Court, or had effect as if so made, no practice arose whereby such disobedience was so punished. The remedy, if available, was not availed of and is in disuse. Sundry means of dealing under the present law with particular defaults have been suggested,[3] but the general problem remains. In England the Court is given powers in relation to specified interlocutory matters, but many matters are not covered, such as directions for settling the issues, and it would be better if some means could be devised whereby the arbitrator could impose sanctions so as to escape the expense and delay of an application to the Court. In 1961 the Commercial Court Users' Conference recommended that the Arbitration Act 1950 be amended so as to grant powers to an arbitrator to enforce compliance with his directions, such as, for example, the Court possesses to strike out a defence for want of compliance with an order for discovery.[4] The recommendation has not been adopted.

[1] Arbitration Act, 1902, s. 4.

[2] See para. 3.4 above.

[3] Russell (1935) p. 340; Russell (1970) pp. 188, 189; *Crawford* v. *Prowting Ltd* [1973] Q.B. 1, 8E, F, G.

[4] *Commercial Court Users' Conference Report* (1962), para. 32. The report refers to the Rules of the Supreme Court, 1883 (U.K.), O. 31, r. 21. See now Rules of the Supreme Court, 1965 (U.K.), O. 24, r. 16 (1), O. 26, r. 6; Supreme Court Rules, 1970, Pt. 23, r. 15 (1) (b), Pt. 24, r. 9 (1) (b).

6.3.2 Working paper proposal. We picked up what we conceived to be the thought behind the recommendation of the Commercial Court Users' Conference and suggested a provision whereby a party would put his substantive rights at risk if he defaulted in compliance with a procedural direction of the arbitrator. To give an arbitrator these powers involved some risk of oppressive use of them, but the ultimate control by the Court would remain in cases of serious error or misconduct by the arbitrator. We suggested that these powers ought to be susceptible of exclusion by agreement. We suggested also that the Court be authorized to punish disobedience to a direction of an arbitrator as if it were disobedience to an order of the Court.

6.3.3 Comment on the working paper. The few commentators on this section of the working paper were generally in favour of the proposals, if nothing else as being the least bad way of dealing with a real problem. The exception was a well known specialist in the United States of America, who was against the proposal on the ground that universal practice was to the contrary.

6.3.4 Recent Australian reports. The recent reports in the Australian States did not deal with the problem. The Law Reform Commission of the Australian Capital Territory made a recommendation similar to the proposals in our working paper so far as concerns determination of the difference adversely to the party in default.[1] However the Commission made a somewhat different recommendation in place of our suggestion that the Court be authorized to punish disobedience to a direction of an arbitrator as if it were disobedience to an order of the Court. Speaking of our suggestion, the Commission said—

> We believe that both substantively and procedurally this is undesirable. We suggest rather that any direction of an arbitrator may, on application by a party to the arbitration, be made an order of the Court. Once it is an order of the Court, the party in default has another opportunity to show obedience or disobedience, as the case may be, and take the consequences of disobedience. We suggest that the necessity for an application to have the arbitrator's direction made an order of the Court offers a desirable opportunity to challenge the propriety of the arbitrator's direction, and that this opportunity should always be present before any question of punishment or disobedience arises. It is less than satisfactory to have the issue of the propriety of the arbitrator's direction questioned in the same proceedings as those in which punishment for disobedience is sought.

[1] *Australian Capital Territory report* (1974) p. 31 para. 120.

6.3.5 Further consideration. We have given a good deal of thought to these divergent views on the procedure for punishment of disobedience to a direction of an arbitrator. We have come to the view that we should adhere to the proposal in our working paper. Our proposal would involve one application to the Court, that is, for punishment. The Australian Capital Territory recommendation would involve two applications to the Court: one for an order similar to the direction of the arbitrator, the second for punishment. The first application would involve some investigation by the Court of the proceedings in the arbitration: whether the application were opposed or not, the Court would not make the order unless satisfied that it was right. Under our scheme, the propriety of the arbitrator's direction would as a rule come into question only if it were oppressive on the face of it or if the defaulting party showed grounds for questioning its propriety. The scheme recommended by the Australian Capital Territory Law Reform Commission is similar to that formerly adopted for the enforcement of orders of the Master in Equity.[1] Under the present practice of the Supreme Court, however, an order made by a master or by a registrar or other officer of the Court is directly enforceable as an order of the Court. It is true that these orders may be reviewed in ways that are not open in the case of a direction of an arbitrator. On the whole, we think that our scheme can be adopted without undue risk of injustice.

[1] Practice Note (1929) 46 W.N. (N.S.W.) 187.

6.3.6 Recommendation. We recommend that the law should be as follows:

(a) where a party disobeys a direction of an arbitrator, the arbitrator may, unless otherwise agreed, determine the difference adversely to the disobedient party;[1]

(b) the Supreme Court may set aside an award made under (a), unless the parties otherwise agree after the award is made;[2]

(c) where a party disobeys a direction of an arbitrator then, unless otherwise agreed, the Supreme Court may punish him as if the direction were an order of the Court.[3]

[1] Draft Bill s. 41 (1)–(5).
[2] Draft Bill s. 41 (6), (7).
[3] Draft Bill s. 42.

SECTION 4.—INTERIM PRESERVATION

6.4.1. Introductory. In this section we discuss what provision there is, or ought to be, for the preservation of the subject matter of a difference under arbitration. Thus where there is a partnership agreement with an arbitration clause, it may be that a receiver of the partnership assets should be appointed pending award in an arbitration. Or there may be an arbitration on a difference respecting the ownership of property, and it may be that there should be a restraint on disposition of the property pending award, or the property may be perishable and should be sold whatever the outcome of the arbitration. We discuss below the question of securing the amount of a money claim.[1]

[1] See paras 6.5.1–6.6.7 below.

6.4.2 Present law: powers of an arbitrator. There is nothing in the Arbitration Act, 1902, particularly addressed to problems of interim preservation. If a difference arises on what should be done by way of interim preservation, and the arbitration agreement extends to such a difference, there is no reason why an arbitrator should not deal with the difference by way of award.[1] An award, of course, is not directly enforceable in the manner of a judgment or order: leave of the Court is necessary. The need to go to two tribunals before getting something enforceable is a disadvantage. It is a disadvantage too that arbitration agreements seldom advert to the possible need for directions for interim preservation. And it is a disadvantage that an award affects only the parties to the agreement: measures for interim preservation may be ineffective unless strangers to the award are also bound.[2] But on the other hand there is this advantage in the arbitrator dealing with questions of interim preservation, that he will have heard and weighed the evidence and, unless something can positively be shown to be wrong with his interim award, leave to enforce it should be almost as of course. This is better than having to prove the case in an original application to the Court.

[1] More particularly, by interim award. See paras 9.5.1–7 below.

[2] Thus suppose there is a difference between A and B touching the beneficial ownership of a credit bank balance standing in the name of A as customer of the bank. The bank would not be safe in refusing to pay a cheque drawn by A merely by reliance on an award. Notice to the bank of an injunction restraining A from drawing on the account would be more effective. *Cf. Elliot* v. *Klinger* [1967] 1 W.L.R. 1165; *Eckman* v. *Midland Bank Ltd* [1973] Q.B. 519, 527E–G; *Nippon Yusen Kaisha* v. *Karageorgis* [1975] 1 W.L.R. 1093, 1095C.

6.4.3 Present law: powers of the Court. The Court has power to grant an injunction or appoint a receiver for interim preservation pending award in an arbitration.[1] The best explored situation is that where there is a partnership under an agreement with an arbitration clause, a partner commences proceedings for dissolution of partnership and applies for the appointment of a receiver, and another partner applies for a stay of the proceedings.[2] In such a case the Court may appoint a receiver but otherwise stay the proceedings.[3] But the Court has exercised its powers in cases other than partnership cases.[4]

[1] *Compagnie du Sénégal etc.* v. *Woods & Co.* (1883) 53 L.J. Ch. 166; Kerr (1963) p. 84.

[2] Under the Arbitration Act, 1902, s. 6.

[3] *Plews* v. *Baker* (1873) L.R. 16 Eq. 564; *Law* v. *Garrett* (1878) 8 Ch. D. 26; *Halsey* v. *Windham* [1822] W.N. (Eng.) 108; *Pini* v. *Roncorini* [1892] 1 Ch. 633; *Machin* v. *Bennett* [1900] W.N. (Eng.) 146; *Eaton* v. *Eaton* [1950] V.L.R. 233.

[4] *Foster* v. *Hastings Corpn* (1903) 19 T.L.R. 204 (building contract); *Compagnie du Sénégal etc.* v. *Woods & Co.* (1883) 53 L.J. Ch. 166 (shipbuilding contract); *Marchon Products Ltd* v. *Thornes* (1954) Russell (1970) p. 161 (master and servant); *Willesford* v. *Watson* (1873) L.R. 8 Ch. App. 473 (mining lease).

6.4.4 Developments in England. The Court has for the purpose of and in relation to a reference, the same power in making orders in respect of—

(a) the preservation, interim custody or sale of any goods which are the subject matter of the reference;

(b) the detention or preservation of any property or thing which is the subject of the reference or as to which any question may arise in the reference; and

(c) interim injunctions or the appointment of a receiver—

as the Court has for the purpose of or in relation to an action or matter in the Court.[1] It seems likely that the draftsman of the original of these provisions[2] had in mind some powers then given or regulated by rule of court, relating to the preservation, custody and sale of property in dispute.[3] The present English rules, somewhat different, are set out below.[4] The powers of the Court in relation to interim injunctions and receivers are substantially those defined by judicial decision rather than by legislation. It is, however, enacted that the Court may, on such terms as the Court thinks fit, grant an injunction or appoint a receiver by interlocutory order in all cases in which it appears to the Court to be just or convenient so to do.[5]

[1] Arbitration Act 1950 (U.K.), s. 12 (6) (e), (g), (h). Section 12 (6) (g), from which subpara. (b) is taken, deals also with ancillary matters and evidentiary matters.

[2] Arbitration Act 1934 (U.K.), s. 8 (1), Sch. 1 (5), (7), (8).

[3] Rules of the Supreme Court, 1883 (U.K.), 0.50, rr.1, 2, 3.

[4] The present rules, Rules of the Supreme Court 1965 (U.K.), 0.29, rr.2, 4 are as follows:

"Detention, preservation, etc., of subject-matter of cause or matter

2. (1) On the application of any party to a cause or matter the Court may make an order for the detention, custody or preservation of any property which is the subject-matter of the cause or matter, or as to which any question may arise therein, or for the inspection of any such property in the possession of a party to the cause or matter.

(2) For the purpose of enabling any order under paragraph (1) to be carried out the Court may by the order authorize any person to enter upon any land or building in the possession of any party to the cause or matter.

(3) Where the right of any party to a specific fund is in dispute in a cause or matter, the Court may, on the application of a party to the cause or matter, order the fund to be paid into court or otherwise secured.

(4) An order under this rule may be made on such terms, if any, as the Court thinks fit.

(5) An application for an order under this rule must be made by summons or by notice under Order 25, rule 7.

(6) Unless the Court otherwise directs, an application by a defendant for such an order may not be made before he enters an appearance."

"Sale of perishable property, etc.

4. (1) The Court may, on the application of any party to a cause or matter, make an order for the sale by such person, in such manner and on such terms (if any) as may be specified in the order of any property (other than land) which is the subject-matter of the cause or matter or as to which any question arises therein and which is of a perishable nature or likely to deteriorate if kept or which for any other good reason it is desirable to sell forthwith.

In this paragraph "land" includes any interest in, or right over, land.

(2) Rule 2 (5) and (6) shall apply in relation to an application for an order under this rule as they apply in relation to an application for an order under that rule."

Cf. Supreme Court Rules, 1970, Pt 28, rr. 2, 3.

[5] Supreme Court of Judicature (Consolidation) Act 1925 (U.K.), s. 45 (1), (2). *Cf.* Supreme Court Act, 1970, ss. 66 (4), 67.

6.4.5 Working paper proposal: powers of an arbitrator. Powers relating to interim preservation are not often required. The majority of arbitrations are concerned with money claims which do not call for measures for interim preservation. In our working paper we said that we thought it better to leave it to the parties to make such provision as they thought fit by agreement, than to enact provisions which might be negatived by agreement. We suggested, therefore, that an arbitrator should not be given statutory powers relating to interim preservation.

6.4.6 Working paper proposals: powers of the Court.

(a) We have noted already the power of the Court to grant an injunction or appoint a receiver for interim preservation pending award.[1] Most of the cases where the power has been exercised have been cases where a party has commenced litigation on an arbitrable matter and another party has applied for a stay of proceedings in the litigation. It is arguable that it is this procedural situation which enables the Court to exercise the powers in question.

(b) The effect of the general enactments relating to interlocutory injunctions and the appointment of receivers in litigation[2] is not altogether clear. The enactments are part of the background in which the case law has developed. We said in our working paper that it would be inconvenient for differences to arise by reference to the manner, litigation or arbitration, in which the substantive dispute is to be determined. We suggested, therefore, that the substance of the English provision relating to injunctions and receivers should be adopted.

(c) We said in our working paper that we thought also that the Court should have powers in relation to an arbitration to make orders for the preservation, interim custody and disposal of property in dispute analogous to those which it has in relation to litigation. The grounds for elaborating these powers in relation to arbitration were the same as those in the case of litigation. Divergences between litigation and arbitration should not arise by legislative silence. Occasions for exercise of the powers would be rare, but their availability for the uncommon case would promote the utility of arbitration and take away possible grounds for applying for leave to revoke a submission or for refusing a stay of litigation. Since the subject called for fairly elaborate legislation, since the arrangements for litigation might not be altogether appropriate for arbitration, and since changes were bound to be required from time to time, we suggested that rule making powers on the subject be given to the Rule Committee of the Supreme Court, rather than that the Court's powers in litigation be applied referentially as in England,[3] or that there be direct statutory provision as seemed to us better in relation to security for costs.[4] The suggested provision covered management, enjoyment and sale or other disposal as well as preservation, detention and custody.

[1] Para. 6.4.3 above.

[2] Supreme Court Act, 1970, ss. 66 (4), 67.

[3] Arbitration Act 1950 (U.K.), s. 12 (6) (e), (g), (h).

[4] See para. 6.7.3 (d)–(f) below.

6.4.7 Comment on the working paper. There was no comment on this section of the working paper.

6.4.8 Recent Australian reports. All the recent reports in the Australian States were for adoption of the present English law.[1] The *Australian Capital Territory report* (1974) does not deal with the matter.

[1] *South Australian report* (1969) pp. 8, 9, draft Bill s. 18 (7) (e), (g), (h); *Queensland report* (1970) p. 21, draft Bill s. 17 (11) (a) (v), (vii), (viii), see now Arbitration Act 1973 (Qd.), s. 18 (11) (e), (g), (h); *Western Australian report* (1974) draft Bill appendix B s. 19 (1) (e), (g), (h); *Victorian report* (1974) p. 9.

6.4.9 Recommendations. We adhere to the proposals in our working paper and therefore recommend that—

(a) the Supreme Court should have power to grant an interlocutory injunction or to appoint a receiver in relation to an arbitration similar to the power which it has in relation to proceedings in the Court;[1]

(b) there should be power to make rules of Court relating to the preservation and sale of property in dispute.[2]

[1] Draft Bill s. 36.

[2] Draft Bill 72 (1) (c).

SECTION 5.—SECURITY FOR AMOUNT IN DISPUTE

6.5.1 Present law. In this section we discuss the question of a respondent to an arbitration on a claim for debt, damages or other money being required to pay into Court or otherwise secure the amount in dispute.[1] The Arbitration Act, 1902, has no provision expressly dealing with the question, though no doubt the parties might make some provision by agreement. An order by the Court under the Act may, however, be made on terms,[2] and there does not seem to be any reason why a respondent in an arbitration, applying to the Court for some order, should not be put on terms that he secure the amount in dispute. It may be appropriate to do so where there are grounds for thinking that the object of the application is merely to delay.

[1] See paras 6.4.1–9 above on the interim preservation of specific property in dispute.

[2] Arbitration Act, 1902, s. 24. The words "the authority making the order" in section 24 probably mean the Court, not an arbitrator or umpire. This is so because in the context of the Act in its original form the words quoted could have had a sensible meaning if taken to refer to the Court or a Judge (ss. 4, 7, 8, 11, 12, 14, 15, 16, 17, 18, 19, 21, 23), or to a court other than the Supreme Court (s. 6), because the Act does not use the word "order" in reference to a direction or decision of an arbitrator, and because the powers of an arbitrator in relation to costs are dealt with elsewhere in the Act (s. 5, Sch. 2 (i)).

6.5.2 Developments in England: security before award. The Court is given, for the purpose of and in relation to a reference to arbitration, the same power of making orders in respect of securing the amount in dispute in the reference as the Court has for the purpose of and in relation to an action or matter in the Court.[1] There used to be a rule of court by which, if there was a *prima facie* case of liability under a contract, but there was alleged to be a defence, the Court might order that the amount in dispute be brought into Court or otherwise secured.[2] This rule has been rescinded and has not been replaced and, as far as we can see, there is not now any specific enactment or rule giving to the Court such a power in relation to an action or matter in the Court. In 1975, however, the Court of Appeal made a change in the practice of the Court in an action to recover money due under a contract.[3] The defendants had money to their credit in bank accounts in London. The plaintiff feared that, unless restrained, the defendants would take the money beyond the reach of execution on a judgment for the plaintiff in the action. The Court of Appeal granted an injunction restraining the defendants from disposing of or removing their assets out of the jurisdiction. The Court of Appeal did so under the statutory power to grant an interlocutory injunction where it appears to the court to be just or convenient so to do.[4] It may be that under this decision the power in the Arbitration Act now has a content lacking under the former practice of the Court. It remains to be seen how far this change of practice will be adopted in New South Wales.

[1] Arbitration Act 1950 (U.K.), s. 12 (6) (f).
[2] Rules of the Supreme Court, 1883, 0.50, r.l.
[3] *Nippon Yusen Kaisha* v. *Karageorgis* [1975] 1 W.L.R. 1093.
[4] Supreme Court of Judicature (Consolidation) Act 1925 (U.K.), s. 45; *cf.* Supreme Court Act, 1970, s. 66 (4).

6.5.3 Developments in England: securing amount due under award. Where an application is made to set aside an award, the Court may order that any money made payable by the award shall be brought into court or otherwise secured pending the determination of the application.[1]

This provision was made in adoption of a recommendation of the Mackinnon Committee. The recommendation was made because of a prevailing practice whereby a respondent against whom an award had been made would procure postponement of the enforcement of the award by moving to set aside the award, or stating an intention so to move.[2]

[1] Arbitration Act 1950 (U.K.), s. 23 (3).
[2] *MacKinnon Report* (1927), paras 14–16.

6.5.4 Working paper proposal.

(a) In our working paper we said that the question of securing the amount in dispute was, we thought, adequately dealt with by the general power to make an order on terms, and that there was no occasion to adopt the English provisions that we have mentioned.

(b) The English general power to make orders securing the amount in dispute[1] might refer to the power exercised in litigation to put a person resisting a claim on terms of securing the amount in dispute in a case where he applied for the exercise of a discretionary power in his favour. This might be done, for example, where a defendant applied for the setting aside of a default judgment, or applied for leave to appeal, or applied for a stay of execution, or where a company sued for an injunction to restrain the commencement or advertisement of proceedings for winding up based on a disputed debt. So understood, we did not question that the Court ought to have the power, but we did not see what this special power gave beyond the general power to impose terms.[2] If it was intended that the Court should be able to order a respondent to give security otherwise than as a term of the exercise of some discretion in his favour, we thought that it went too far and ought not to be adopted.

(c) We did not see in the power to order security on an application to set aside[3] anything which was not given by the general power to impose terms.[4] We thought that it was unnecessary and ought not to be adopted.

(d) We made a qualification to the foregoing. In the ordinary course of litigation, a question of imposing terms would not arise until the hearing and determination of an application for the order in connection with which the terms were imposed. Thus, where a successful claimant applied for leave to enforce the award in the manner of a judgment, the respondent might give notice of a motion to set aside the award: in the ordinary course the question of terms would not arise until the hearing of the latter motion. In this way the respondent might get a postponement of the hearing of the application for leave to enforce the judgment and not be required to give security until disposal of his own motion. It might be that the statutory provisions in England to which we have referred were intended to enable the claimant to make his own substantive motion for security and thus to foreclose the respondent's motion unless security was given. If so, the provisions were procedural and would be better dealt with, if necessary, by something in the rules of Court.

(e) But we did not see the necessity for legislation, either by statute or rule of court. In the sort of case adverted to by the MacKinnon Committee[5] the respondent would be asking for an adjournment of the hearing of the claimant's motion for leave to enforce the award. It seemed to us that the Court might, under its inherent jurisdiction, refuse an adjournment unless security were given for the amount payable under the award.

[1] Arbitration Act 1950 (U.K.), s. 12 (6) (f).

[2] Arbitration Act, 1902, s. 24; Arbitration Act 1950 (U.K.), s. 28.

[3] Arbitration Act 1950 (U.K.), s. 23 (3).

[4] Arbitration Act, 1902, s. 24; Arbitration Act 1950 (U.K.), s. 28.

[5] See para. 6.5.3 above.

6.5.5 Comment on the working paper. Opinion was divided. Some would like to see provision for securing the amount in dispute, others had misgivings. All this comment was made before reports of the change in practice in England reached Australia.[1]

[1] See para. 6.5.2 above.

6.5.6 Recent Australian reports. All the recent reports in the Australian States were for adoption of the present English law.[1] The *Australian Capital Territory report* (1974) did not deal with the matter.

[1] *South Australian report* (1969) p. 8 draft Bill s. 18 (7) (f); *Queensland report* (1970) p. 21 draft Bill s. 17 (11) (a) (vi), see now Arbitration Act 1973 (Qd.) s. 18 (11) (f); *Western Australian report* (1974) draft Bill appendix B s. 19 (1) (f); *Victorian report* (1974) p. 9.

6.5.7 Further consideration.

(a) Subject to the change in practice in England to which we have referred,[1] it is not the practice in litigation to require a defendant to secure the amount in dispute, except as a term of a discretionary order sought by the defendant. In matters of this kind we think that the practice in litigation ought to be the model for arbitration, or at all events that a respondent's position in an arbitration ought not to be worse than a defendant's in litigation.

(b) Changes in the practice of the Court may, however, be made by judicial decision, or by rules of Court.

(c) If it becomes established in New South Wales that the Supreme Court may restrain by injunction a disposition of property so as to preserve the property for satisfaction of a possible future money judgment,[1] the provision we recommend for injunctions in aid of arbitrations[2] would enable a like injunction to be granted so as to preserve property for satisfaction of a possible future money award.

(d) The Rule Committee of the Supreme Court has power to make rules in respect of securing the amount in dispute in litigation.[3] We think that there is a case for giving to the Rule Committee a like power in relation to arbitrations.[4] That would enable the Committee to keep the practice in arbitrations in line with the practice in proceedings in the Court. But we would not go any further.

(e) We adhere to the view that there is no need to adopt the English provision for securing what is due under a challenged award.[5] That can be done under the inherent power of the Court to impose terms when making an order relating to the conduct of proceedings in the Court.

[1] See para. 6.5.2 above.

[2] Draft Bill s. 36. See para. 6.4.9 (a) above.

[3] Supreme Court Act, 1970, s. 124 (1) (a), (n).

[4] Draft Bill s. 72 (1) (b).

[5] Arbitration Act 1950 (U.K.), s. 23 (3). See paras 6.5.3–4 (c)–(e) above.

6.5.8 Recommendation. We recommend that the Rule Committee of the Supreme Court be authorized to make rules relating to securing the amount in dispute in an arbitration.[1]

[1] Draft Bill s. 72 (1) (b).

SECTION 6.—ADMIRALTY ARREST AND BAIL

6.6.1 Background. In some proceedings in the Supreme Court in Admiralty the plaintiff may cause a ship, cargo or other property to be arrested. The property arrested stands liable to be applied in or towards satisfaction of what may be adjusted for the plaintiff in the proceedings. Persons interested in the property may give bail for the purpose of preventing arrest or obtaining release from arrest. If a plaintiff in Admiralty causes property to be arrested in this way without sufficient cause, he may be held liable in damages for maliciously procuring the arrest.[1]

[1] *Halsbury on Malicious Prosecution and Proceedings* (1958) p. 374; *Olson and Mahony S.S. Co.* v. *The Ship "Thelma"* (1913) 14 S.R. 10.

6.6.2 Arbitration problems. Where a plaintiff has property arrested or takes bail in litigation in Admiralty on a difference referable to arbitration, and the defendant obtains a stay of the litigation, the property arrested or the bail must be released. In ordinary cases the Court can grant the stay on the terms that the defendant give other sufficient security for what may be awarded in the arbitration. So far there is no problem. But if by law the defendant is entitled to a stay of the litigation, he cannot be subjected to such a term: he gets the stay and the property or bail must be released unconditionally.[1] If there were an effective *Scott* v. *Avery* clause the defendant could presumably achieve a like result.[2] In these cases the plaintiff, if he has procured an arrest, would be at risk of a claim for damages for

procuring the arrest maliciously.[3] Finally, the property or bail is security for what may be adjudged in the litigation, or for what may be payable to the plaintiff under an agreed settlement in the litigation, not for what may be awarded in an arbitration.[4]

[1] *The Golden Trader* [1975] 1 Q.B. 348.

[2] He might do better by using the clause to get a judgment in his favour than by applying for a stay.

[3] See para. 6.6.1 above.

[4] *The Golden Trader* [1975] 1 Q.B. 348.

6.6.3 Working paper proposals. We discussed these problems in the working paper in relation to *Scott* v. *Avery* clauses.[1] We suggested that measures for arrest of property should be available notwithstanding a *Scott* v. *Avery* clause and proposed draft legislation to give effect to the suggestion.[2]

[1] Working paper para. 122, see also para. 4.2.7 above. The working paper was published before the decision in *The Golden Trader* [1975] 1 Q.B. 348.

[2] Working paper para. 123; working paper draft Bill s. 14 (7).

6.6.4 Comment on the working paper. There was no comment.

6.6.5 Recent Australian reports. In South Australia there is a recommendation for legislation as follows:

> 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.[1]

There are generally similar recommendations in Queensland and in Victoria.[2] The reports in Western Australia and the Australian Capital Territory do not deal with the matter.

[1] *South Australian report* (1969) p. 6 (draft Bill s. 13), 18.

[2] *Queensland report* (1970) p. 7, 18 draft Bill s. 11 (see now Arbitration Act 1973 (Qd.) s. 12), *Victorian report* (1974) p. 7.

6.6.6 Further consideration.

(a) We have recommended that *Scott* v. *Avery* clauses be made void. If this recommendation is adopted, there is no need for legislation in the form proposed in the working paper. We therefore do not now pursue that proposal.

(b) The legislation recommended in South Australia and Queensland, and adopted in Queensland, is based on an American model.[1] Under the American provision a

defendant is as a rule entitled as of right to a stay of litigation on a difference agreed to be referred to arbitration: there are thus close analogies with the position in *The Golden Trader*.[2] As we understand the recommendations, the intent is that where there is a claim on a difference agreed to be referred to arbitration, and the claim is one which, were it not for the arbitration agreement, might be made in proceedings *in rem* in Admiralty, the claimant may commence proceedings in Admiralty and pursue the proceedings by arrest of a ship or other property. The proceedings would then be not further prosecuted save that recourse to the ship or property arrested might be had for enforcement of an award.

(c) But is there a need for legislation? There is not now, and there would not be under our recommendations, any case in which a defendant is entitled unconditionally to a stay of litigation. And we recommend that *Scott* v. *Avery* clauses be made void. If that recommendation is adopted, it seems to us that what has been called the alternative security method will in all cases be available. That is, that proceedings in Admiralty can be commenced, and security obtained in those proceedings by arrest or bail, then if the proceedings are stayed under the Arbitration Act the stay can be made subject to the term that the defendant furnish security for what may be awarded in an arbitration. We think that there is no need for legislation on the matter.

(d) There is another reason for caution in recommending legislation on matters of Admiralty jurisdiction of the Supreme Court, namely the limited legislative powers of the State. The Supreme Court is a Colonial Court of Admiralty within the meaning of the Colonial Courts of Admiralty Act 1890 (U.K.).[3] That Act contemplated that "Colonial laws" might affect the practice or procedure of a Colonial Court of Admiralty.[4] "Colonial law" means "any Act, ordinance or other law having the force of legislative enactment in a British possession and made by any authority . . . competent to make laws for such possession".[5] "British possession", in relation to the Australian federation, means the Commonwealth of Australia and not the States or any of them.[6] Only the Commonwealth Parliament is "competent to make laws for such possession" (i.e., for the Commonwealth of Australia). It seems to follow that "Colonial law" means a law of the Commonwealth, not a law of a State. A Colonial law (that is, a Commonwealth law) affecting practice or procedure was subject to approval by Her Majesty.[7] There seems to be no room for State legislative power on the same subject because, if there were such a power, it would not be subject to approval by Her Majesty: it is implicit that such a power is

excluded. Section 4 of the Colonial Courts of Admiralty Act 1890 (U.K.) ceased to have effect in Australia on the commencement of the Statute of Westminster 1931.[8] This section of the Statute of Westminster was clearly enough aimed at abolishing the need for Her Majesty's approval to Commonwealth Acts as Colonial laws. We do not think that the Statute of Westminster should be read as taking away from the Commonwealth, or granting to the States, legislative power with respect to the practice and procedure of Colonial Courts of Admiralty in Australia. The Rule Committee of the Supreme Court has power to regulate the procedure and practice of the Supreme Court as a Colonial Court of Admiralty.[9] Therefore it seems that the practice and procedure of the Supreme Court in Admiralty, in relation to its jurisdiction under the Colonial Courts of Admiralty Act 1890, may be regulated by rules of Court, but not by New South Wales Act.

[1] United States Code, Article 9, s. 8. See para. 4.2.8 above.

[2] [1975] 1 Q.B. 348. See the United States Code, Article 9, s. 3.

[3] *McIlwraith McEacharn Ltd* v. *The Shell Co. of Australia Ltd* (1945) 70 C.L.R. 175.

[4] S. 4.

[5] S. 15.

[6] *McIlwraith McEacharn Ltd* v. *The Shell Co. of Australia Ltd* (1945) 70 C.L.R. 175.

[7] Colonial Courts of Admiralty Act 1890 (U.K.), s. 4.

[8] Statute of Westminster 1931 (U.K.), s. 6.

[9] Colonial Courts of Admiralty Act 1890 (U.K.), s. 7 (1).

6.6.7 Recommendation. We recommend that there should not be any special provision dealing with arrest or bail in Admiralty in relation to arbitrations.

SECTION 7.—SECURITY FOR COSTS

6.7.1 Present law. An arbitration agreement may authorize an arbitrator to require a party to give security for costs, but in the absence of agreement he is not so authorized.[1] The Court does not have a general power to order a party to an arbitration to give security for costs, but where a party makes an application to the Court in aid of an arbitration, the Court may, in granting his application, do so on terms that he give security for costs.[2] Perhaps a respondent might apply for leave to revoke the submission unless the claimant gave security for costs, but we have found no authority on the point.

[1] *Re Unione Stearinerie Lanza and Wiener* [1917] 2 K.B. 558.

[2] *In re Bjornstad and The Ouse Shipping Co. Ltd* [1924] 2 K.B. 673. The applicant was resident abroad.

6.7.2 Developments in England. In England the Court has, for the purpose of and in relation to a reference, the same power of making orders in respect of security for costs as it has for the purpose of and in relation to litigation in the Court.[1] The Court has a long-standing inherent discretionary power to order that a plaintiff (or person in the position of a plaintiff) give security for the costs of other parties to the proceedings and that in the meantime the proceedings be stayed. Practices grew up controlling the exercise of the power, and the power is now regulated by rules of Court. Briefly, the cases in which the rules of Court authorize an order for security for costs are, both in England and in New South Wales, residence abroad, poverty of a nominal plaintiff, and defaults relating to giving his address.[2] A plaintiff company may be required to give security for costs if it appears that it could not pay the costs of a successful defendant.[3]

[1] Arbitration Act 1950 (U.K.), s. 12 (6) (a). This provision gives effect to a recommendation of the MacKinnon Committee, but the Committee did not give reasons: *MacKinnon Report* (1927), para. 6 (d).

[2] Rules of the Supreme Court, 1965 (U.K.), 0.23, r. 1. *Cf.* Supreme Court Rules, 1970, Pt 53 r. 2.

[3] Companies Act 1948 (U.K.), s. 447. *Cf.* Companies Act, 1961, s. 363 (1).

6.7.3 Working paper discussion.

(a) The abolition of imprisonment for debt by the Supreme Court[1] raises general questions concerning the present law relating to security for costs in litigation, but we did not enter upon those questions. The availability of security for costs in specified cases was an incident of litigation. Our question was whether that availability ought to be extended to arbitrations.

(b) The important cases for security for costs were, first, residence abroad of the claimant and, second, the claimant a company not in a position to pay costs. A claimant resident abroad had unsuccessfully attempted to distinguish arbitration from litigation on the ground that, the respondent having agreed to have the difference settled by arbitration, he ought not to be allowed to obstruct arbitration as agreed by obtaining an order for security for costs.[2] This distinction had some weight, we said, where the claimant was resident abroad at all material times, but did not affect the case of a claimant company unable to pay costs.

(c) While not then convinced of the wisdom of a provision for security for costs, we included such a provision in the draft Bill in the working paper.

(d) Three ways occurred to us of framing a statutory provision for security for costs. First, the provision might pick up referentially the powers of the Court in litigation. This was

the English scheme, but we saw difficulties in it. One difficulty was that the rules of Court were not fully appropriate to arbitration: for example, the cases of poverty of a nominal plaintiff, of defective statement of address in originating process, and of evasive change of address[3] were inappropriate to arbitration. Another difficulty was that the statutory extension of the operation of the rules of Court might be an embarrassment to the Rule Committee: the Rule Committee might feel that it is precluded from making a rule appropriate to litigation, because it was inappropriate to arbitration. A further difficulty was that the meaning of the Act might become obscure upon change of the rules of Court.[4]

(e) The second way of framing a statutory provision for security for costs would be to authorize the Rule Committee to make rules on the subject. This seemed best to us for giving other powers to the Court in aid of arbitration, for example, the interim preservation of property in dispute.[5] It seemed unnecessarily complex, however, in relation to security for costs, and it might be thought inappropriate to leave it to rules of Court to deal with security for costs to be given by a company where that subject was dealt with by statute in relation to litigation.[6]

(f) The third way of framing a statutory provision for security for costs was to legislate directly so as to give appropriate powers to the Court. This way commended itself to us because it was a simple way of dealing with a simple subject.

(g) In adopting the provision in the Companies Act,[7] we extended it so as to embrace any corporation, not just a company incorporated under the Act,[8] and we dropped the assumption that liability to a defendant for costs would arise only if a defence was successful.

(h) If the power was given to the Court, it should, we suggested, be capable of exclusion by agreement, but not by contract of adhesion.

[1] Supreme Court Act, 1970, s. 98 (1).

[2] *Hudson Strumpffabrik G.m.b.H.* v. *Bentley Engineering Co. Ltd* [1962] 2 Q.B. 587, 592.

[3] Supreme Court Rules, 1970, Pt 53 r. 2 (1) (b), (c), (d).

[4] See para. 6.5.2 above.

[5] See para. 6.4.6 above.

[6] Companies Act, 1961, s. 363 (1).

[7] Companies Act, 1961, s. 363 (1).

[8] Companies Act, 1961, s. 5 (1), s. 5 (1) "Company". A company not so incorporated may be resident here (*Halsbury on Corporations* (1974) para. 1225) and such a case stands outside the provisions for security for costs in litigation (Supreme Court Rules, 1970, Pt 53 r. 2; Companies Act, 1961, s. 363 (1)).

6.7.4 Comment on the working paper. A commentator thought that security for costs should not be ordered against a claimant on the ground of residence abroad where he was resident abroad when the arbitration agreement was made. Subject to that, the few commentators on the section favoured some provision for security for costs. One thought it better to give a rule-making power rather than legislate directly on the subject. Another would not allow contracting out by an agreement for arbitration of future differences.

6.7.5 Recent Australian reports. All the recent reports in Australian States were for adoption of the present English law.[1] The *Australian Capital Territory report* (1974) did not deal with the matter.

[1] *South Australian report* (1969) p. 8 draft Bill s. 18 (7) (a); *Queensland report* (1970) p. 21 draft Bill s. 17 (11) (a) (i), see now Arbitration Act 1973 (Qd.) s. 18 (11) (a); *Western Australian report* (1974) draft Bill appendix B s. 19 (1) (a); *Victorian report* (1974) p. 9.

6.7.6 Further consideration.

(a) We think that, security for costs in proper cases being an incident of lititgation, it ought also in like cases to be an incident of arbitration.

(b) We think that it is, or ought to be, a consideration against ordering security that the claimant was resident abroad at the time when the arbitration agreement was made. However, the Court would have a discretion. We do not think that the case referred to[1] is necessarily the last word on the subject. And under our recommendation it is possible to stipulate by exempt contract that security for costs will not be required. Further, a like question would arise in litigation on a contract in which the parties had stipulated that disputes under the contract would be determined by the courts of New South Wales: here also we think that the practice in arbitration should follow, not lead, the practice in litigation. Therefore we do not recommend any special provision in favour of a claimant resident abroad at the time when the arbitration agreement was made.

(c) We would permit contracting out, but only by exempt contract. The case discussed above of a party resident abroad when the arbitration agreement is made is a good example of a case where contracting out ought to be allowed.

[1] *Hudson Strumpffabrik G.m.b.H.* v. *Bentley Engineering Co. Ltd* [1962] 2 Q.B. 587. See para. 6.7.3 (b) above.

6.7.7 Recommendations. We recommend that—

(a) provision be made enabling the Supreme Court to order a claimant in an arbitration to give security for costs—

(i) where the claimant is ordinarily resident outside New South Wales;

and

(ii) where the claimant is a corporation and there is reason to believe that it will be unable to pay costs of the arbitration if required to do so by order of the Court or by award;[1]

and

(b) parties be at liberty to contract out of the foregoing by exempt contract but not otherwise.[2]

[1] Draft Bill s. 37 (1).

[2] Draft Bill s. 37 (2).

SECTION 8.—EVIDENCE BEFORE AN ARBITRATOR

6.8.1 Present statutory arrangements. An arbitrator has authority to receive evidence, to examine witnesses, and to administer oaths to witnesses.[1] The parties to a reference and those claiming through them must, unless otherwise agreed, and subject to any legal objection, submit to be examined by the arbitrator on oath and produce documents as required.[2] Unless otherwise agreed, witnesses are to be examined on oath if the arbitrator thinks fit.[3] Provision is made for orders of the Supreme Court for taking evidence on commission.[4] Supreme Court subpoenas may be issued for the purposes of an arbitration.[5] Provision is made for declarations and affirmations in place of oaths.[6] A person may make a statutory declaration on any subject and an arbitrator may take and receive statutory declarations.[7] In the Evidence Act, 1898, "legal proceeding" *prima facie* includes an arbitration and "Court" includes an arbitrator.[8] Thus, amongst other things, the general statutory rules on competency and compellability are applied to arbitrations.[9] A person who wilfully and corruptly gives false evidence before an arbitrator is guilty of perjury and is punishable accordingly.[10] Privileges in relation to giving evidence and producing documents and other things are protected by rules of the Supreme Court.[11]

[1] Interpretation Act, 1897, s. 33.

[2] Arbitration Act, 1902, s. 5, Sch. 2 (f).

[3] Arbitration Act, 1902, s. 5, Sch. 2 (g).

[4] Arbitration Act, 1902, ss. 21, 23.

[5] Arbitration Act, 1902, s. 10.

[6] Oaths Act, 1900, s. 13.

[7] Oaths Act, 1900, s. 21 (1). This is concerned with the making of statutory declarations, not with their admissibility as evidence.

[8] Evidence Act, 1898, s. 3 (1). But, in relaion to Part IIA (admissibility of documentary evidence as to facts in issue), see the opening words of s. 3 (1) and s. 14A, which lead to a similar result.

[9] Evidence Act, 1898, Part II. See also Crimes Act, 1900, s. 407.

[10] Arbitration Act, 1902, s. 25. See also Crimes Act, 1900, ss. 327, 330, 339, 342; Oaths Act, 1900, ss. 13, 25. In England the matter is dealt with by the Perjury Act 1911 (U.K.), s. 1 (1), (2).

[11] Supreme Court Rules, 1970, Pt 36, r. 13.

6.8.2 Laws of evidence apply. Arbitrators are bound by the laws of evidence as are courts of law.[1] But occasion rarely arises for this rule to be applied by a court. In the first place, it is competent to the parties to relax this rule by agreement.[2] Parties commonly do so, and may do so impliedly.[3] In the second place, in an arbitration, as in litigation, as a rule a party cannot complain of a wrong reception or rejection of evidence unless he objects promptly.[4] In the third place, a party cannot take advantage of a wrong reception or rejection of evidence unless he gets a stated case on the question, or the error appears on the face of the award, or the error, either alone or with other things, establishes a case of misconduct. In the fourth place, even if evidentiary error is established, the Court will not set aside an award on that ground unless the error leads to substantial injustice.[5]

[1] *The Attorney General* v. *Davison* (1825) McCl. & Yo. 160; 148 E.R. 366; *In re Enoch and Zaretzky, Bock & Co.* [1910] 1 K.B. 327; *Owen* v. *Nicholl* [1948] 1 All E.R. 707.

[2] *Macpherson Train & Co. Ltd.* v. *J. Milhem & Sons* [1955] 2 Lloyd's Rep. 59. The provision in the Arbitration Act, 1902, Sch. 2 (f) that the parties shall submit to be examined by the arbitrator has its origin in a contractual stipulation designed to obviate the former rule that the parties were disqualified from giving evidence. See Amos (1837) p. 698; *The Attorney General* v. *Davison* (1825) McCl. & Yo. 160, 168; 148 E.R. 366, 370; Evidence Act, 1898, s. 5.

[3] *The Myron* [1970] 1 Q.B. 527, 533G.

[4] *Macpherson Train & Co. Ltd* v. *J. Milhem & Sons* [1955] 2 Lloyd's Rep. 59.

[5] *Hagger* v. *Baker* (1845) 14 M. & W. 9; 153 E.R. 367; *In re Enoch and Zaretzky, Bock & Co.* [1910] 1 K.B. 327, 336; *Mediterranean and Eastern Export Co. Ltd* v. *Fortress Fabrics (Manchester) Ltd* (1948) 81 Ll.L.Rep. 401, 404.

6.8.3 Error of substantive law and denial of justice distinguished. Sometimes cases are treated as raising a question of the law of evidence but are more properly considered, at least for present purposes, as raising a question of substantive law. Thus, where a contract for the sale of goods prescribes exclusively a means of determining the quality of the goods, it is an error of law to determine quality by some other means, such as expert opinion.[1] In a sense the arbitrator goes wrong if he allows the expert opinion to be given in evidence, because it is irrelevant, but he goes wrong in a matter of substance if he not only admits the evidence but acts upon it in making his award. Sometimes, again, cases are treated as raising a question of the law of evidence but are more properly considered, at least for present purposes, as raising questions of denial of justice. Such a case occurs where an arbitrator receives evidence in the absence of a party,[2] or refuses to receive relevant evidence on proper tender by a party.[3] This section is not concerned with errors of the kinds described above, but rather with such rules of the law of evidence as those concerning hearsay, those concerning the proof of documents and those concerning the use which may be made of a view or inspection by the arbitrator. The distinction is not an easy one to express, but is, we think, the distinction behind a provision that a court may dispense with "the technical rules of evidence".[4]

[1] See for example *"Agroexport" Enreprise d'Etat pour la Commerce Extérieur* v. *N. V. Goorden Import Cy. S.A.* [1956] 1 Lloyd's Rep. 319.

[2] *Varley* v. *Spratt* [1955] V.L.R. 403; *Government of Ceylon* v. *Chandris* [1963] 1 Lloyd's Rep. 214.

[3] *Phipps* v. *Ingram* (1835) 3 Dowl. 669; *Nickalls* v. *Warren* (1844) 6 Q.B. 615, 618; 115 E.R. 231, 232.

[4] Commercial Causes Act, 1903, s. 6 (b); Notice on Commercial Causes, 1895, para. 6 (Mathew (1902) p. 16). The arrangements for commercial causes were intended to give to the parties some of the advantages of arbitration: Mathew (1902), Introduction generally and especially p. 18. *Cf.* the Supreme Court Act, 1970, s. 82 (1) (a), which omits "technical".

6.8.4 Rejection of admissible evidence. It has been suggested that an arbitrator has some discretion as to the quantity of evidence that he will hear,[1] "but declining to receive evidence on any matter is, in ordinary circumstances, a delicate step to take, for the refusal to receive proof where proof is necessary is fatal to the award".[2] Probably the position is similar to the position in litigation: in general there is no limit on the quantity of evidence which a party may adduce,[3] but no doubt a court has power to stop an abuse of process in the shape of a vexatious prolongation of the taking of evidence.

[1] *Nickalls* v. *Warren* (1844) 6 Q.B. 615, 618; 115 E.R. 231, 232. And see Kyd (1791) p. 59.

[2] Russell (1970) p. 236.

[3] *Faure, Fairclough Ltd* v. *Premier Oil & Cake Mills Ltd* [1968] 1 Lloyd's Rep. 236.

6.8.5 Evidence by affidavit or statutory declaration. Unless otherwise agreed, evidence by affidavit or statutory declaration is not admissible in an arbitration.[1]

[1] Russell (1970) p. 241.

6.8.6 Evidence before arbitrators in practice. We believe that arbitrations are often conducted without an attempt to observe fully the laws of evidence, especially where the arbitrator is not a lawyer.

6.8.7 The law in England. There were divergences between the statutory arrangements in England and those in New South Wales before the English Act of 1934. We therefore summarize the relevant provisions of the English Act of 1950, without the customary heading "Developments in England"—

(a) Unless otherwise agreed, the parties to the reference and those claiming through them must, subject to any legal objection—
  (i) submit to be examined by the arbitrator on oath or affirmation; and
  (ii) produce documents as required.[1]

(b) Unless otherwise agreed, witnesses are to be examined on oath or affirmation if the arbitrator thinks fit.[2]

(c) Unless otherwise agreed, an arbitrator has power to administer oaths and take affirmations.[3]

(d) Subpoenas to give evidence and subpoenas for production may be issued.[4]

(e) A person is not to be compelled under a subpoena to produce a document which he would not be compelled to produce on the trial of an action.[5]

(f) The Court may order the issue of a subpoena to a person wherever he may be within the United Kingdom.[6]

(g) The Court may order the issue of a writ of *habeas corpus ad testificandum* to bring up a prisoner for examination.[7]

(h) The Court may make like orders to those it may make in proceedings in the Court in respect of—

(i) the giving of evidence by affidavit;[8]

(ii) the examination of a witness before an officer of the Court or other person;[9] and

(iii) the issue of a commission or request for the examination of a witness out of the jurisdiction.[10]

These arrangements follow a recommendation of the MacKinnon Committee, but the Committee did not give reasons for the recommendation.[11]

[1] Arbitration Act 1950 (U.K.) s. 12 (1). *Cf.* Arbitration Act, 1902, s. 5, sch. 2 (f).

[2] Arbitration Act 1950 (U.K.) s. 12 (2). *Cf.* Arbitration Act, 1902, s. 5, sch. 2 (g), Oaths Act, 1900, ss. 12, 13.

[3] Arbitration Act 1950 (U.K.) s. 12 (3). *Cf.* Interpretation Act, 1897, s. 33, Oaths Act, 1900, ss. 12, 13.

[4] Arbitration Act 1950 (U.K.) s. 12 (4). *Cf.* Arbitration Act, 1902, s. 10.

[5] Arbitration Act 1950 (U.K.) s. 12 (4). *Cf.* Supreme Court Rules, 1970, Pt 36 r. 13 (1), (3).

[6] Arbitration Act 1950 (U.K.) s. 12 (4).

[7] Arbitration Act 1950 (U.K.) s. 12 (5). *Cf.* Supreme Court Act, 1970, s. 72.

[8] Arbitration Act 1950 (U.K.) s. 12 (6) (c). There is no similar enactment in New South Wales.

[9] Arbitration Act 1950 (U.K.) s. 12 (6) (d). *Cf.* Arbitration Act, 1902, ss. 21, 23.

[10] Arbitration Act 1950 (U.K.) s. 12 (6) (d). *Cf.* Arbitration Act, 1902, ss. 21, 23.

[11] *MacKinnon report* (1927), para. 6.

6.8.8 Comparative law: United States of America. In the United States of America court rules regarding the admission and rejection of evidence do not prevail in arbitration. It seems that an arbitrator has a discretion to admit or reject evidence not admissible in a court, hearsay

for example. It seems also that an arbitrator has a discretion to reject evidence admissible in a court, unduly repetitious evidence for example, but arbitrators are cautioned against rejecting admissible evidence: it must be an extreme case.[1]

[1] Domke (1968), § 24.02; Sturges (1930), § 214.

6.8.9 Working paper proposals: general.

(a) We suggested in our working paper that an arbitrator, though having a duty to act fairly and a duty not to act upon irrelevant matter, should not have a duty otherwise to observe the laws of evidence, unless the parties agreed that he should do so. An advantage sometimes seen in arbitration, as compared with litigation, was, we said, that the difference might be determined by a person who was not a lawyer but was experienced in the subject-matter of the difference. It was unreal to expect such an arbitrator to apply the laws of evidence as if he were a judge. It was oppressive as well as unreal to put on a conscientious arbitrator a duty which, to the knowledge of the parties, he was not equipped to perform.

(b) We suggested, therefore, that an arbitrator should be authorized to reecive and act upon relevant matter even though not admissible under the law of evidence. An arbitrator should, however, we said, have a duty to receive relevant matter admissible under the law of evidence, subject to a reserve power to reject matter vexatiously tendered as evidence.

(c) These general proposals would, we said, enable an arbitrator to receive affidavits or statutory declarations as evidence. We thought it was nonetheless useful to adopt a modification of the English provision for affidavit evidence.[1]

[1] Arbitration Act 1950 (U.K.) s. 12 (6) (c). See para. 6.8.7 above.

6.8.10 Working paper proposals: evidence on commission or by deposition.

(a) As we mentioned elsewhere,[1] we found difficulties in the English scheme[2] whereby the Court was given powers in relation to an arbitration by reference to its powers in litigation. And, it being a procedural matter, we thought it better that the provisions, necessarily detailed, should be made by rules of Court rather than, as at present, by statute.[3] We suggested, therefore, that the Rule Committee be given power to make rules relating to evidence on commission or by deposition.

(b) Another possibility was, we said, that an arbitrator might direct the examination of a witness before a person appointed by the arbitrator. A provision to that effect would have occasional utility where it was convenient that a witness should be examined at a distant place, but inconvenient that the arbitrator should himself go to that place. Its utility would lie in the avoidance of the time, trouble and expense involved in an application to the Court. It would, of course, be open to the parties to give to the arbitrator appropriate power by agreement. We invited comment on the proposal, but did not include such a provision in the draft Bill in the working paper. Other provisions of that draft Bill, however, were drawn with a view to enabling effect to be given to such an agreement.

[1] See para. 6.7.3 (d) above.

[2] Arbitration Act 1950 (U.K.), s. 12 (6).

[3] Arbitration Act, 1902, ss. 21, 23.

6.8.11 Working paper proposals: refusal to be sworn, etc. A person may be required by subpoena to attend before an arbitrator[1] and, the subpoena being an order of the Supreme Court, there are adequate sanctions for securing obedience.[2] But the law appears to be unsatisfactory in the case of a person refusing to be sworn or refusing to answer a question or produce a document. The law in England before 1889 was clear enough: there was a procedure whereby the recalcitrant witness might have been attached,[3] but this procedure was abolished by the Act of 1889 and replaced by provisions for the issue of mere subpoenas.[4] The New South Wales Acts of 1892 and 1902 followed the English Act of 1889, but did adopt provisions for Court orders for the examination of witnesses:[5] possibly a wide construction of these provisions would enable the Court to order the examination before a judge of a witness in default before an arbitrator. Comparable provisions were introduced in England in 1934[6] and these may be available to meet the problem under discussion, but we have found no authority on the point. We suggested in our working paper that what was needed was a provision whereby a witness before an arbitrator who refused to be sworn, or to answer a question, or to produce a document or other thing before an arbitrator should be liable to be examined before the Supreme Court and to pay the costs incurred by reason of his default.

[1] Arbitration Act, 1902, s. 10.

[2] Evidence Act, 1898, ss. 13, 14 are presumably not applicable.

[3] Civil Procedure Act 1833 (U.K.), s. 40. See the form of order to a witness in Chitty's *Forms* (1866) p. 919.

[4] Arbitration Act 1889 (U.K.), ss. 8, 18. A refusal to give evidence is not a breach of the requirements of a subpoena for testimony in ordinary form.

[5] Arbitration Act, 1892, ss. 18–20; Arbitration Act, 1902, ss. 21–23.

[6] Arbitration Act 1934 (U.K.), s. 8 (1), Sch. 1 (4); Arbitration Act 1950 (U.K.), s. 12 (6) (d).

6.8.12 Working paper proposal: District Court subpoena. We raised the question whether it would be useful to authorize the District Court to issue subpoenas for the purposes of an arbitration. The power might be particularly useful where an arbitration was held in a place far from Sydney. We invited comment on the question but the draft Bill in the working paper did not have any provision giving such a power.

6.8.13 Working paper proposal: perjury. We proposed that the present provision dealing with perjury be retained.[1]

[1] Arbitration Act, 1902, s. 25. See working paper draft Bill s. 58 (1).

6.8.14 Comment on the working paper: general. Our general proposals[1] were in the main well received. One lawyer, having had unhappy experiences before arbitrators who were not lawyers, thought that the laws of evidence were a useful restraint on an abitrator who might otherwise admit masses of material not receivable in litigation: an arbitrator should, he said, be bound by the laws of evidence unless the parties otherwise agreed or the difference raised a matter for expert opinion and the arbitrator had an appropriate expert qualification. A commentator in the United States had doubts on the proposal to allow an arbitrator to reject matter tendered vexatiously as evidence.

[1] Para. 6.8.9 above.

6.8.15 Comment on the working paper: evidence on commission or by deposition. The proposal that an arbitrator might, if the parties so agreed, authorize another person to take evidence,[1] attracted support in New South Wales, but learned commentators in England doubted its utility.

[1]Para. 6.8.10 (b) above.

6.8.16 Comment on the working paper: District Court subpoena. This proposal[1] received substantial support from several organizations and individuals. However, a lawyer with intimate acquaintance with court organization in New South Wales points out that there are officers in many places in the State who are authorized to issue Supreme Court subpoenas. To allow the issue of District Court subpoenas for arbitrations generally would promote complexity rather than utility.

[1] See para. 6.8.12 above.

6.8.17 Recent Australian reports. The recent reports in the Australian States are in favour of the present English law, subject to what appears below in this paragraph.[1] These reports also recommended or saw as

desirable a provision to the effect that a witness in an arbitration should not be compelled to answer a question that he would not be compelled to answer in an action.[2] The Queensland and Western Australian reports add some detailed provisions relating to subpoenas.[3] The Law Reform Commission of the Australian Capital Territory agreed on the whole with the view put in our working paper that subject to the general duty to act fairly, an arbitrator should not have to adhere to the law of evidence.[4]

[1] *South Australian report* (1969) p. 8, draft Bill, s. 18 (1)–(3), (5) (6), (7) (c), (d); *Queensland report* (1970) pp. 8, 9, 20, 21, draft Bill s. 17 (1)–(4), (7), (10), (11) (a) (iii), (iv), see now Arbitration Act 1973 (Qd.) s. 18 (1)–(4), (7), (10), (11) (c), (d): the Act omits the requirement to submit to examination by the arbitrator; *Western Australian report* (1974) draft Bill appendix B ss. 17 (1), (2), (3), 18 (1), (5), 19 (1) (c), (d); *Victorian report* (1970) pp, 8, 9.

[2] *South Australian report* (1969) p. 8 draft Bill s. 18 (4); *Queensland report* (1970) p. 21 draft Bill s. 17 (9), see now Arbitration Act 1973 (Qd.) s. 18 (9); *Western Australian report* (1974) draft Bill appendix B s. 17 (4); *Victorian report* (1974) p. 9. The provision is drawn from the Arbitration Act, 1902, s. 22, repealed by the Supreme Court Act, 1970: see now Supreme Court Rules, 1970, Pt 36 r. 13.

[3] *Queensland report* (1970) pps. 20, 21, draft Bill s. 17 (5), (6), (8), see now Arbitration Act 1973 (Qd.) s. 18 (5), (6), (8); *Western Australian report* (1970) draft Bill Appendix B s. 18 (2), (3), (4).

[4] *Australian Capital Territory report* (1974) p. 30 paras 115, 116.

6.8.18 Further consideration.

(a) In general we adhere to the proposals in the working paper.

(b) One of these proposals was that an arbitrator should have power to reject as evidence matter which *in his opinion* is unnecessary or it tendered vexatiously. It is a strong thing to reject any relevant evidence. We think it better to drop "in his opinion" so that parties will more easily be able to challenge a rejection as misconduct.

(c) We give reasons below why we do not favour adoption of some provisions of the English law and some recommendations in recent Australian reports—

(i) The provisions that a person is not to be compelled under a subpoena to produce a document which he would not be compelled to produce on the trial of an action.[1] This is covered by the Supreme Court Rules.[2]

(ii) The Court may order the issue of a subpoena to a person wherever he may be in the United Kingdom.[3] This is aimed at, for example, a witness in Scotland, who is therefore in the United Kingdom, but not in England. The circumstances in New South Wales do not call for such a provision.

(iii) Writ of *habeas corpus ad testificandum*.[4] This is covered by the Supreme Court Act, 1970.[5]

(iv) The provision that a person is not to be compelled to answer a question that he would not be compelled to answer in an action.[6] This is covered by the Supreme Court Rules.[7]

(v) Detailed provisions relating to subpoenas.[8] The Rule Committee of the Supreme Court is authorized to deal with this.[9]

[1] Arbitration Act 1950 (U.K.) s. 12 (4), para. 6.8.7 (e) above.
[2] Supreme Court Rules, 1970, Pt 36 r. 13 (1), (3).
[3] Arbitration Act 1950 (U.K.) s. 12 (4), para. 6.8.7 (f) above.
[4] Arbitration Act 1950 (U.K. s. 12 (5), see para. 6.8.7 (g) above.
[5] Supreme Court Act, 1970, s. 72.
[6] See para. 6.8.17 above.
[7] Supreme Court Rules, 1970, Pt 36 r. 13 (2), (3).
[8] See para. 6.8.17 above.
[9] Supreme Court Act, 1970, s. 124 (1) (a).

6.8.19 Recommendation. We recommend that—

(a) Unless otherwise agreed, matter admissible under the law of evidence (including affidavits) should be admissible in an arbitration, and an arbitrator should be allowed to admit relevant matter not admissible under the law of evidence, but should be allowed to reject unnecessary or vexatious matter.[1]

(b) If the parties so agree, an arbitrator should be enabled to authorize another person to receive matter as evidence in an arbitration.[2]

(c) The present arrangements for subpoenas and for punishment of perjury should be retained.[3]

(d) The Rule Committee of the Supreme Court should have power to make rules for taking evidence by deposition or on commission for the purposes of an arbitration.[4]

(e) Where a person refuses to be sworn as a witness, or refuses to answer a question or refuses to produce a document or other thing, he should be liable to be examined in the Supreme Court and should be liable to be made to pay the costs of the proceedings in the Supreme Court.[5]

[1] Draft Bill ss. 35 (4) (a), 38.
[2] Draft Bill s. 35 (4).
[3] Draft Bill ss. 39, 68.
[4] Draft Bill s. 72 (1) (a).
[5] Draft Bill s. 40.

SECTION 9.—THIRD PARTY CLAIMS

6.9.1 The problem. Suppose A is a landowner and B is a builder. A and B make a building contract for a house on the land. B engages a subcontractor, C, to do some of the work, to the specification in the contract between A and B. A complains that C's work is bad and takes B to arbitration under a clause in the building contract. The arbitrator finds that the work is not up to specification and makes an award against B. B looks to C for indemnity. C will not pay and B sues him in court. In the action, the award is irrelevant and inadmissible on the issue of liability. The Court finds that the work is up to specification and gives judgment for C. B has lost twice because of inconsistent findings of fact. A like problem may arise where there is an arbitration agreement between B and C: the arbitrator in a submission under that agreement may not be the same as the arbitrator on the difference between A and B.

6.9.2 A proposal. A commentator on our working paper has put it to us that legislation should empower the Court to order the joinder of third parties to arbitration proceedings.

6.9.3 Discussion. We are against the proposal. It is of the essence of arbitration that persons in difference have agreed to refer their difference to arbitration. It would be quite wrong to require a man to submit to arbitration before an arbitrator whom he has had no part in appointing and under an agreement to which he is not a party. The problem of third party claims arises in its most acute form where there is a *Scott* v. *Avery* clause: we have recommended the avoidance of these clauses.[1] Where there is no *Scott* v. *Avery* clause, the problem would be likely to lead to an application for leave to revoke the submission, or to opposition to a stay of litigation. In either of these cases, the fact that an issue between parties to the arbitration agreement was also an issue between a party and a stranger would be relevant: in favour of giving leave to revoke, against granting a stay of litigation.[2] Given the nature of arbitration as depending on an agreement to arbitrate, we do not think that the law ought to go further. If A, B and C agree to arbitration all is well. If only two of them agree to arbitration, there is a case under the present law and under our recommendations for relief against the arbitration agreement so that related claims can be determined together in litigation. With sufficient forethought the contracts between A and B and between B and C could be so framed as to lead to a three party arbitration. An attempt has been made to do this in at least one form of contract for use in the building industry.[3] We think that this is the best way of dealing with the problem and that there is no case for legislation.[4]

[1] Para. 4.2.16 above.

[2] See para. 4.1.17 above.

[3] Form of sub-contract (SCE. 3 May 1971) issued by the Master Builders' Association of N.S.W. and the Building Industry Sub-Contractors' Organization of N.S.W., clause 39 (e).

[4] We do not express any opinion about the form of sub-contract just mentioned.

SECTION 10.—DISCOVERY; INSPECTION ETC. OF PERSON, PROPERTY OR PROCESS

6.10.1 Introductory. In this section we discuss the law of discovery as applied to arbitration. "Discovery" here refers to pre-trial procedures whereby a party may be required to state what relevant documents and other things he has, and to produce for inspection those not privileged, and to pre-trial procedures whereby a party may be required to answer questions framed by another party. This section also considers means whereby property or a process the subject of an arbitration can be inspected, observed or tested.

6.10.2 Present law. Unless otherwise agreed, and subject to any legal objection, the parties and those claiming through them must do all things required of them by the arbitrator.[1] Hence an arbitrator may make requirements for the purposes of discovery,[2] and of inspection and so on of property.[3] The powers of an arbitrator do not, however, affect a stranger[4] to the arbitration.[5] The sanctions for obedience to the directions of an arbitrator are limited.[6] The Court will not order discovery in aid of an arbitration.[7] There is, so far as we know, no reported instance of an application to the Court for an order for the inspection of property in aid of an arbitration: we do not see how such an application could be supported.

[1] Arbitration Act, 1902, s. 5, Sch. 2 (f).

[2] *Kursell* v. *Timber Operators and Contractors Ltd* [1923] 2 K.B. 202.

[3] Russell (1970) p. 190.

[4] That is, a person who is not a party and does not claim through a party: Arbitration Act, 1902, s. 5, Sch. 2 (f).

[5] *Cf. Persson* v. *Heathwoods Pty Ltd* (1967) 68 S.R. 27.

[6] See para. 6.3.1 above.

[7] *Wellington* v. *Mackintosh* (1743) 2 Atk. 569, 570; 26 E.R. 741; *Street* v. *Rigby* (1802) 6 Ves. Jun. 815, 819–821; 31 E.R. 1323, 1325, 1326; Kerr (1870) p. 10; Story (1877) pp. 736, 737. *Cf.* Supreme Court Rules, 1970, Pt 1 r. 14.

6.10.3 Developments in England. In England the Court has, for the purpose of and in relation to a reference, the same power of making orders in respect of—

(a) discovery of documents and interrogatories;

(b) the inspection of any property or thing which is the subject of the reference, or as to which any question may arise in the reference;

(c) authorizing, for the purpose of such an inspection, any person to enter upon or into any land or building in the possession of any party to the reference;

(d) 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—

as the Court has for the purpose of and in relation to an action or matter in the Court.[1] The originals of these provisions were enacted in 1934[2] in adoption of a recommendation of the MacKinnon Committee.[3] The expression of the enactments paraphrased in subparagraphs (b),

(c) and (d) above is based on the rules of Court in force in 1934.[4] These rules have been replaced, and the present rule is set out in the footnote.[5]

[1] Arbitration Act 1950 (U.K.), s. 12 (6) (b), (g).

[2] Arbitration Act 1934 (U.K.), s. 8 (1), Sch. 1 (1), (7).

[3] *MacKinnon Report* (1927), para. 6.

[4] Rules of the Supreme Court, 1883 (U.K.), 0.50, r. 3.

[5] Rules of the Supreme Court, 1965 (U.K.), 0.29, r. 3, is as follows:
"Power to order samples to be taken, etc.

3. (1) Where it considers it necessary or expedient for the purpose of obtaining full information or evidence in any cause or matter, the Court may, on the application of a party to the cause or matter, and on such terms, if any, as it thinks just, by order authorize or require any sample to be taken of any property which is the subject-matter of the cause or matter or as to which any question may arise therein, any observation to be made on such property or any experiment to be tried on or with such property.

(2) For the purpose of enabling any order under paragraph (1) to be carried out the Court may by the order authorize any person to enter upon any land or building in the possession of any party to the cause or matter.

(3) Rule 2 (5) and (6) shall apply in relation to an application for an order under this rule as they apply in relation to an application for an order under that rule."

Cf. Supreme Court Rules, 1970, Pt 25 r. 8.

6.10.4 Working paper proposal. We suggested in our working paper that provision should be made for discovery, and for inspection of property and so on, by order of the Court. We thought that the appropriate provision was one whereby the Rule Committee might make rules on the subject.

6.10.5 Comment on the working paper. There was little comment, but what there was supported the proposals.

6.10.6 Medical examination. A commentator suggested that provision be made for medical examination. Procedures for medical examination of parties and other persons have been found useful in litigation.[1] Like procedures would have some utility in arbitrations, though less often than formerly having regard to the new restrictions on arbitration agreements relating to contracts of insurance.[2] We think that the Rule Committee of the Supreme Court should be authorized to make rules on the subject. The power should, we think be limited to medical examination of the parties. Examination of other persons would be an intrusion on privacy hardly justifiable by the existence of an arbitration agreement to which the person concerned is not a party.

[1] Supreme Court Rules, 1970, Pt 25 rr. 1–7, 10.

[2] Insurance Act, 1902, s. 19.

6.10.7 Recent Australian reports. The recent reports in the Australian States are for adoption of the English provisions.[1]. The *Australian Capital Territory report* (1974) did not deal with the matter.

[1] *South Australian report* (1969) pp. 8, 9, draft Bill s. 18 (7) (b), (g); *Queensland report* (1970) p. 21 draft Bill s. 17 (11) (a) (ii), (vii), see now Arbitration Act 1973 (Qd.), s. 18 (11) (b), (g); *Western Australian report* (1974) draft Bill appendix B s. 19 (1) (b), (g); *Victorian report* (1974) p. 9.

6.10.8 Recommendation. We recommend that power be conferred on the Rule Committee of the Supreme Court to make rules with respect to discovery, medical inspection, inspection of property, and related matters, for the purposes of arbitrations.[1]

[1] Draft Bill s. 72 (1) (d), (e), (f), (g).

SECTION 11.—EXPERT ASSISTANCE

6.11.1 Proposal. A commentator has put it to us that there is uncertainty in the law relating to expert assistance to arbitrators. He said that a new Arbitration Act should prescribe the powers of an arbitrator, with and without consent, to appoint experts as referees, assessors, court witnesses or private consultants. Attention might also be given to other matters relating to experts, including the procedure for choosing the expert, and an expert's authority to receive evidence, to compel attendance of persons, to compel production of documents, to administer an oath, to enter and inspect property.

6.11.2 Consideration. There is indeed an absence of precise rules on this subject. We think, however, that a detailed statutory formulation ought not to be introduced. Arbitrations vary greatly in their length and complexity. An arbitration on the quality of goods may be all over in ten minutes, an arbitration under a major civil engineering contract may last for more than a year. Statutory prescriptions of particular procedural matters may be right for some kinds of arbitration but will be wrong for others. Arbitration Acts in England and in countries who have taken their law from England have, we believe, followed a sound policy in speaking only in general terms about the conduct of arbitrations. The draft Bill we recommend would, we think, be a significant improvement on the present Act so far as concerns expert assistance to arbitrators. There is, for example, the basic prescription of an arbitrator's duties and powers, that he must act fairly between the parties but, subject to that duty, and subject to the Act and any agreement between the parties, he may conduct the arbitration as he thinks fit.[1] Under this provision it would be a matter for him to decide how an expert will be chosen, what his instructions will be, and so on. The draft Bill also has provisions whereby an expert may be authorized to take evidence and to administer oaths,[2] whereby a person may be compelled to attend before, or produce documents to, an expert,[3] and whereby rules of court may be made relating to inspection of property, trying experiments and observing processes.[4]

[1] Draft Bill s. 35 (1).
[2] Draft Bill s. 35 (4).
[3] Draft Bill s. 39 (1).
[4] Draft Bill s. 72 (1) (f), (g).

6.11.3 Recommendation. We recommend that a new Arbitration Act should not contain provisions dealing specially with expert assistance to arbitrators.

SECTION 12.—STATUTORY PROCEDURES AND FORMS

6.12.1 General. A commentator said that arbitrations as conducted in New South Wales today are too formal, too much like court proceedings, too slow and too expensive. It was suggested that the parties might be led to a more commonsense approach if a new Act gave some guidance to the parties and incorporated model procedures suitable for typical cases. This is, we think, a matter for education, rather than legislation. Another commentator said that there may be a place for a statutory list of matters on which agreement was desirable, and that agreement on these matters might be made a condition of the validity of an arbitration agreement. We think again that an Act of Parliament is not the place for education or advice and that statutory conditions of the validity of agreements are necessarily mischievous and need a very strong justification before adoption. Our recommendations do not adopt these proposals.

PART 7.—POWERS OF AN ARBITRATOR

SECTION 1.—BASIS OF DETERMINATION

7.1.1 Introductory. In this section we consider how far the arbitrator has a duty to decide the difference submitted to him by reference to law,[1] how far he is entitled to act on some other basis, to act, for example, *ex aequo et bono*,[2] and how far these matters may be controlled by agreement. We are not concerned here with matters of procedure and evidence before the arbitrator but rather (although a sharp distinction cannot be made) with the rules (of law or otherwise) which he must apply in order to reach his decision on the difference. Nor are we concerned here with arbitration arising out of illegal transactions, such as a sale of goods at a price prohibited by law,[3] nor with a case where an award directs a contravention of a statutory prohibition.[4]

[1] We are not concerned here with questions of the conflict of laws. Commonly the relevant law will be the law of the country where the arbitration is held and an assumption to that effect may be made for the purposes of this section.

[2] In other words, to act by reference to considerations of general justice and fairness. We use the Latin phrase for the sake of its convenient brevity. In other countries a person authorized so to act is described as an *amiable compositeur*. See Sanders (c. 1957), pp. 19, 21.

[3] *David Taylor & Son Ltd* v. *Barnett Trading Co.* [1953] 1 W.L.R. 562. See also *Aubert* v. *Maze* (1801) 2 Bos. & P. 371, 375; 126 E.R. 1333, 1336; *Wohlenberg* v. *Lageman* (1815) 6 Taunt. 251 255; 128 E.R. 1031, 1032; *Cayzer, Irvine & Co. Ltd* v. *Board of Trade* [1927] 1 K.B. 269, 291, 292.

[4] *Riesenberg* v. *Weinberg* (1958) 59 S.R. 106.

7.1.2 Present law: older authorities. Until 1935 it could, we think, be said that the duty of the arbitrator to apply the law, or his liberty to act *ex aequo et bono,* depended on the terms of the submission. There was indeed a change in what was taken to be implicit in the submission in the absence of express stipulation: early in the nineteenth century the implication was that the arbitrator was at liberty to act *ex aequo et bono,*[1] but later the implication was held to be that the arbitrator was to decide by reference to law.[2]

[1] *Ching* v. *Ching* (1801) 6 Ves. Jun. 282; 31 E.R. 1052, and see the note to *Delver* v. *Barnes* (1807) 1 Taunt. 48, 52; 127 E.R. 748, 750, 751, Cohn (1941) pp. 17, 18, and the view of English law expressed by Story *J.* in *Kleine* v. *Catara* (1814) 2 Gall. 61; 14 Fed. Cas. 732, 735. The same idea lies behind the earlier pronouncements on setting aside the award for error of law on its face: there are repeated references to the arbitrator intending to apply the law, but mistaking it. See *Kent* v. *Elstob* (1802) 3 East 17; 102 E.R. 502; *Young* v. *Walter* (1804) 9 Ves. Jun. 364; 32 E.R. 642; *Broadhurst* v. *Darlington* (1833) 2 Dowl. 38; *Fuller* v. *Fenwick* (1846) 3 C.B. 705, 712; 136 E.R. 282, 285. See also *Goode* v. *Bechtel* (1904) 2 C.L.R. 121, 126; *Board of Trade* v. *Cayzer, Irvine & Co. Ltd* [1927] A.C. 610, 628; *N. V. Vulcaan* v. *A/S Mowinckels* [1937] 42 Com. Cas. 200, 205–208.

[2] *Jager* v. *Tolme & Runge* [1916] 1 K.B. 939, 952, 957, 961; *Czarnikow* v. *Roth, Schmidt & Co.* [1922] 2 K.B. 478, 488; *Board of Trade* v. *Cayzer, Irvine & Co. Ltd* [1927] A.C. 610, 628, 629; *Ramdutt Ramkissendas* v. *F. D. Sassoon & Co.* (1929) L.R. 56 Ind. App. 128, 135, 136; *N. V. Vulcaan* v. *A/S Mowinckels* [1938] 2 All E.R. 152; *Chandris* v. *Isbrandtsen–Moller Co. Inc.* [1951] 1 K.B. 240; Cohn (1941) p. 7.

7.1.3 Present law: Recent authorities. In 1935, Goddard *J.* said, without giving reasons, that the parties to a submission with a stipulation calling for a decision *ex aequo et bono* probably knew perfectly well that so far as English law was concerned the courts would not uphold the stipulation.[1] Megaw *J.* decided in 1962 that by the law of England an arbitrator must apply the law of England or some other fixed and recognizable system of law: a stipulation in the submission for an award *ex aequo et bono* was against public policy and was therefore ineffective to permit an arbitrator to apply some criterion such as his own view of justice.[2] Megaw *J.* based his decision on the judgments in the Court of Appeal in *Czarnikow* v. *Roth, Schmidt & Co.*[3] *Czarnikow's Case* was concerned with a stipulation that no party to an arbitration should seek a consultative stated case. The decision was that the stipulation was invalid. It was invalid because it tended to abrogate the statutory provision that an arbitrator may, and shall if so directed by the Court, state in the form of a special case for the opinion of the Court any question of law arising in the reference.[4] In their judgments the Lords Justices spoke of the utility of arbitration, a utility which depended on arbitrators deciding according to law, spoke of the inability of parties by private agreement to oust the jurisdiction of the courts, and spoke of the dangers which would attend a licence to parties, or to trade associations, to agree to have differences determined otherwise than by reference to the law. Scrutton, *L.J.* did indeed say that "arbitrators, *unless expressly otherwise authorized,* have to apply the laws of England."[5] Megaw *J.*, however, thought

it clear that the words emphasized were used to refer to the statutory provision[6] whereby the parties might by agreement exclude the power of an arbitrator to state his award in the form of a special case.[7]

[1] *Maritime Insurance Co. Ltd* v. *Assecuranz-Union von* 1865 (1935) 52 Ll. L. Rep. 16, 20. The decision was criticized in other respects by Lord Wilberforce in *Compagnie d'Armement Maritime S.A.* v. *Compagnie Tunisienne de Navigation S.A.* [1971] A.C. 572, 598.

[2] *Orion Cia. Espanola de Seguros* v. *Belfort Maatschappij voor Algemene Verzekgringeen* [1962] 2 Lloyd's Rep. 257.

[3] [1922] 2 K.B. 478.

[4] Arbitration Act 1889 (U.K.), s. 19.

[5] [1922] 2 K.B. 488. The emphasis is ours.

[6] Arbitration Act 1889 (U.K.), s. 7 (b).

[7] [1962] 2 Lloyd's Rep. 263.

7.1.4 Criticism of the recent authorities.

(a) We need not assent to or dissent from the decision in the *Orion Case*[1] as a true application of the law as it stands. We do not, however, think that the law so declared is as it should be. We think that *prima facie* the parties ought not to be prevented by law from stipulating for the arbitration of their differences *ex aequo et bono* or on any other basis which they might themselves adopt in negotiation for a compromise without arbitration.[2]

(b) The operation of such a stipulation as ousting the jurisdiction of the Courts does not carry weight with us. An agreement on a means for resolving differences without approach to the Courts should, it seems to us, be welcomed by the State and by the community. The Courts have quite enough to do in other fields.

(c) Nor do we think that the risk of the introduction of special codes regulating particular fields of trade or other activity is a ground for denying validity to stipulations such as those now under discussion. Our objection here is to the crudity of the sanction of invalidity. For the sake of protecting the community from some apprehended but unspecified possibility of evil, every stipulation for arbitration *ex aequo et bono* is invalidated, no matter how reasonable it is for the parties in their particular situation and no matter, indeed, how ill-equipped the law may be to resolve their dispute. The proper remedy here is, we suggest, not the general invalidation of the stipulations in question; instead, where an abuse is shown to exist in some field of trade or other activity, Parliament should legislate to control the abuse. Such legislation has been a commonplace of government for centuries.

(d) Further, the invalidation of the stipulation in question is ineffective to prevent the development of codes regulating particular trades and activities. That can be done by the rules of trade and other associations, whether arbitration is involved or not. Both the common law (for example, the law touching covenants in restraint of trade) and statute law (for example, the trade practices legislation) provide means for the control of such rules.

[1] [1962] 2 Lloyd's Rep. 257.

[2] Cohn (1941); Tangley (1965) pp. 721, 722.

7.1.5 Comparative law. In the United States of America[1] and in western Europe[2] an arbitrator need not (in the absence of special agreement) determine matters by reference to law, but may act by reference to equity and good conscience or as *amiable compositeur*. Indeed, the duty of an arbitrator to apply the law, recently asserted in England, seems to be peculiar to England and countries, such as the former colonies, which passed Acts based on the Arbitration Act 1889 (U.K.).

[1] Domke (1968) p. 257.

[2] Sanders (1958) p. 143.

7.1.6 Working paper proposal. We suggested that the law should be that an arbitrator must decide the difference before him by reference to the law, unless the parties otherwise agreed. We thought it right that *prima facie* the arbitrator should decide by reference to the law: the need for a positive agreement on some other basis of arbitration should be a signal to the parties of the possible risks involved.[1] All this was subject to the special considerations touching contracts of adhesion: we suggested that in an arbitration under a contract of adhesion the arbitrator should apply the law.

[1] Cohn (1965) pp. 156–158.

7.1.7 Comment on the working paper. Opinion was divided on the question whether, if the parties so agreed, an arbitrator might make his award otherwise than by reference to law. The balance of opinion was in favour of the proposal in our working paper. Those against the proposal saw dangers in the possible introduction by arbitrators of special codes of quasi-law in particular fields of trade or industry, without control by the courts. Some said that if the suggestion were adopted there would be less room for questions of law to come before the Court on stated cases. The result would be that the development of law by judicial decision would be hampered. Some said that if an arbitrator need not decide by reference to law there would be a tendency toward more lengthy hearings before arbitrators, because parties would have less guidance on what was relevant for the purposes of evidence and argument.[1] So too, the outcome of an arbitration would be less predictable and therefore, amongst other things, it would be harder to reach an agreed settlement.

[1] See Freeman (1973) pp. 181–186.

7.1.8 Recent Australian reports. The Law Reform Commission of Queensland accepted the result of the recent English cases that an arbitrator must decide by reference to the law and recommended a provision making it easier to see whether the arbitrator had done so: the Commission recommended that an arbitrator be required to give reasons for his award unless the parties otherwise agreed after the difference had arisen.[1] The *Western Australian report* was to a like effect, although some members of a subcommittee did not wish it to be made easier to have an award set aside.[2] The *Victorian report* makes a strong case for restricting judicial review of awards for error of law, but did not in terms advert to the question whether an arbitrator should be required to decide by reference to law.[3] The Law Reform Commission of the Australian Capital Territory considered the question now under discussion and came to the view that the rule that an arbitrator is bound to apply the law should be subject to the qualification that in an agreement to arbitrate on an existing difference the parties might agree otherwise.[4]

[1] *Queensland report* (1970) pp. 11–14, draft Bill s. 23. See now Arbitration Act 1973 (Qd.) s. 24.

[2] *Western Australian report* (1974), pp. 12, 13 (para. 32), draft Bill appendix B s. 22.

[3] *Victorian report* (1974) pp. 11, 12.

[4] *Australian Capital Territory report* (1974) pp. 9, 10, paras 34–37.

7.1.9 Further consideration.

(a) We do not think that weight should be given to the point that if our suggestion were adopted there would be less room for questions of law to come before the Court on stated cases and that therefore the development of the law by judicial decision would be hampered. The function of the Court is to determine disputes. As a by-product of that function, reasons for judgment in the Court contribute to the development of the law. We think that as a rule parties want a determination, perhaps a determination according to law: they are not concerned to promote the development of the law by judicial decision. If they are so concerned, they can of course forbear to contract out of the rule that the arbitrator must decide by reference to law. Judicial development of the law, valuable though it is, does not justify exposing parties to trouble, expense and delay not otherwise requisite for the determination of their difference in the agreed manner.

(b) We have, of course, abandoned our proposal that contracting out of the *prima facie* rule should be possible by any contract which is not a contract of adhesion. We would allow contracting out by exempt contract but not

otherwise. An exempt contract is either a contract made after the relevant difference has arisen or a contract within one of three other closely defined classes. Parties to exempt contracts can safely be left to weigh the other matters raised by our commentators. To allow this measure of freedom of contract would, we think, tend to promote the fair resolution of differences.

(c) One further point is this. If our recommendations elsewhere in this report are accepted, *Scott* v. *Avery* clauses will be invalid. In every case it will be open to a party who repents of his agreement to arbitrate to apply to the Court for relief from the agreement, either leave to revoke the authority of the arbitrator, or a refusal to stay litigation. If he has agreed to let the arbitrator decide otherwise than by reference to law, and if the nature of the difference is such that he is exposed to a serious risk of injustice, these facts would tend to support a case for relief from the arbitration agreement.

7.1.10 Recommendation. We recommend that it be the duty of an arbitrator to decide questions of law by reference to law, unless the parties otherwise agree by exempt contract.

SECTION 2.—MAJORITY ACTION

7.2.1 Present law. Where there are two or more arbitrators they must act unanimously unless otherwise agreed.[1]

[1] *United Kingdom Mutual Steamship Assurance Association* v. *Houston & Co.* [1896] 1 Q.B. 567. That case was concerned with an award made by two out of three arbitrators, but the principle presumably applies to all decisions in the course of the arbitration, such as settling points of procedure, and admitting or not admitting evidence. See also *MEPC Australia Ltd* v. *The Commonwealth* [1973] 2 N.S.W.L.R. 848.

7.2.2 Developments in England. The law has been changed in England and now, where there are three arbitrators, the award of any two of them is binding.[1]

[1] Arbitration Act, 1950 (U.K.), s. 9 (2). The enactment adopts a suggestion of the MacKinnon Committee: *MacKinnon Report* (1927) para. 21. The enactment is not expressed to be subject to contrary agreement.

7.2.3 Comparative Law: United States of America. The common law rule in the United States is that arbitrators must act unanimously in making their award, but majority action is commonly permitted by statute.[1]

[1] Domke (1968), § 29.02. Uniform Arbitration Act (U.S.A.), s. 4.

7.2.4 Working paper proposal. We suggested in our working paper that majority action should be authorized unless otherwise agreed. We suggested that the provision should not be confined, as was the English, to a case where there were three arbitrators nor should it be confined to the award, as distinct from other steps in the arbitration.

7.2.5 Comment on the working paper. There was little comment on this section of the working paper, but what there was supported the proposal.

7.2.6 Recent Australian reports. The *South Australian report* recommended a provision whereby, if there were an uneven number of arbitrators, they might, unless otherwise agreed, act by majority decision.[1] There is a like recommendation in Western Australia.[2] The *Queensland report* recommended adoption of the English provision.[3] In Victoria the Chief Justice's Law Reform Committee thought it better to leave the question to the agreement of the parties: the English scheme may be useful where there were but two parties, but it was quite different where there were three.[4] The *Australian Capital Territory report* recommends an arrangement similar to that suggested in our working paper.[5]

[1] *South Australian report* (1969) p. 7, draft Bill s. 16 (5).

[2] *Western Australia report* (1974) draft Bill appendix B s. 13 (b).

[3] *Queensland report* (1970) p. 19 draft Bill s. 15 (2). See now Arbitration Act 1973 (Qd.) s. 16 (2).

[4] *Victorian report* (1974) p. 8.

[5] *Australian Capital Territory report* (1974) pp. 31, 32, para. 122.

7.2.7 Further consideration. We remain generally in favour of the suggestion in our working paper. We see the force of the observations made by the Chief Justice's Law Reform Committee in Victoria and think that the provision should be confined to cases where there are only two sides to the difference. A power to decide by majority may be needed where there is an even number of arbitrators. Suppose there are four arbitrators, and they have a question of the amount of damages. It three arbitrators say the damages should be $1,000 and the fourth says they should be $2,000, the decision of the three should prevail.

7.2.8 Recommendation. We recommend that where there are only two sides to the difference, and there are three or more arbitrators, they may, unless otherwise agreed, act by a majority.[1]

[1] Draft Bill s. 44.

SECTION 3.—INTEREST ON MONEY CLAIMED

7.3.1 Present law. Interest on money is payable if there is a contract to pay it. By the rules of the common law and of equity interest is payable in particular circumstances notwithstanding that there is no contract to pay it. But in general there is no right to interest on a debt or other money claim unless that right is given by contract.[1] In the Supreme Court, where judgment is given for the recovery of money there is a discretion to include in the judgment interest on the money at a rate determined by the Court for the whole or any part of the time between accrual of the cause of action and the date when the judgment takes effect.[2] In an arbitration the arbitrator will have power to award interest where interest is payable at law on in equity and the question of interest is a matter referred to him. He may also award interest where the parties agree that he may do so, notwithstanding that there is no antecedent liability for interest. Such an agreement may be implied: the common implication in England in a mercantile arbitration is that the arbitrator shall have a power to award interest similar to the power to award interest of a court of record in England.[3] The latter power is generally similar to that of the Supreme Court mentioned above.[4] The law is not firmly settled in New South Wales, but it seems that, at least in a mercantile case within the exclusive jurisdiction of the Supreme Court, there would be an implied agreement that the arbitrator would have a power to award interest similar to that of the Supreme Court mentioned above.[5]

[1] *Halsbury on Money* (1959) pp. 8, 9.

[2] Supreme Court Act, 1970, s. 94.

[3] *Chandris* v. *Isbrandtsen–Moller Co. Inc.* [1951] 1 K.B. 240.

[4] Law Reform (Miscellaneous Provisions) Act 1934 (U.K.), s. 3 (1).

[5] *Chandris* v. *Isbrandtsen–Moller Co. Inc.* [1951] 1 K.B. 240. The distinction between the positions in England and New South Wales is that the English enactment applies to all courts of record but the New South Wales enactment applies only to the Supreme Court. And see *Evans* v. *National Pool Equipment Pty Ltd* [1972] 2 N.S.W.L.R. 410.

7.3.2 Comparative law: United States of America. It seems that in the United States an arbitrator may award interest from a time prior to the award, unless the parties otherwise agree.[1]

[1] Domke (1968), §.30.03; *cf.* Sturges (1930) pp. 607–610.

7.3.3 Working paper proposal. We suggested in our working paper that an arbitrator should, unless otherwise agreed, have a power to award interest similar to that of the Supreme Court. We thought that the process of implication by which a similar result had been reached in England[1] should not be relied on in New South Wales because of differences in the relevant legislation and because the leading decision in England was confined to mercantile arbitrations.[1] We suggested, therefore, that an Arbitration Act should give to arbitrators a power to award interest similar to that of the Supreme Court.

[1] *Chandris* v. *Isbrandtsen–Moller Co. Inc.* [1951] 1 K.B. 240.

7.3.4 Comment on the working paper. There was no comment on this section of the working paper.

7.3.5 Recent Australian reports. In Victoria the Chief Justice's Law Reform Committee has made a recommendation similar in substance to our recommendation below.[1] The other recent Australian reports do not deal with the matter.

[1] *Victorian report* (1974) p. 14.

7.3.6 Recommendation. We recommend that a new Arbitration Act should authorize an arbitrator to allow interest on money awarded from the time when the claim arises to the time of the award, at such rate as he may direct, unless otherwise agreed by the parties.[1]

[1] Draft Bill s. 46.

SECTION 4.—SPECIFIC PERFORMANCE

7.4.1 Aspects of specific performance. The subject of specific performance arises in three ways in relation to arbitration. First, specific performance may be considered as a means of compelling a reluctant party to perform his agreement to submit a difference to arbitration: the law has, however, other means of doing this[1] and the action for specific performance never has been and is not available for this purpose.[2] We do not recommend any change. Secondly, specific performance may be considered as a description of the powers (or part of the powers) which an arbitrator has (or does not have) in making an award for the determination of the differences submitted to him: this aspect of specific performance is the concern of this section and we return to it in the following paragraphs. In the third place, proceedings lie for compelling the specific performance of the agreement to abide by the award.[3] The need for such proceedings rarely arises, and we are not aware of any deficiencies of the relevant law: we have no recommendations for change.

[1] For example, staying an action brought in breach of the arbitration agreement (Arbitration Act, 1902, s. 6), overcoming default in appointment of an arbitrator (Arbitration Act, 1902, s. 8 (b)).

[2] Fry (1911) pp. 773, 774.

[3] Fry (1911) pp. 767–770.

7.4.2 Description of the remedy. In the very briefest terms, specific performance is an equitable remedy by which a party to a contract is ordered to perform his obligations under the contract. Many special rules govern the grant or refusal of the remedy. Specific performance is not granted where damages for breach of contract would be an adequate remedy. This rule generally limits the remedy to such cases as contracts for the sale or other disposition of land, company shares and other interests for which there is not an open market, and goods of a unique or special character.[1] Specific performance is as a rule not granted of contracts for personal services or contracts whose performance would require repeated or prolonged supervision. In England, in an action

for breach of contract to deliver specific or ascertained goods, the court has a statutory power to direct specific performance, and to impose terms and conditions:[2] it does not seem that this provision has significantly altered the law, or at all events the practice, in England.[3] There is no legislation of this sort in New South Wales.

[1] *Dougan* v. *Ley* (1946) 71 C.L.R. 142.

[2] Sale of Goods Act 1893 (U.K.), s. 52.

[3] Benjamin (1974) paras 1346–1350.

7.4.3 Award for specific performance. The Arbitration Act, 1902, says nothing about the power of an arbitrator to award specific performance. On principle, one would expect that the existence and extent of such a power would depend on the arbitration agreement.[1] However, the MacKinnon Committee said that "at present it is at least doubtful whether an arbitrator or umpire can make an award ordering any sort of specific performance."[2] The Committee did not give the grounds for doubt: perhaps it merely had in mind cases where the arbitration agreement does not in terms authorize an award for specific performance.

[1] "In every reference to arbitration the arbitrator is empowered to make an award on the differences or disputes comprised in the agreement of reference, and by this agreement the parties may confer such other powers incidental to the power of making the award as they may in their discretion think fit.": *Halsbury on Arbitration* (1973) para. 577. The passage has remained substantially unchanged in all the editions of *Halsbury's Laws of England* (1st edn. Vol. 1 (1907) p. 457; 2nd edn. Vol. 1 (1931) p. 648; 3rd edn. Vol. 2 (1953) p. 31). The parties may by agreement confer other extraordinary powers on an arbitrator, for example, foreclosure of mortgage (*Hosie* v. *Bartley* (1906) 6 S.R. 626), appointment of a receiver (*Olver* v. *Hillier* [1959] 1 W.L.R. 551), cf. *Eaton* v. *Eaton* [1950] V.L.R. 233, and dissolution of partnership (*Eaton* v. *Eaton* (above)). For numerous other examples see Russell (1900) pp. 235–249. The proposition in the text is the law in the United States of America: Domke (1968), § 30.01. And see *Jopling* v. *Jopling* (1909) 8 C.L.R. 33.

[2] *MacKinnon Report* (1927), para. 28.

7.4.4 Developments in England. In England it has been enacted that "unless a contrary intention is expressed therein, every arbitration agreement 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 High Court to order specific performance of any contract other than a contract relating to land or any interest in land".[1] This provision appears to be a consequence[2] of the MacKinnon Committee's view that an arbitrator or umpire "Should at any rate be given the power to order the delivery of specific goods under section 52 of the Sale of Goods Act, 1893, against payment of their price", and that there was no reason why he should not also be given power to order specific performance of a contract by the delievery of any property other than land or money in any case in which the Court might lawfully do so.[3] We have not found any discussion of this provision in any of the law reports, books or journals.

[1] Arbitration Act 1950 (U.K.), s. 15.

[2] By way of the Arbitration Act 1934 (U.K.), s. 7.

[3] *MacKinnon Report* (1927), para. 28.

7.4.5 Working paper proposal. In our working paper we said that we believed it to be law that the parties might by agreement authorize an arbitrator to award specific performance. The English section[1] appeared to assume that to be the law: it required that the arbitration agreement be deemed to contain a provision of that description. The question was whether an arbitration agreement which did not in terms confer that power should suffer a statutory alteration so that it did. We suggested that it should not. Specific performance was a sophisticated remedy. Parties should not confer such a power by inadvertence. We thought it better that the existence and extent of such a power should depend on the agreement of the parties. We proposed that the English provision on this subject should not be adopted.

[1] Arbitration Act 1950 (U.K.), s. 15.

7.4.6 Comment on the working paper. Most commentators thought that the English provision should be adopted. Some who took this view contemplated that under such a provision an arbitrator might rightly award specific performance in a case where the Court would not so order. For example, a seller of ordinary trade goods might suffer an award that he specifically perform his promise to deliver the goods.

7.4.7 Recent Australian reports. In South Australia and Queensland the reports recommend adoption of the English provision.[1] In Western Australia the report recommends adoption of a like provision, but contracts relating to land are not excluded.[2] In Victoria the Chief Justice's Law Reform Committee formed a view similar to that put in our working paper, and for similar reasons.[3] The *Australian Capital Territory report* (1974) does not deal with the matter.

[1] *South Australian report* (1969) p. 9 draft Bill s. 22; *Queensland report* (1970) pp. 10, 23, draft Bill s. 21 (see now Arbitration Act 1973 (Qd.) s. 22.

[2] *Western Australian report* (1974) draft Bill appendix B s. 23 (b).

[3] *Victorian report* (1974) p. 11.

7.4.8 Further consideration. Notwithstanding the comment on our working paper, and notwithstanding the weight of the views of law reform agencies in three States, we remain of the view expressed in the working paper. Adoption of the English provision would not of itself enable an arbitrator lawfully to award specific performance of the general run of building or mercantile contracts, because the equitable remedy does not apply to such cases. Special agreement would still be needed in these cases.

7.4.9 Recommendation. We recommend that the English provision relating to specific performance should not be adopted.

SECTION 5.—COSTS OF ARBITRATION

7.5.1 Present law. Where the arbitration agreement is not in writing, all questions of costs of the arbitration and the award turn on the terms of the agreement and there is no provision for taxation of these costs in the Court. The remainder of this section is concerned with costs of an arbitration and award under a written agreement. Unless otherwise agreed, the costs of the reference and award[1] are in the discretion of the arbitrator. He may direct by whom and to whom costs are to be paid, may direct the manner of payment, and may tax or settle their amount. He may award costs to be paid on a solicitor and client basis.[2] He may direct taxation in the Court and, if he directs the payment of costs but fixes no other means of ascertainment, the costs may be taxed in the Court.[3] An arbitrator should follow the practice of the Court and as a rule award that the costs of the successful party be paid by the unsuccessful party: there must be positive reasons for not doing so.[4] Where an arbitrator has power to deal with costs, but does not do so, his award is liable to be remitted or set aside.[5] It seems that the Court has no power to deal with the costs of an arbitration, not even where the Court sets aside an award, except by consent,[6] or in cases where the power to impose terms can be applied.[7]

[1] "Costs of the reference" are, in ordinary usage, the costs incurred by the parties, other than the costs of the award; "costs of the award" are the fees and expenses of the arbitrator: *Government of Ceylon* v. *Chandris* [1963] 2 Q.B. 327, 333.

[2] Arbitration Act, 1902, s. 5, Sch. 2 (i).

[3] This was the position before 1889 where the submission was made a rule of Court. It is continued by the closing words of section 4 of the Arbitration Act, 1902. See also the Supreme Court Rules, 1970, Pt. 52 r. 47.

[4] Russell (1970) p. 303. But see para. 7.5.7 below.

[5] Russell (1970) p. 307.

[6] For example, *Dineen* v. *Walpole* [1969] 1 Lloyd's Rep. 261, 265, 267.

[7] Arbitration Act, 1902, s. 24.

7.5.2 Developments in England. The legislation in England avoids a stipulation in an agreement for arbitration of future differences that each party will pay his own costs.[1] If an arbitrator fails to deal with costs, he may amend his award so as to cure the failure on application to him within 14 days after publication of the award.[2] Costs payable under an award are, unless the award otherwise directs, taxable in the Court.[3] The statutory power of the Court to charge solicitors' costs or property recovered or preserved in proceedings in the High Court[4] is extended to property recovered or preserved in an arbitration.[5]

[1] Arbitration Act 1950 (U.K.), s. 18 (3). This is an adoption of a suggestion of the MacKinnon Committee, as a means of getting rid of a clause formerly common in insurance policies. The Committee saw such a clause as a means whereby an insured might be unfairly coerced into settling his claim. See the *MacKinnon report* (1927), paras 34 (b), 35 (b).

[2] Arbitration Act 1950 (U.K.), s. 18 (4). The Court may extend time (s. 18 (4)).

[3] Arbitration Act 1950 (U.K.), s. 18 (2).

[4] Solicitors Act 1957 (U.K.), s. 72. *Cf.* Legal Practitioners Act, 1898, s. 39A.

[5] Arbitration Act 1950 (U.K.), s. 18 (5).

7.5.3 Other matters relating to costs. We deal elsewhere in this report with security for costs,[1] and the fees and expenses of the arbitrator.[2]

[1] Paras 6.7.1–7 above.

[2] Paras 5.4.1–9 above.

7.5.4 Working paper proposals.

(a) We suggested that where an arbitration proved abortive, the Court should have power to make orders concerning the costs of the reference and the award. To take an extreme case, the award might be set aside on the ground that it had been procured by the fraud of a party: the Court should be able to order the fraudulent party to pay costs.

(b) We suggested that a new Bill should adopt the policy behind the English enactment avoiding a stipulation in an agreement for arbitration of future differences that each party should pay his own costs, but only where the stipulation was in a contract of adhesion.[1] We suggested therefore that the general provisions concerning costs should have effect subject to any agreement between the parties, but notwithstanding anything in a contract of adhesion.

(c) The English provision for a charging order for solicitors' costs[2] should, we thought, be adopted. This should be done by amendment of the Legal Practitioners Act, 1898.

(d) We noted the judge-made rule that an arbitrator should follow the practice of the courts and ordinarily award that the losing party pay the costs of the winning party.[3] We asked whether this should be changed. There may be a lesson for lawyers in the remark that "It is a curious circumstance—and one experiences it time and time again—that lay arbitrators always seem to think that parties should pay their own costs."[4] We invited views on the question.

[1] We do not see what policy considerations justified the avoidance of the costs stipulation in *Smeaton Hanscomb & Co. Ltd* v. *Sassoon J. Setty, Son & Co.* (No. 2) [1953] 2 All E.R. 1588, 1589, D, E.

[2] Arbitration Act 1950 (U.K.), s. 18 (5).

[3] See para. 7.5.1 above.

[4] Lord Goddard in *Lewis* v. *Haverfordwest Rural District Council* [1953] 1 W.L.R. 1486, 1487.

7.5.5 Comment on the working paper. There was some support for and no dissent from our proposals. On the question whether arbitrators should ordinarily award that the loser should pay the winner's costs, a group of lawyers thought that the present rule should be kept, but a trade association which has much to do with arbitration thought that an arbitrator should have an absolute discretion.

7.5.6 Recent Australian reports. In South Australia, Queensland and Western Australia there are recommendations for adoption of the substance of the present English provisions, save that the *South Australian report* drops the provision avoiding an agreement that each party will pay his own costs.[1] In Victoria the report generally favours the English provisions, but would retain the present arrangement in Victoria that unless otherwise agreed a party may apply to have costs taxed in the Court.[2] The Law Reform Commission of the Australian Capital Territory made recommendations generally similar to the proposals in our working paper, save that contracting out would be allowed only after the difference had arisen, that in particular a stipulation in an agreement for the arbitration of future differences that each party would pay his own costs should be void, and that an arbitrator should be authorized to supplement his award so as to repair an omission to deal with costs.[3]

[1] *South Australian report* (1969) p. 10 draft Bill s. 25; *Queensland report* (1970) pp. 12, 23, 24, draft Bill s. 25 (see now Arbitration Act 1973 (Qd.) s. 26); *Western Australian report* (1974) draft Bill appendix B s. 24.

[2] *Victorian report* (1974) p. 13. See Arbitration Act 1958 (Vic.) s. 4, Sch. 2 para. (i).

[3] *Australian Capital Territory report* (1974) pp. 27, 28, paras 104–107.

7.5.7 Further consideration.

(a) In general, we adhere to the proposals in our working paper, save that, in place of what we proposed about contracting out, we think that an exempt contract, but no other contract, should be allowed to displace the general provisions concerning costs.

(b) We think that, in the context of our recommendation[1] that within limits of time an arbitrator should be authorized to alter his award in any way, there is no need for a special authority to repair an omission to deal with costs.

(c) On the question of control of the arbitrator's powers over costs, we think that there ought not to be legislation abolishing or qualifying the judge-made rule mentioned above.[2] The law has recently been re-formulated in terms less absolute than those we used in the working paper.[3]

(i) An arbitrator, like a judge, in dealing with costs must exercise the discretion invested in him judicially.

(ii) There is no need for an umpire or arbitrator, if he so exercises his discretion as to depart from the general rule, to state the reason why he does so in his award. On the other hand, in all probability, in most cases where an umpire/arbitrator does so act, it would save costs if he were to state his reasons in his award. In that event the parties would not be put to the expense of trying to ascertain what his reasons were and possibly moving the Court to set aside the award.

(iii) If the award does depart from the general rule as to costs but bears on its face no statement of the reasons supporting that departure, the party objecting to the award in that respect may bring before the Court such evidence as he can obtain as to the grounds, or lack of grounds, bearing upon the unusual exercise of discretion by the arbitrator or umpire.

(iv) The above propositions apply to all categories of awards as to costs. That is to say, they apply to the extreme case in which the successful party has been ordered to pay all the costs of an unsuccessful party as well as the costs of the award, and also to a case, . . . in which a successful party has been made to bear his own costs and to pay half the costs of the award.

(v) There is a burden of proof upon the party seeking to set aside an award in relation to the decision of an umpire or arbitrator in relation to costs or seeking to have the award remitted so that the arbitrator or umpire may deal with the costs in a way other than that in which he originally dealt with them.[4]

Further, the parties can, by exempt contract, make whatever agreement they please on the subject.

(d) We have already recommended that an award ought not to be binding so far as concerns the amount of the fees and expenses of an arbitrator.[5]

[1] Paras 9.9.4 (a), 9 below.

[2] Paras 7.5.1, 4 (d) above.

[3] Para. 7.5.1 above.

[4] *Centrala Morska Importowo Eksportowa* v. *Companhia Nacional de Navegacao S.A.R.L.* [1975] 2 Lloyd's Rep. 69, 71, 72; *Berbette Pty Ltd* v. *Hansa* [1976] V.R. 358.

[5] Paras 5.4.6 (b), 9 above.

7.5.8 Recommendation. We recommend that there should be legislation to the following effect:

(a) Costs of the reference and award are in the discretion of the arbitrator.[1]

(b) Costs awarded to be paid are taxable in the Court, unless fixed by the arbitrator.[2]

(c) The above may be varied by exempt contract, but not otherwise.[3]

(d) Where an arbitration proves abortive, for example, where a sole arbitrator is removed and not replaced, the Court may deal with the costs, unless otherwise agreed.[4]

[1] Draft Bill s. 47 (1), (2).

[2] Draft Bill s. 47 (3).

[3] Draft Bill s. 47 (4).

[4] Draft Bill s. 66.

PART 8.—STATED CASES

8.1 Present law. An arbitrator or umpire may at any stage of the proceedings under a reference, and shall, if so directed by the Court, state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference:[1] we shall refer to such a case as a consultative case. "The arbitrators or umpire acting under a submission shall, unless the submission expresses a contrary intention, have power—(a) to state an award as to the whole or part thereof in the form of a case stated for the opinion of the Court . . ."[2] The provision for consultative stated cases applies notwithstanding contrary agreement,[3] but the provision for an award in the form of a stated case may be displaced by agreement.[4] Although an arbitrator should act in accordance with the opinion of the Court on a consultative stated case, neither he nor the parties are bound by the opinion.[5] The opinion of the Court on a consultative stated case is not a "judgment" or "order" for the purpose of giving a right of appeal.[5] As a rule, the Court will not direct the arbitrator to state a case unless the applicant has formulated the question of law and requested the arbitrator to state the case and the arbitrator has refused.[6] This rule can have a haphazard operation where the applicant is not legally represented, the arbitrator does not inform the parties of the way in which he intends to decide some question, or the question is not canvassed at a hearing before the arbitrator, but arises on his reasons for his award. The rule has too great a tendency to allow the final decision on the merits to be put at risk by a slip in procedure. The rule is a useful guide, and it cannot cut down the discretion given by the Act, but we think that it has been too rigidly applied. The rule would need modification as a consequence of our recommendation that review for error of law on the face of the award should be dropped.[7]

[1] Arbitration Act, 1902, s. 19.

[2] Arbitration Act, 1902, s. 9 (a).

[3] *Czarnikow* v. *Roth, Schmidt & Co.* [1922] 2 K.B. 478; *Isca Construction Co. Pty Ltd* v. *Grafton City Council* (1962) 8 L.G.R.A. 87, 92.

[4] Arbitration Act, 1902, s. 9 (a).

[5] *Minister for Works (W.A.)* v. *Civil and Civic Pty Ltd* (1967) 116 C.L.R. 273. But an appeal does lie from the Supreme Court in a Division to the Court of Appeal: Supreme Court Act, 1970, s. 101 (1) (b).

[6] *Montgomery, Jones & Co.* v. *Liebenthal & Co.* (1898) 78 L.T. 406; *Roke* v. *Stevens* [1951] N.Z.L.R. 375; *R.S. Hartley Ltd* v. *Provincial Insurance Co. Ltd* [1957] 1 Lloyd's Rep. 121; *Sutherland Shire Council* v. *Kirby* (1960) 6 L.G.R.A. 155, 159.

[7] See paras 9.6.24 (a), 9.7.12 (c) below.

8.2 History. There were no statutory provisions for stated cases before 1854. Arrangements for stated cases were, however, made by agreement.[1] In 1854, statutory provision was made for awards in the form of a special case.[2] Statutory provision for the consultative stated case was first made in 1889.[3] The present law in New South Wales adopts the substance of these former English provisions.

[1] The early instances in the reported cases have, so far as our researches have gone, arisen in references in causes: the arbitrator is authorized to reserve questions of law for the Court. A distinction is not drawn between a consultative case and an award in the form of a case: perhaps to look for this distinction is to view the cases in the early nineteenth century in the light of concepts not then existing. The power was treated as dealing with the kind of award which could be made, not with a consultative case in the course of the arbitration. See, for example, *Ferguson* v. *Norman* (1837) 4 Bing. N.C. 52; 132 E.R. 708; *Wood* v. *Hotham* (1839) 5 M. & W. 674; 151 E.R. 286; *Jephson* v. *Howkins* (1841) 2 M. & G. 366; 133 E.R. 787; *Bradbee* v. *Christ's Hospital* (1842) 4 Man. & G. 714; 134 E.R. 294; *Miller* v. *Shuttleworth* (1849) 7 C.B. 105; 137 E.R. 43; *Hodgkinson* v. *Fernie* (1857) 3 C.B.N.S. 189, 202, 203; 140 E.R. 712, 717. See also Amos (1837) p. 701, col. 2; Key & Elphinstone (1878) Vol. 1 p. 133 (vi). We have found no reference to the practice before 1837. Kyd (1791) and Tidd's *Practice* (1828) are silent.

[2] Common Law Procedure Act 1854 (U.K.), s. 5.

[3] Arbitration Act 1889 (U.K.), s. 19.

8.3 Developments in England. As to consultative cases, the law has been changed so as to give an appeal to the Court of Appeal from the decision of the High Court, but only by leave of the High Court or of the Court of Appeal.[1] It has also been enacted that "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 High Court to be stated, notwithstanding that proceedings under the reference are still pending".[2] We do not see the utility of this latter enactment: it seems to do no more than express what is inherent in the circumstances of a consultative case or an interim award. Perhaps it was enacted in order to overcome the effect of some decision which has escaped our notice.[3] We think that this enactment should not be adopted in New South Wales. As to awards in the form of a special case, the Court has been given power to direct the making of such an award,[4] and the power to contract out has been excluded.[5]

[1] Arbitration Act 1950 (U.K.), s. 21 (3). It is not clear whether the decision on a consultative stated case now binds the arbitrator or the parties: see Russell (1970) p. 259; *Minister for Works (W.A.)* v. *Civil and Civic Pty Ltd* (1967) 116 C.L.R. 273, 276.

[2] Arbitration Act 1950 (U.K.), s. 21 (2).

[3] The provision is not based on any recommendation in the *MacKinnon Report* (1927).

[4] Arbitration Act 1950 (U.K.), s. 21 (1).

[5] The relevant words in the Arbitration Act 1889 (U.K.), s. 7, have been dropped. See *Orion Cia. Espanola de Seguros* v. *Belfort Maatschappij voor Algemene Verzekringeen* [1962] 2 Lloyd's Rep. 257.

8.4 Working paper proposals. We proposed that the decision of the Court on a consultative case be made binding on the parties and the arbitrator. This would open the ordinary avenues of appeal. We proposed that the Court be empowered to direct the making of an award in the form of a stated case. We proposed that the parties be competent (except by contract of adhesion) to contract out of the provisions for consultative cases and awards in the form of a stated case.[1] We proposed abolition of the rule that the Court will not direct an arbitrator to state a case unless he has refused to do so on request.[2]

[1] We said that perhaps this competency should be further restricted so as to arise only after an arbitrable difference had arisen. See para. 5.3.6 (d) above.

[2] See para. 8.1 above and working paper draft Bill s. 46.

8.5 Comment on the working paper. Comment was diverse. Those who saw importance in arbitrators having to apply the law and in not stemming the flow of commercial cases supported adoption of the English arrangements. Commentators concerned with foreign trade would have liked to see stated cases curtailed or abolished.

8.6 Recent Australian reports. In South Australia there is a recommendation that the Court be authorized to order the making of an award in the form of a case and that the power to contract out of the provisions for awards in the form of a case be dropped.[1] In Queensland there is a recommendation for the adoption in substance of the current English provisions.[2] In Western Australia there is a recommendation for the adoption of the substance of the current English provisions, save that there should not be a need for leave to appeal from a decision on a consultative case.[3] In Victoria there is a recommendation that the present arrangements (similar to the present arrangements in New South Wales) be retained, save that there should be an appeal, by leave, from a decision on a consultative case.[4] In the Australian Capital Territory there are recommendations that a decision on a consultative case be made binding on the parties and the arbitrator and be made appealable,[5] that the Court be enabled to direct an award in the form of a case, and that contracting out be permitted, but only after differences have arisen.[6]

[1] *South Australian report* (1969), p. 11, draft Bill s. 28 (1). The draft Bill adopts in s. 28 (2) the Arbitration Act 1950 (U.K.), s. 21 (2).

[2] *Queensland report* (1970), p. 25, draft Bill s. 28. See now Arbitration Act 1973 (Qd.), s. 29.

[3] *Western Australian report* (1974), draft Bill appendix B s. 28.

[4] *Victorian report* (1974), p. 14.

[5] Leave to appeal is not discussed.

[6] *Australian Capital Territory report* (1974), pp. 12–14, paras 48–53.

8.7 Further consideration—

(a) We adhere generally to the proposals in the working paper, but would allow contracting out by exempt contract and not otherwise. The question of allowing parties to agree effectively that there shall not be any stated case raises matters of principle. These matters of principle are similar to those raised by the question of allowing parties to agree effectively that the arbitrator may decide otherwise than by reference to law, and the question whether error of law on the face of an award should continue as a ground for setting the award aside.

(b) It may be said in favour of giving effect to such an agreement that the expense, delay and trouble of stated cases are seen by many as drawbacks to the English laws of

arbitration, that by the present law of New South Wales there can be no award in the form of a case if the parties so agree and that this state of the law has not led to noticeable dissatisfaction. Further, we would allow contracting out by exempt contract, but not otherwise: the parties to an exempt contract, closely defined as it is, ought to know, or take responsibility for, what they are doing. Stated cases are peculiar to the law of England and former British colonies: they are unlikely to find favour with foreign business men.[1] A prompt decision which is more or less right will commonly be closer to the wishes and interests of the parties than a legally impeccable decision reached after perhaps years of arbitration and litigation. Avenues of judicial supervision may also be avenues of delay in meeting, or escape from, just obligations.

(c) It may be said against giving effect to such an agreement that to allow restriction of stated cases would lead to uncertainty in the conduct of arbitrations and unpredictability of result (some would say injustice of result). It would tend to narrow the scope for development of the law by judicial decision, and to enable the establishment of special codes of quasi-law in particular fields of trade or commerce.

(d) These considerations on either side cannot be measured against each other. It is a matter of judgment. Our judgment is that as a rule there should be no contracting out, but that contracting out by exempt contract ought to be allowed.

(e) We have noted that in England and Queensland leave is necessary for an appeal from the decision of the Court at first instance on a consultative case. There is a like recommendation in Victoria. In general, we think that there should be restraint on judicial supervision of arbitrations. If an arbitrator is to be guided or corrected by the Court, it is enough as a general rule, we think, that such matters should be dealt with finally by the Court at first instance. We think, therefore, that there should not be an appeal to the Court of Appeal, except by leave of the Court of Appeal, from a decision of the Court at first instance on either form of stated case. It is not open to Parliament to impose a requirement of leave in respect of an appeal to the Privy Council or to the High Court of Australia.[2]

[1] We venture this view notwithstanding the wide acceptance amongst foreigners of London as a place for arbitration, and the laws of England as the laws governing the procedure in an arbitration. The handling of many thousands of arbitrations with expert professionalism and integrity counts for more, we suspect, in favour of London and the laws of England than the numerically small risk of litigation on stated cases counts the other way.

[2] On State powers regarding Privy Council appeals, see Nettheim (1965).

8.8 Recommendations.

(a) We recommend that both forms of stated case be retained, but that contracting out by exempt contract be permitted.[1]

(b) We recommend that the Court be enabled to order the making of an award in the form of a case.[2]

(c) We recommend that the decision of the Court on a consultative case be made binding on the parties and on the arbitrator.[3] This would open the ordinary avenues of appeal.[4]

(d) We recommend that leave of the Court of Appeal be required for an appeal to the Court of Appeal from the decision of the Court in a Division on a consultative case or on an award in the form of a case.[5]

[1] Draft Bill ss. 48, 49 (1), 50.

[2] Draft Bill s. 50 (b).

[3] See "determine" in the draft Bill s. 49 (1).

[4] Supreme Court Act, 1970, s. 101 (1) (b) (i).

[5] Draft Bill Schedule 2, amendment to Supreme Court Act, 1970, s. 101 (2).

PART 9.—AWARD

SECTION 1.—FINALITY OF AWARD

9.1.1 Present law. There is, in a written arbitration agreement, unless a contrary intention is expressed, and so far as applicable, an implied provision that the award shall be final and binding on the parties and the persons claiming under them respectively.[1] The first enactment to this effect was in the Arbitration Act 1889 (U.K.).[2] Before then an express provision to the same effect was sometimes put in an arbitration agreement.[3] In the absence of express provision, either contractual or statutory (as might happen where an arbitration agreement is not in writing), the common law would imply a provision to the same effect.[4] The provision does not, it need hardly be said, operate to the full extent of its terms: it is subject, for example, to the powers of the Court to set aside the award. Such a provision, however, whether statutory or contractual, and whether express or implied, has for centuries been part of the background in which the law of arbitration has developed. Such a provision has no doubt, for example, played a part in the growth of the law regarding the merger of disputed rights in the award,[5] and regarding the estoppels to which an award gives rise.

[1] Arbitration Act, 1902, s. 5, Sch. 2 (h). The Arbitration Act 1950 (U.K.), s. 16, is to the same effect.

[2] Arbitration Act 1889 (U.K.), s. 2, Sch. 1 (h).

[3] See for example Key & Elphinstone (1878) Vol. 1 p. 124; Bythewood & Jarman (1885) Vol. 2 p. 201. Another scheme, with similar consequences, was to have a provision that the parties would stand to and abide by the award: Russell (1870) p. 706.

[4] See Russell (1970) p. 312; Ames (1888).

[5] *Dobbs* v. *National Bank of Australia Ltd* (1935) 53 C.L.R. 643, 653, 654; *Albeck* v. *A.B.Y.-Cecil Mfg. Co. Pty Ltd* [1965] V.R. 342, 351, 352; *F. J. Bloemen Pty Ltd* v. *Gold Coast City Council* [1973] A.C. 115, 124–126; *Administration of Papua and New Guinea* v. *Daera Guba* (1973) 130 C.L.R. 353, 453. Cf. *London and Overseas Freighters Ltd* v. *Timber Shipping Co. S.A.* [1971] 1 Q.B. 268, 276F, G. And see Spencer Bower & Turner (1969) pp. 27, 52, 101, 192, 193.

9.1.2 Working paper proposal. In our working paper we said that although the provision only expressed what would otherwise be implied, we suggested that its substance should be adopted in a new Act. It expressed a rule on which it was desirable that uniformity be maintained with other countries.

9.1.3 Comment on the working paper. There was none.

9.1.4 Recent Australian reports. Like provisions are recommended for adoption in South Australia, Queensland, Western Australia and the Australian Capital Territory.[1]

[1] *South Australian report* (1969) p. 10 draft Bill s. 23; *Queensland report* (1970) pp. 10, 23, draft Bill s. 22, see now Arbitration Act 1973 (Qd.) s. 23; *Western Australian report* (1974) draft Bill appendix B s. 23 (c); *Australian Capital Territory report* (1974) p. 33 para. 128. See also *Victorian report* (1974) p. 11.

9.1.5 Recommendation. We recommend that it be provided that, unless otherwise agreed, there shall be an implied stipulation in an arbitration agreement that an award shall be final and binding on the parties and those claiming under them.[1]

[1] Draft Bill s. 54.

SECTION 2.—TIME FOR AWARD

9.2.1 Present law. Unless otherwise agreed, or otherwise enacted, an arbitrator may make his award at any time.[1] It became customary to stipulate for the award to be made within a specified time,[2] and the matter is now largely regulated by statute.[3] Unless otherwise agreed, an arbitrator under an arbitration agreement in writing must make his award within three months after entering on the reference,[4] but he may extend the time.[5] Unless otherwise agreed, an umpire under an arbitration agreement in writing must make his award within one month after the time for award by the arbitrators, but he may extend the time.[6] Where the Court remits an award the Court may fix a time for the award on further consideration: unless so fixed, the time is three months.[7] The Court may enlarge the time for making an award,[8] and, it seems, may do so notwithstanding agreement to the contrary.[9] The powers of an arbitrator or umpire to extend time are exercisable only during the time during which he may make an award,[10] but the Court may extend time before or after the expiry of the time otherwise fixed.[11] All these powers may be exercised from time to time.[12] After the time fixed for

making the award has passed, the arbitrator has no further authority and his award, if made, will be an empty gesture.[13] If arbitrators allow the time for making an award to elapse without making an award then, unless otherwise agreed, an umpire may enter on the reference.[14] The parties may extend time by agreement and a party may waive his right to object for lateness.

[1] *Curtis* v. *Potts* (1814) 3 M. & S. 145; 105 E.R. 565.

[2] For example, Tidd's *Forms* (1819) p. 342.

[3] The English legislation before 1889 comprised the Civil Procedure Act 1833 (U.K.), s. 39 and the Common Law Procedure Act 1854 (U.K.), s. 15.

[4] Arbitration Act, 1902, s. 5, Sch. 2, para. (c), "or after being called on to act by notice in writing from any party to the submission".

[5] Arbitration Act, 1902, s. 5, Sch. 2 (c).

[6] Arbitration Act, 1902, s. 5, Sch. 2 (e).

[7] Arbitration Act, 1902, s. 12 (2).

[8] Arbitration Act, 1902, s. 11.

[9] *Knowles & Sons Ltd* v. *Bolton Corpn* [1900] 2 Q.B. 253, 257.

[10] Russell (1935) pp. 458, 459.

[11] Arbitration Act, 1902, s. 11.

[12] Arbitration Act, 1902, s. 11, Sch. 2 (c), (e).

[13] *Darnley* v. *London, Chatham, and Dover Rly Co.* (1867) L.R. 2 H.L. 43. Subject, of course, to the possibility of an extension of time by the Court or by agreement.

[14] Arbitration Act, 1902, s. 5, Sch. 2 (d).

9.2.2 Developments in England. In England there have been marked changes from the law as enacted by the Arbitration Act 1889. Although the parties are at liberty to stipulate for a time within which an award must be made, there is no longer a *prima facie* time fixed by the Act.[1] But delay by an arbitrator is expressly made a ground of removal by the Court[2] and, where there is an umpire, the Court may at any time order that he enter upon the reference in place of the arbitrators as if he were a sole arbitrator.[3] The provisions are retained whereby, if the Court remits an award, the Court may fix a time for the award on further consideration and, unless so fixed, the time is three months.[4] The provision is also retained whereby the Court may extend a time fixed for making the award, whether fixed by the Court on remission or by agreement of the parties.[5] The changes noticed above were made in adoption of recommendations of the MacKinnon Committee.[6] The Committee saw no practical value in the arrangements whereby a time for award was fixed but the arbitrator could enlarge it: he did so as a matter of course. Further, an arbitrator sympathetic to a party with no defence might deliberately delay making an award. The recommended remedy was to drop these arrangements, but to make delay an express ground for removal.

[1] Arbitration Act 1950 (U.K.), s. 13 (1).

[2] Arbitration Act 1950 (U.K.), s. 13. (3).

[3] Arbitration Act 1950 (U.K.), s. 8 (3).

[4] Arbitration Act 1950 (U.K.), s. 22 (2). *Cf.* Arbitration Act, 1902, s. 12 (2).

[5] Arbitration Act 1950 (U.K.), s. 13 (2). *Cf.* Arbitration Act, 1902, s. 11.

[6] *MacKinnon Report* (1927) para. 5.

9.2.3 Comparative law: United States of America. A time for making the award is usually fixed by the parties.[1] By the Uniform Arbitration Act, the award must be made within the agreed time, if any; if no time is agreed the Court may fix a time; the parties may extend time by consent; and a party waives objection for lateness if he does not give notice of objection before delivery of the award to him.[2]

[1] Domke (1968), § 29.01.

[2] Uniform Arbitration Act (U.S.A.), s. 8 (b).

9.2.4 Working paper proposals.

(a) We said that we agreed with the MacKinnon Committee. Further, we thought it consonant with their recommendations that the time limit for an award on further consideration after remission should be dropped.[1]

(b) We thought, however, that except in the case of time for award fixed by contract of adhesion, the Court should not be authorized to extend time where extension would be contrary to the agreement of the parties. It must be borne in mind, we said, that fixing a time for award and excluding the power to extend time was a hazardous way of attempting to secure a quick decision: if the award was not made within time the arbitration failed and the difference remained undecided.

(c) We deal elsewhere with the question whether delay should be an express ground for removal of an arbitrator. We said in our working paper and we now repeat that it should not.[2]

[1] Arbitration Act, 1902, s. 12 (2).

[2] Paras 5.3.6 (b), 9 (c) above.

9.2.5 Comment on the working paper. The only comment was that the power of the Court to extend time should not be capable of exclusion by any agreement: the power embodied a proven principle of justice.

9.2.6 Recent Australian recommendations. There are recommendations in four States in favour of the English provisions.[1] In the Australian Capital Territory there is a recommendation like the recommendations we make below, save that contracting out would be allowed only after the difference has arisen.[2]

[1] *South Australian report* (1969); pp. 7, 9, 11 draft Bill ss. 16 (4), 20, 29 (2); *Queensland report* (1970), pp. 19, 22, 25 draft Bill ss. 14 (3), 19, 29 (2) (see now Arbitration Act 1973 (Qd.) ss. 15 (3), 20, 30 (2)); *Western Australian report* (1974), draft Bill appendix B ss. 14 (2), 21, 29 (2); *Victorian report* (1974), pp. 8, 10, 15, 24.

[2] *Australian Capital Territory report* (1974) p. 32, paras 125, 126.

9.2.7 Further consideration.

(a) Here as elsewhere we have dropped the fact that the arbitration agreement is or is not a contract of adhesion as a criterion to determine whether contracting out should be allowed. Some power of contracting out should be allowed. Businessmen may have reasons which seem good to them why they should want an award within an agreed time or not at all. We would allow contracting out by exempt contract. This power would be wider than that recommended by the Law Reform Commission of the Australian Capital Territory. Under both recommendations the parties could contract out after the difference has arisen: in addition we would allow contracting out before differences have arisen, by the other forms of exempt contract.

(b) Otherwise we adhere to the proposals in our working paper.

9.2.8 Recommendations. We recommend that—

(a) a new Arbitration Act should not fix any time for award, and should be at liberty to agree on these matters by exempt contract;[1]

(b) the Court should have power to extend time, unless the parties otherwise agree by exempt contract.[2]

[1] Draft Bill s. 52 (1), (3).
[2] Draft Bill s. 52 (2), (3).

SECTION 3.—WRITING AND SIGNATURE

9.3.1 Present law. Unless otherwise agreed, the award of an arbitrator must be made in writing.[1] There is not, however, an express provision that the award of an umpire must be in writing.[2] Where an award is in the form of a stated case, there is, no doubt, an implicit requirement that the award be in writing.[3] An award need not be signed. Possibly an unwritten award may be rendered unenforceable by statutes requiring writing.[4] The foregoing is a discussion of the law, not guidance for the orderly conduct of an arbitration: an award usually ought to be, and is, in writing and signed.

[1] Arbitration Act, 1902, s. 5, Sch. 2 (c).
[2] Arbitration Act, 1902, s. 5, Sch. 2 (e).
[3] Arbitration Act, 1902, s. 9 (a).
[4] For example, Conveyancing Act, 1919, ss. 23B, 23C, 54A. See Sturges (1930) p. 530.

9.3.2 Developments in England. The need for writing was dropped in 1935[1] and has not been restored,[2] although there no doubt persists an implied requirement that an award in the form of a stated case be in writing.[3]

[1] Arbitration Act 1934 (U.K.), s. 21 (6).
[2] *Cf.* Arbitration Act 1950 (U.K.), s. 13 (1).
[3] Arbitration Act 1950 (U.K.), s. 21 (1) (b).

9.3.3 Comparative law: United States of America. An award need not be in writing or signed unless so required by statute or agreement.[1] Writing and signature are commonly required by statute.[2]

[1] Sturges (1930) pp. 526–534.

[2] For example, Uniform Arbitration Act (U.S.A.), s. 8 (a).

9.3.4 Working paper proposal. We said that the statutory requirement[1] of writing was a condition of the validity of an award. While rarely troublesome, the requirement should not, we said, be retained unless positive reasons for doing so could be seen. England seemed to have managed well enough for nearly forty years without the requirement. We suggested that the requirement be dropped.

[1] Arbitration Act, 1902, s. 5, Sch. 2 para. (c).

9.3.5 Comment on the working paper. One commentator agreed with the proposal. Another said that there should be writing: an award should be easy to prove and the best proof was documentary evidence.

9.3.6 Recent Australian reports. In South Australia there is a recommendation for the adoption of the English arrangements, namely, no express requirement of writing but probably an implied requirement that an award in the form of a stated case be in writing.[1] In the other recent reports the question whether writing should be required has been influenced by the question whether reasons for the award should be required. In Queensland and Western Australia there are recommendations that writing be required, but the parties may, after the difference has arisen, dispense with the requirement.[2] There are like recommendations for the giving of reasons.[2] In Victoria the present law appears to be the same as that in New South Wales and a change is not recommended.[3] In the Australian Capital Territory there is a recommendation that a party may require that the award be in writing and may require that reasons be given.[4]

[1] *South Australian report* (1969) generally. See para. 9.3.2 above.

[2] *Queensland report* (1970) pp. 11, 23, draft Bill s. 23 (1) (see now Arbitration Act 1973 (Qd.), s. 24 (1)); *Western Australian report* (1974) pp. 12, 13 para. 32, draft Bill appendix B, s. 22 (1), (2).

[3] *Victorian report* (1974) pp. 11, 12.

[4] *Australian Capital Territory report* (1974), p. 34, paras 137, 138.

9.3.7 Further consideration.

(a) We remain of the view that there should not be a statutory requirement of writing or of signature as a condition of the validity of an award. We recommend below that there should not be a statutory requirement that reasons be

given:[1] in our scheme, therefore, there is no need for writing as an incident of a requirement that reasons be given. As we have said, we are concerned with the law, not with guidance for the orderly conduct of an arbitration: an award usually ought to be, and is, in writing and signed.[2] The present law in New South Wales, and the requirements of writing existing or recommended elsewhere in Australia, call for writing as a condition of the validity of the award. Such a law requiring writing will operate when, and only when, the arbitrator has given his decision (an award in all but form) but has not put his decision in writing. The effect, and the only effect, of such a law is to let the losing party concede that the arbitrator has decided against him, yet repudiate the decision because it is not in writing. On any view that is wrong. If the parties wish to ensure that the award is in writing, they can so agree.

(b) We have so far dealt with writing as a condition of the validity of an award. Where an award is not made in writing, a party may reasonably require a statement of the terms of the award. He may need it, for example, for the purpose of enforcing the award. We think that provision should be made giving a right to such a statement, but not so as to affect the validity of the award.

[1] Para. 9.4.8 below.

[2] It is, of course, usually in the interests of the arbitrator to make his award in writing so that he can hold the document under a lien for his fees and expenses. See para. 5.4.1 above.

9.3.8 Recommendation. We recommend that—

(a) there should not be a statutory requirement that an award be in writing or signed;

(b) where an arbitrator has made an award, but the award is not in writing, the arbitrator should be required, on request by a party, to give a statement of the terms of the award, in writing and signed by him;[1]

(c) an arbitrator should have a lien on such a statement for his fees and expenses, as he has on an award in writing;[2]

(d) sanctions for compliance with (b) above should be provided in the shape of qualifying the arbitrator's remedies for his fees;[3]

(e) (b) to (d) should have effect except so far as otherwise agreed.[4]

[1] Draft Bill s. 59 (1).

[2] Draft Bill s. 59 (2).

[3] Draft Bill s. 59 (3).

[4] Draft Bill s. 59 (4).

SECTION 4.—REASONS FOR AWARD

9.4.1. Present law. The present law, both in England and in New South Wales, is that an arbitrator need not give reasons for his award unless the parties agree that reasons should be given.

9.4.2 Working paper proposal. In our working paper we expressed a view against a possible statutory requirement that an arbitrator give his reasons in all cases, or in all cases unless the parties otherwise agree. We formed this view for the reasons, first, that such a requirement would be an undue burden on arbitrators, second, that it would give a new ground for attacking the award, namely that the reasons, whether good or bad in law, did not satisfy the statutory requirement[1] and, third, that if the parties wanted reasons they could agree that reasons must be given.[2]

[1] *In re Poyser & Mills' Arbitration* [1964] 2 Q.B. 467. In Queensland failure to comply with the statutory requirement to give reasons is misconduct giving ground to set aside the award: Arbitration Act 1973 (Qd.), ss. 4 (definitions of "imperfect execution of powers" and "misconduct"), 24, 32 (2). This follows a recommendation in the *Queensland report* (1970), and there is a recommendation for like legislation in the *Western Australian report* (1974), draft Bill appendix B, s. 31 (3), (5). See para. 9.4.4 below.

[2] Working paper p. 233, para. 236.

9.4.3 Comment on the working paper. Most of the commentators on this proposal in the working paper were against the view we expressed. Sometimes the grounds did not clearly emerge, but four commentators at least thought that the giving of reasons, or the duty to give reasons, would be a useful restraint on arbitrators. Another saw in published reasons a contribution toward establishing rules on international trade practice.

9.4.4 The Queensland and Western Australian reports. The makers of these reports recommended that an arbitrator be required to give reasons, subject to contrary agreement after differences had arisen.[1] Briefly, the Queensland Law Reform Commission thought that, since an arbitrator was bound to apply the law, there should be means to ensure that he applied the law correctly: there was a means where he gave his reasons as part of his award. But, in the absence of agreement of the parties on the point, the arbitrator might choose to give or not to give his reasons as part of his award. Most arbitrators did not know the significance of the choice: the availability of a challenge to the award for error of law was therefore accidental. Error of law on the face of the award should remain as a ground for setting aside the award. The law would be improved if arbitrators were required to give reasons, subject to contrary agreement after differences had arisen. The Law Reform Commission of Western Australia thought that the court should have wide powers of reviewing awards for error of law and that finality of the award should yield to legal correctness.

[1] *Queensland report* (1970) pp. 12–14, 23, draft Bill s. 23; see now Arbitration Act 1973 (Qd.), s. 24; *Western Australian report* (1970) pp. 12, 13, para. 32, draft Bill appendix B s. 22.

9.4.5 The Victorian report. In Victoria the Chief Justice's Law Reform Committee recommended against adoption of the Queensland scheme.[1] They stressed the importance of finality: usually, they said, more important than satisfaction that all the legal steps were or could have been tested in court. They saw more room for ensuring legal correctness in an arbitration under an agreement made before differences arose, but on balance recommended against adoption of the Queensland scheme.

[1] *Victorian report* (1974), pp. 11, 12.

9.4.6 The Australian Capital Territory report. The Law Reform Commission of the Australian Capital Territory recommended that a party be enabled to require, by request before award, the arbitrator to give reasons for his award. The objection that such a provision would impair the finality of the award lacked substance in view of other recommended limitations on the Court's power to interfere with the award.[1] These other limitations were, briefly, that an award should not be liable to be set aside for error on the face of the award, but that it should be a case for remission that it appears to the Court that the award is or may be "grossly wrong", that expression being defined.[2]

[1] *Australian Capital Territory report* (1974) p. 34 para. 138.

[2] *Australian Capital Territory report* (1974) pp. 14–17, paras 58–68.

9.4.7 Further consideration. We remain of the view put in the working paper, namely, that there should not be a statutory requirement that an arbitrator give reasons for his award, either automatically or on request by a party. In addition to the reasons given in our working paper and repeated above,[1] we are much influenced by the remark of Barwick *C.J.* in 1972 that "finality in arbitration in the award of the lay arbitrator is more significant than legal propriety in all his processes in reaching that award . . .",[2] and by the like view taken in Victoria by the Chief Justice's Law Reform Committee.[3] It is indeed mainly the importance which we put on finality which leads us to differ from the recent recommendations in favour of reasons being given. It is true, as suggested by the Law Reform Commission of the Australian Capital Territory, that other limitations on curial interference tend to promote finality, nevertheless reasons for an award would be a material assistance in showing that the award is "grossly wrong". As a rule, we would contemplate that an award might be shown to be grossly wrong by reference to the nature of the difference, the proceedings in the arbitration, and the terms of the award itself. Reasons for an award would open too wide a range of material for challenge to the award, even on the restricted grounds for setting aside which we recommend.

[1] Para. 9.4.2 above.

[2] *Tuta Products Pty Ltd* v. *Hutcherson Bros Pty Ltd* (1972) 127 C.L.R. 253, 258.

[3] See para. 9.4.5 above.

9.4.8 Recommendation. We recommend that an Arbitration Act should not require an arbitrator to give reasons for his award. The parties may, of course, agree that the arbitrator must give reasons.

SECTION 5.—INTERIM AWARD

9.5.1 Nature of an interim award. There are at least three kinds of interim award. One kind is a direction analogous to an interlocutory injunction or other order in litigation, relating to the enjoyment or management, pending final award, of the subject matter of the difference.[1] An example of a second kind is furnished by a direction to make a payment to go in part satisfaction of a larger claim to be quantified by final award.[2] A third kind of interim award is a determination of some matter in issue, leaving other matters in issue to be determined by later award, whether the matter the subject of the interim determination is a distinct head of difference,[3] or a step towards the determination of some head of difference.[4]

[1] *Wrightson v. Bywater* (1838) 3 M & W. 199, 205–207; 150 E. R. 1114, 1117, 1118; *Woodrow* v. *Trawlers (White Sea and Grimsby) Ltd* [1930] 1 K.B. 176, 190.

[2] *Woodrow* v. *Trawlers (White Sea and Grimsby) Ltd* [1930] 1 K.B. 176; *Fidelitas Shipping Co. Ltd* v. *V/O Exportchleb* [1966] 1 Q.B. 630, 638 E, F, G; *MacKinnon Report* (1927), para. 27.

[3] For example, the differences referred may be (a) a claim for damages for breach of contract A and (b) a claim for damages for beach of contract B: an interim award might determine claim (a), leaving claim (b) for later determination. See *Wrightson* v. *Bywater* (1838) 3 M. & W. 199; 150 E.R. 1114.

[4] For example, the difference referred may be a claim for damages for breach of contract: an interim award might determine that there was a breach, leaving the amount of damages for later determination. See *Fidelitas Shipping Co. Ltd* v. *V/O Exportchleb* [1966] 1 Q.B. 630, 638 E, F, G; *MacKinnon Report* (1927), para. 27.

9.5.2 Present law. One would expect the law to be that the power of an arbitrator to make an interim award depends on what has been agreed between the parties. There are authorities supporting that view,[1] but there are authorities against it.[2]

[1] *Wrightson* v. *Bywater* (1838) 3 M. & W. 199; 150 E.R. 1114; *MacKinnon Report* (1927), para. 27; Russell (1935) pp. 292, 293. *Cf. Woodrow* v. *Trawlers (White Sea and Grimsby) Ltd* [1930] 1 K.B. 176, 189, 190.

[2] *Woodrow* v. *Trawlers (White Sea and Grimsby) Ltd* [1930] 1 K.B. 176, 187, 188; *Fidelitas Shipping Co.* v. *V/O Exportchleb* [1966] 1 Q.B. 630, 643E.

9.5.3 Developments in England. In England, unless otherwise agreed, an arbitrator may make an interim award.[1] An interim award may be stated in the form of a special case for the decision of the Court.[2]

[1] Arbitration Act 1950 (U.K.), s. 14.

[2] Arbitration Act 1950 (U.K.), ss. 14, 21 (1) (b).

9.5.4 Working paper proposal. In our working paper we said that we agreed with the MacKinnon Committee in thinking that a power in an arbitrator or umpire to make an interim award is useful. "In many cases it is desirable that he should be able to do so, and in some cases one of the parties may not be willing to give him such an authority—e.g. where one party clearly owes the other a large sum but there is a dispute as to some minor matter in their dealings. An interim award may also

be very useful in order to deal with liability, and with a postponement of the enquiry into damages."[1] There was, we said, some attraction in the idea that only a determination of something necessary for the ultimate resolution of the difference submitted should be characterized as an interim award, a concept like that of an interlocutory judgment in litigation, and that directions for interim preservation, management or enjoyment, or for payment on account of an admitted but unquantified liability, should not be so characterized. But we thought that difficulties of definition, and the inherent difficulties in applying a statutory distinction, tipped the balance against attempting the task.

[1] *MacKinnon Report* (1927), para. 27.

9.5.5 Comment on the working paper. The proposal in the working paper attracted little comment, but such comment as there was favoured the proposal.

9.5.6 Recent Australian reports. The *Victorian report* was against making provision for interim awards.[1] The other recent recommendations favour making such provision.[2] The view taken in Victoria was that, convenient though such a procedure may sometimes be, piecemeal determinations were rarely satisfactory: if the parties wished to authorize the making of interim awards, it was better to do so by agreement.

[1] *Victorian report* (1974) pp. 10, 11.

[2] *South Australian report* (1969) p. 9, draft Bill s. 21; *Queensland report* (1970) pp. 10, 22, 23, draft Bill s. 20 (see now Arbitration Act 1973 (Qd.), s. 21); *Western Australian report* (1974) p. 15 (para. 37 (h)), draft Bill Appendix B s. 23 (a); *Australian Capital Territory report* (1974) p. 32 para. 127.

9.5.7 Recommendation. We recommend that a new Arbitration Act should authorize an arbitrator to make an interim award, unless otherwise agreed by the parties.[1]

[1] Draft Bill s. 53.

SECTION 6.—SETTING ASIDE THE AWARD

9.6.1 Present statute law. "Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the Court may set the award aside."[1] An understanding of this provision calls for some reference to history.

[1] Arbitration Act, 1902, s. 13 (2).

9.6.2 Common law practice before 1698. Before 1698 a practice had arisen in the superior courts of common law at Westminster whereby the parties to an action might obtain by consent a rule of court[1] referring their differences to arbitration. The award of the arbitrator was liable to be set aside by the court under whose rule the arbitration was held. The grounds for setting aside the award no doubt were

elaborated and enlarged in the years prior to 1890, but this was done by the processes of the common law, without aid or restriction by Parliament. The courts of common law had no jurisdiction to set aside an award on a submission by consent out of court.[2]

[1] Or an order of a judge or an order at *nisi prius*, which orders had to be made rules of court for the purposes of the practice discussed in this paragraph.

[2] Russell (1882) p. 663.

9.6.3 Chancery practice before 1698. Also before 1698, a jurisdiction had arisen in the Court of Chancery to set aside an award on a submission by consent out of court. Such an award was liable to be set aside in Chancery on various grounds, including misconduct of the arbitrator and extending also to mistake of law made by the arbitrator in making his award.[1] The procedure was by bill, not by any summary application.

[1] *Brown* v. *Brown* (1683) 1 Vern. 157; 23 E.R. 384; *Corneforth* v. *Geer* (1715) 2 Vern. 705; 23 E.R. 1058; *Racecourse Betting Control Board* v. *Secretary for Air* [1944] Ch. 114, 127; Kyd (1791) p. 239.

9.6.4 The Arbitration Act 1698. The Arbitration Act 1698 was addressed in part to the arrangements for setting aside an award on a submission by consent out of court. It was concerned, that is to say, to put new procedures and powers in the place of those of the Court of Chancery in respect of awards on the submissions to which the Act applied. It seems probable that three mischiefs were perceived in the Chancery jurisdiction: the procedure by bill was too slow and costly, the grounds on which an award might be set aside were so extensive as to threaten the utility of arbitration, and there was an inconveniently long time, probably twenty years,[1] during which the award was liable to be set aside.

[1] *Nichols* v. *Roe* (1834) 3 My. & K. 431, 440; 40 E.R. 164, 168.

9.6.5 The fourfold remedy of the Act of 1698. The remedy prescribed by the Act of 1698 was fourfold. In the first place, the Act permitted an application for the setting aside of an award to be made by summary application on affidavit rather than by suit or action.[1] Secondly, the Act specified exhaustively the grounds upon which an award on a submission within the Act might be set aside.[2] Thirdly, the Act forbade the exercise of the old Chancery jurisdiction so far as concerned awards on submissions within the Act.[3] Fourthly, a time was fixed after which proceedings for the setting aside of an award were precluded.[4]

[1] Arbitration Act 1698 (U.K.), s. 1; *Nichols* v. *Roe* (1834) 3 My. & K. 431, 440; 40 E.R. 164, 168.

[2] Arbitration Act 1698 (U.K.), s. 2.

[3] Arbitration Act 1698 (U.K.), ss. 1, 2. But the submission might, if so agreed by the parties, have been made a rule or order of the Court of Chancery and then that Court might have exercised the summary jurisdiction under the Act of 1698.

[4] Arbitration Act 1698 (U.K.), s. 2.

9.6.6 Judicial treatment of the Act of 1698. The Act of 1698 was effective as regards the first, third and fourth of these remedies, but was ineffective as regards the second. The only ground upon which an award might be set aside under the Act was that the award was "procured by corruption or undue means".[1] By the time the Act was repealed in 1890,[2] however, nearly two hundred years of judicial decision had so enlarged the grounds upon which an award might be set aside on summary application that the law as administered bore no resemblance to the law as enacted. The judicial enlargement is easier to perceive in its result than are the steps by which the result was reached. Probably the events were something like the following. As late as 1738 the courts were substantially adhering to the terms of the Act: an award on a submission within the Act of 1698 might be set aside only on grounds of fraud or corruption in the arbitrators, not on the grounds, for example, of want of finality or want of mutuality.[3] But within twenty-five years it was established in the Court of King's Bench that an award on a reference in a cause might be set aside on any ground on which an award might be set aside in equity,[4] including error of law on the face of the award,[5] and that an award on a submission within the Act of 1698 stood on the same footing as an award on a reference in a cause.[6] It is likely that these steps are the work of Lord Mansfield, who sat as Lord Chief Justice from 1756 to 1786.

[1] Arbitration Act 1968 (U.K.), s. 2. The reference to misbehaviour of the arbitrator in section 1 is literally concerned only with the stopping or delaying of process for contempt, not with setting aside the award, and is expressed as a requirement additional, not alternative, to procurement by corruption or other undue means.

[2] Arbitration Act 1889 (U.K.), ss. 26 (1), 29.

[3] *Hutchins* v. *Hutchins* (1738) Andr. 297; 95 E.R. 406.

[4] *R.* v. *Wheeler* (1761) 3 Burr. 1256, 1259 (n); 97 E.R. 819, 820.

[5] *Lucas d. Markham* v. *Wilson* (1758) 2 Burr. 701; 97 E.R. 522; *Montifiori* v. *Montifiori* (1762) 1 W. Bl. 363; 96 E.R. 203. See the view of Story *J.* in *Kleine* v. *Catara* (1814) 2 Gall. 61, that an arbitrator who gives his reasons is presumed to refer it to the Court to review his decision on the law.

[6] *Lucas d. Markham* v. *Wilson* (above).

9.6.7 The position in 1875.

(a) By 1875, when the Court of Chancery, the Court of Queen's Bench and the other superior Courts at Westminster (and other courts) were united in the Supreme Court of Judicature,[1] it had become settled that the courts might, on summary application, set aside an award on a submission within the Act of 1698 on a great variety of grounds, including error of law on the face of the award,[2] misconduct of the arbitrator not involving corruption,[3] termination of the authority of the arbitrator by revocation,[4] or by death of a party,[5] award made out of time,[6] excess of authority,[7] want of finality[8] and uncertainty.[9] The

practice on the setting aside of awards on a submission within the Act of 1698 were so far equated to that on the setting aside of awards on a reference by consent in a cause that the reported cases frequently did not distinguish between the two classes of award. There were occasional attempts to reconcile this course of practice with the words of the Act of 1698[10] and there were occasional attempts to maintain the position that an award on a reference in a cause might only be set aside on grounds of fraud or corruption of the arbitrator or of error of law,[11] a position which might have been held with greater strength as regards an award on a submission within the Act of 1698. But the fact that the practice of the Courts had departed from the requirements of the Act of 1698 was frankly recognized.[12]

(b) Proceedings to set aside an award on a submission within the Act of 1698 were treated as proceedings to invoke the jurisdiction given by that Act whatever was the ground upon which the applicant relied,[13] indeed the courts of common law had no jurisdiction to set aside such an award except the jurisdiction given by the Act.[14] Accordingly, the time limit fixed by the Act of 1698 was applied whatever ground was relied upon.[15] This time limit was applied as a direct requirement of the Act of 1698, not by analogy as was done in the case of an award on a reference by consent in a cause.[16]

(c) The result was that, with the single exception of the time limit for the application, the courts dealt with applications to set aside awards in the same way, whether the award was on a reference in a cause or on a submission within the Act of 1698. The result thus reached appears to have received adequate statutory support in 1854, for it was enacted in that year that the proceedings upon specified arbitrations should, except as otherwise directed by the Act or by the submission or document authorizing the reference, be conducted subject to the same rules as to (amongst other things) the setting aside of the award, as upon a reference by consent in a cause.[17] This enactment applied to an arbitration on a submission within the Act of 1698.[18]

(d) Such was the law touching the setting aside of an award on a submission within the Act of 1698 on the eve of the union of the old courts in the Supreme Court of Judicature in 1875. The old Chancery jurisdiction to set aside an award on a submission by consent out of court, although excluded by the Act of 1698 as regards an award on a submission within that Act, remained otherwise unimpaired and was and is exercised from time to time in cases, for example, where the submission is not in writing.[19] On our reading of the numerous cases on the subject, we have

formed the view that the grounds for setting aside an award in Chancery were no less extensive than those available in a court of common law.[20]

[1] Supreme Court of Judicature Act 1873 (U.K.), s. 3; Supreme Court of Judicature (Commencement) Act 1874 (U.K.), s. 2; Supreme Court of Judicature Act 1875 (U.K.), s. 2.

[2] *Wohlenberg* v. *Lageman* (1815) 6 Taunt. 251, 255; 128 E.R. 1031, 1032; *Richardson* v. *Nourse* (1819) 3 B. & Ald. 237; 106 E.R. 648; *In re Huddersfield Corpn. & Jacomb* (1874) L.R. 17 Eq. 476; (1874) L.R. 10 Ch. App. 92.

[3] *Harvey* v. *Shelton* (1844) 7 Beav. 455; 49 E.R. 1141; *In re Hall & Hinds* (1841) 2 Man. & G. 847, 853, note 22; 133 E.R. 987, 989; *In re Plews & Middleton* (1845) 6 Q.B. 845; 115 E.R. 319.

[4] *King* v. *Joseph* (1814) 5 Taunt. 452; 128 E.R. 765.

[5] *In re Hare, Milne & Haswell* (1839) 6 Bing. N.C. 158; 133 E.R. 62.

[6] *In re Swinford & Horne* (1817) 6 M. & S. 226; 105 E.R. 1227.

[7] *In re Mackay* (1834) 2 A. & E. 356; 111 E.R. 138; *Boodle* v. *Davies* (1835) 3 A. & E. 200; 111 E.R. 389; *In re Tandy & Tandy* (1841) 9 Dowl. 1044.

[8] *In re Mackay* (above); *Boodle* v. *Davies* (above); *In re Tribe & Upperton* (1835) 3 A. & E. 295; 111 E.R. 425; *Wood* v. *Wilson* (1835) 2 C.M. & R. 241; 150 E.R. 105; *In re Marshall & Dresser* (1843) 3 Q.B. 878; 114 E.R. 746.

[9] *In re Mackay* (above); *Boodle* v. *Davies* (above); *In re Tribe & Upperton* (above).

[10] For example, Denman *C.J.* in *In re Plews & Middleton* (1845) 6 Q.B. 845, 852; 115 E.R. 319, 321.

[11] *Hodgkinson* v. *Fernie* (1857) 3 C.B.N.S. 189; 140 E.R. 712.

[12] *Nichols* v. *Chalie* (1807) 14 Ves. Jun. 266, 271; 33 E.R. 523, 525; *Veale* v. *Warner* (1669) 1 Wms. Saund. 326, 327 (d) note (s); 85 E.R. 468, 472.

[13] *Auriol* v. *Smith* (1823) Turn. & R. 121; 37 E.R. 1041.

[14] Russell (1882) p. 663. *Cf. Meyer* v. *Leanse* [1958] 2 Q.B. 371, 380.

[15] The cases are numerous, see for example, *Dubois* v. *Medlycott* (1737) Barnes 55; 94 E.R. 803; *Freame* v. *Pinnegar* (1774) 1 Cowp. 23; 98 E.R. 947; *Pedley* v. *Goddard* (1796) 7 T.R. 73; 101 E.R. 861; *In re Perring & Keymer* (1834) 3 Dowl. 98; *Rushworth* v. *Barron* (1835) 3 Dowl. 317; *Reynolds* v. *Askew* (1837) 5 Dowl. 682; *In re Smith & Blake* (1839) 8 Dowl. 133; *Harvey* v. *Shelton* (1844) 7 Beav. 455; 49 E.R. 1141; *In re Ross & Ross* (1847) 4 D. & L. 648.

[16] Russell (1882) p. 671.

[17] Common Law Procedure Act 1854 (U.K.), s. 7.

[18] *In re Rouse & Co. and Meier & Co.* (1871) L.R. 6 C.P. 212.

[19] *South Sea Co.* v. *Bumstead* (1734) 2 Eq. Cas. Abr. 80 pl. 8; 22 E.R. 70; *Metcalf* v. *Ives* (1737) Cas. temp. Hard. 82; 95 E.R. 248; *Ridout* v. *Payne* (1747) 3 Atk. 486, 494; 26 E.R. 1080, 1084; *Chicot* v. *Lequesne* (1751) 2 Ves. Sen. 315; 28 E.R. 203; *Knox* v. *Symmonds* (1791) 1 Ves. Jun. 369; 30 E.R. 390; *Emery* v. *Wase* (1801) 5 Ves. Jun. 846, 847; 31 E.R. 889, 890; *Anon* v. *Mills* (1811) 17 Ves. Jun. 419; 34 E.R. 162; *Nichols* v. *Roe* (1834) 3 M. & K. 431; 40 E.R. 164; *Veale* v. *Warner* (1669) 1 Wms. Saund. (1845 edn) 326, 327 (n); 85 E.R. 468, 471; *Hamilton* v. *Bankin* (1850) 3 De G. & Sm. 782; 64 E.R. 703; *Buccleuch* v. *Metropolitan Board of Works* (1870) L.R. 5 Exch. 221; 230, 232; *R.* v. *Northumberland Compensation Appeal Tribunal* [1952] 1 K.B. 338, 351; *Altco Ltd* v. *Sutherland* [1971] 2 Lloyd's Rep. 515, 520; Tidd's *Practice* (1828) Vol. 2 p. 840; *Chitty's Archbold* (1866) p. 1683; Story (1877) paras 1450–1456. *Cf. Birtley District Co-operative Society Ltd* v. *Windy Nook & District Industrial Co-operative Society* [1959] 1 W.L.R. 142.

[20] And see Russell (1870) p. 686.

9.6.8 The Judicature Acts. On the union in 1875 of the old courts in the Supreme Court of Judicature, the only remaining operation of the Act of 1698, as regards the setting aside of an award on a submission within that Act, was to impose a time limit for the commencement of proceedings and to require that the proceedings be by summary application and not by action.

9.6.9 The Arbitration Act 1889. The Arbitration Act 1889 commenced on the 1st of January, 1890.[1] It repealed (amongst others) the Act of 1698 and section 7 of the Common Law Procedure Act 1854.[2] The Act of 1889 enacted that "where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the Court may set the award aside".[3] Three minor points may be noticed. First, under this legislation the power is not, as formerly, confined to an award on a submission in writing. Second, the words "arbitration or" are puzzling. Perhaps "arbitration" here is synonymous with "award", the new legislation picking up the obsolete sense of "arbitration" in the Act of 1698. Perhaps, on the other hand, the intention was to embrace cases where the submission had been improperly procured, for example, a party may have been induced by fraud to join in the submission.[4] Thirdly, the Acts of 1889 and 1902 do not have a limit of time for an application for the setting aside of an award. In England a time limit was, and still is, fixed by rule of Court,[5] but there is no time limit in New South Wales.[6]

[1] Arbitration Act 1889 (U.K.), s. 29.

[2] Arbitration Act 1889 (U.K.), s. 26.

[3] Arbitration Act 1889 (U.K.), s. 11 (2). This enactment is reproduced in the Arbitration Act, 1902, s. 13 (2).

[4] Hogg (1936) p. 146.

[5] See now Rules of the Supreme Court, 1965 (U.K.), O.73, r. 5.

[6] The application must be made within a reasonable time: *Roach* v. *Truth and Sportsman Ltd* (1938) 55 W.N. 77; *Cole* v. *Mosman M.C.* (1960) 6 L.G.R.A. 31.

9.6.10 The recent cases.

(a) The differences between the old legislation[1] and the new[2] might suggest that some change in the law was intended, but the former law was still applied, and it has been held that the Act of 1889 did not alter the power of the Court to set aside an award for error of law on its face.[3] No doubt the language of the legislation[4] is elastic enough to comprehend most cases where something has gone wrong in the arbitration, but its apparent statement of the grounds for setting aside an award is not of any utility.

(b) When it was decided that an award might be set aside for error of law on its face, even though the error consisted in the adoption by the arbitrator of an answer given by the Court on a consultative case,[5] it became clear that error of law could not of itself be described as "misconduct" within the meaning of the Act. A few years later, the jurisdiction to set aside an award on this ground was described

as an inherent jurisdiction, not dependent on the Arbitration Act,[6] and the jurisdiction has been so described in several later cases.[7] The discussion in these cases was concerned with the jurisdiction to set aside awards on summary application. The foregoing historical narrative will show that the idea of an inherent jurisdiction to set aside an award on a submission by consent out of court on summary application, whether for error of law or any other ground, is not supportable, except by the mere force of judicial precedent commencing in 1922.

(c) "Inherent jurisdiction" might indeed be used in another sense, that is, to describe the non-statutory jurisdiction formerly possessed by the Court of Chancery and possessed in and after 1875 by the Supreme Court of Judicature. The exercise of that jurisdiction was restrained by the Act of 1698, but the restraint was dropped in 1890 and there is now no obstacle to its exercise. But that is a jurisdiction in an action, not on summary application.

[1] Arbitration Act 1698 (U.K.), s. 2; Common Law Procedure Act 1854 (U.K.), s. 7.

[2] Arbitration Act 1889 (U.K.), s. 11 (2).

[3] *British Westinghouse Electric and Manufacturing Co. Ltd* v. *Underground Electric Rlys Co. of London Ltd* [1912] A.C. 673, 686, 687.

[4] Arbitration Act 1889 (U.K.), s. 11 (2); Arbitration Act, 1902, s. 13 (2).

[5] *British Westinghouse Electric and Manufacturing Co. Ltd* v. *Underground Electric Rlys Co. of London Ltd* [1912] A.C. 673.

[6] *In re Jones & Carter* [1922] 2 Ch. 599.

[7] *Horrell* v. *St John* [1928] 2 K.B. 616; *Absalom (F.R.) Ltd* v. *Great Western (London) Garden Village Socy Ltd* [1933] A.C. 592, 617; *Racecourse Betting Control Board* v. *Secretary for Air* [1944] Ch. 114; *Lloyds Bank Ltd* v. *Jones* [1955] 2 Q.B. 298; *Jones* v. *Pembrokeshire County Council* [1967] 1 Q.B. 181. See also Jacob (1970) page 49.

9.6.11 The position today in New South Wales. In the result, the statutory provision for setting aside awards[1] is now merely procedural: it allows relief to be given on summary application which could otherwise be given in an action. Since the Supreme Court Act, 1970, drops the distinction between an action and other proceedings, and since the procedure for any relief in the Supreme Court is better left to the Rule Committee, the statutory provision[1] in New South Wales for setting aside awards now has no utility at all.

[1] Arbitration Act, 1902, s. 13 (2).

9.6.12 The position today in England. The general cases for setting aside awards have been discussed above. The only relevant provision in the Arbitration Act is the provision that "where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the High Court may set the award aside".[1]

[1] Arbitration Act 1950 (U.K.), s. 22 (2). This is similar to the Arbitration Act, 1902, s. 13 (2), but adds "or the proceedings". For the purpose of the added words, see para. 5.3.5 (note 4) above.

9.6.13 The grounds for setting aside: error on the face of the award. We go on to consider whether the grounds for setting aside awards should remain as they are. One ground for doing so has been deplored by judges for upwards of a century: the ground of error on the face of the award.[1] There are three criticisms. One is that a party who has agreed to arbitration should, in the absence of misconduct in the arbitrator or fraud, take the decision of the arbitrator for better or for worse. A second is that it lies in the discretion of the arbitrator whether or not to allow review of his reasons: it is in his discretion whether his reasons appear on the face of his award. A third criticism is that whether an error appears on the face of the award (or some document referred to in, and made part of, the award, which is the same thing) is a question which leads to arid distinctions unrelated to the merits of the dispute and scarcely supportive of the principle that in general the award should bind the parties.

[1] *Tuta Products Pty Ltd* v. *Hutcherson Bros Pty Ltd* (1972) 127 C.L.R. 253; *Arenson* v. *Arenson* [1973] Ch. 346, 362D–E.

9.6.14 The first criticism: the agreement should bind. This criticism, that a party agreeing to arbitration should be bound by its result can be met simply enough. It can be met, for example, by an enactment to the effect that the parties may, except by contract of adhesion, agree that the award shall not be liable to be set aside for error on its face.

9.6.15 The second criticism: the discretion to give or not to give reasons. The second criticism, that the arbitrator has it in his discretion to preclude review of his award for error of law, by not giving reasons, is more serious. One means of meeting the criticism would be to require the arbitrator to give his reasons in all cases, or in all cases unless the parties otherwise agree. We have recommended above that there should not be a statutory requirement that an arbitrator give reasons for his award.[1]

[1] Para. 9.4.8 above.

9.6.16 The third criticism: the distinction between error on the face of the award and other error. This is an intractable problem. The law on this point makes a compromise between the competing principles of, on the one hand, supporting the finality of the award and, on the other hand, not letting people's rights be fixed on an obvious mistake. Unless a general right of appeal on questions of law is granted (which we think ought not to be done), or review for error on the face of the award is abolished (which we think ought to be done), some such distinction is necessary and we see no alternative which would be more serviceable than the present one.

9.6.17 Working paper proposal. We suggested that the law be changed so that an award would no longer be liable to be set aside for error of law appearing on its face. Some means had to be left, however, for

the correction of gross errors, in cases where the parties had not agreed to exclude review of the award for error. The appropriate means was, we suggested, by remission of the award, and if necessary, by direction to make a new award in the form of a stated case.[1] We suggested in other sections of the working paper a modification of the rules or practice relating to remission[2] and directions to make an award in the form of a case.[3]

[1] *In re Palmer & Co. and Hosken & Co.* [1898] 1 Q.B. 131. There are other possibilities. For example, if the question of law can be identified and its materiality demonstrated, an application for a declaration of right might be joined with an application for remission of the award.

[2] Para. 9.7.5 below.

[3] Para. 8.1 above.

9.6.18 Other grounds for setting aside an award. Apart from the case of error on the face of the award, it is enacted that the Court may set aside an award where the arbitrator has misconducted himself or the award has been improperly procured.[1] These general words embrace a variety of cases where things go wrong in an arbitration through some shortcoming, intentional or not, of the arbitrator or of a party. There are cases which suggest that sometimes an award is set aside on insufficiently weighty grounds,[2] but there is probably little which legislation can do to alter this situation. If there is to be legislation, it must be in general terms, and the ambit of the general terms must depend on judicial attitudes.[3] We suggested in the working paper that legislation should not limit the grounds in the nature of misconduct or improper procurement on which an award could be set aside.

[1] Arbitration Act, 1902, s. 13 (2).

[2] See, for example, *E. Rotheray & Sons Ltd* v. *Carlo Bedarida & Co.* [1961] 1 Lloyd's Rep. 220.

[3] See para. 9.6.10 (a) above.

9.6.19 Power to restrict grounds for setting aside. In the working paper we expressed the view that, except in the case of a contract of adhesion, it should be open to the parties to limit by agreement the grounds on which the award might be set aside by the Court, or to exclude altogether the power of the Court to set aside the award. A party would no doubt as a rule be unwise to agree that, for example, corruption of the arbitrator should not be a ground for setting aside the award, but we did not see that the Legislature should be concerned to prevent him from so agreeing. There might be a case for providing that such an agreement should not be effective unless made after the difference under arbitration had arisen.[1]

[1] See para. 5.3.6 (d) above.

9.6.20 Time for application for setting aside. As we have mentioned,[1] in England a time limit is fixed for an application to set aside an award; none is fixed in New South Wales, but the application must be made within a reasonable time.[2] The time fixed in England is six weeks after the award has been made and published to the parties,[3] but the Court

may extend the time.[4] We suggested in the working paper that the Rule Committee of the Supreme Court be given power to make rules on this subject.[5] We suggested also that a time limit be fixed by rules of Court, subject to a power to extend the time. There should be a time limit because the award is not finally binding while it is liable to be set aside. But we further suggested that the six weeks allowed in England is too long and that the time should be twenty-eight days, the ordinary time for an appeal to the Supreme Court.[6]

[1] Para. 9.6.9 above.

[2] *Cole* v. *Mosman M.C.* (1960) 6 L.G.R.A. 31.

[3] Rules of the Supreme Court, 1965 (U.K.), 0.73, r. 5 (1) (b).

[4] O.3, r.5.

[5] The Supreme Court Act, 1970, s. 124 (1) (a), would not apply because, on the suggested scheme, an application for the setting aside of an award would not be an application under an Act.

[6] Supreme Court Rules, 1970, Pt 51A r.3.

9.6.21 Comment on the working paper. The main proposal in the working paper was for abolition of the power to set aside an award for error on its face. Comment on this proposal was generally favourable. There was, however, uneasiness about the proposed degree of freedom to contract out.

9.6.22 Recent Australian reports. The *South Australian report* recommended adoption of the present English legislation, supplemented by a definition of misconduct.[1] The *Queensland report* was to a like effect, but failure to make an award in writing, or to give reasons, was expressly included in the definition of misconduct.[2] In Western Australia there is a recommendation that the present English legislation be adopted; in addition it is recommended that there be a definition of "misconduct" whereby some more specific matters are included,[3] and that an award should also be liable to be set aside for "jurisdictional error" in relation to the proceedings.[4] "Jurisdictional error" is defined so as to include more specific matters, amongst them failure to give reasons for the award and error of law on the face of the award.[5] In Victoria the Chief Justice's Law Reform Committee saw possible value in the Queensland recommendation.[6] The Law Reform Commission of the Australian Capital Territory recommended adoption of the present English legislation, without elaboration, but with a prohibition against setting aside an award for error on its face or where justice may be done by remission with any necessary directions.[7]

[1] *South Australian report* (1969) pp. 4, 11, draft Bill ss. 3, 31 (2). See para. 5.3.8 above.

[2] *Queensland report* (1970), pp. 12–14, 16, 23, 25, draft Bill ss. 3, 23, 31 (2). See now Arbitration Act 1973 (Qd.), ss. 4, 24, 32 (2).

[3] *Western Australian report* (1974) draft Bill appendix B s. 31 (5). See para. 5.3.8 above.

[4] *Western Australian report* (1974) draft Bill appendix B s. 31 (3).

[5] *Western Australian report* (1974) draft Bill appendix B s. 31 (5).

[6] *Victorian report* (1974) pp. 4, 5.

[7] *Australian Capital Territory report* (1974) p. 17, para. 68 (1)–(3).

9.6.23 Further consideration.

(a) We adhere generally to the proposals in the working paper, but would make changes in three respects.

(b) In the first place, although we adhere to our view that error on the face of an award should no longer be a ground for setting aside the award, we take the view that statutory power should be given to set aside an award where it appears to the Court that the award is or may be "grossly wrong" and it does not appear that justice may be done by remitting the award. The concept of "grossly wrong" is discussed below in relation to remission of awards.[1] We take this view because we think that, when it appears that the award is or may be grossly wrong, the award should not be allowed to stand. Although the best remedy is to remit the award so that the arbitrator can try again, there will be cases where remission is impossible or unlikely to be useful. The parties may, for example, have agreed to have a particular arbitrator and him alone. If he dies, remission is impossible. For another example, if the arbitrator is perverse, and persistent in his perversity, remission will be useless.

(c) In the second place, we would make some changes in our proposals in the working paper for contracting out. The proposals were that there should be no freedom to contract out by contract of adhesion, but full freedom to contract out by other contract. The second branch of this proposal went too far. A man should not be allowed to agree to forgo his rights in case of denial of justice or fraud unless he knows the facts when he so agrees.

(d) In the third place, we think that there should not be an appeal from a decision of the Court at first instance on an application for the setting aside of an award, except by leave of the Court of Appeal.[2]

[1] Para. 9.7.5 below.

[2] See para. 8.7 (e) above.

9.6.24 Recommendations. We recommend that—

(a) error on the face of an award should not be a ground for setting the award aside;[1]

(b) an award may be set aside when it is or may be "grossly wrong" in the defined sense and justice may not be done by remission;[2]

(c) an award may be set aside for denial of justice or fraud, unless the parties otherwise agree with knowledge of the denial of justice or fraud;[3]

(d) subject to (c), the parties may, by exempt contract but not otherwise, limit or exclude the powers of the Court to set aside an award;[4]

(e) there should not be an appeal to the Court of Appeal from a decision of the Court at first instance on an application for the setting aside of an award, except by leave of the Court of Appeal;[5] and

(f) the Rule Committee of the Supreme Court should be authorized to make rules with respect to the time for the making of an application to set aside an award.[6]

[1] Draft Bill s. 58 (3).

[2] Draft Bill s. 58 (1).

[3] Draft Bill s. 58 (7).

[4] Draft Bill s. 58 (5), (6).

[5] Draft Bill Sch. 2, amendment to Supreme Court Act, 1970, s. 101 (2).

[6] Draft Bill s. 72 (1) (j).

SECTION 7.—REMISSION

9.7.1 Present law. "In all cases of reference to arbitration the Court may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire."[1]

[1] Arbitration Act, 1902, s. 12 (1).

9.7.2 History. In England there was, before 1854, no statutory provision for remission of an award to an arbitrator. The Court would not remit an award except by consent,[1] but sometimes a remission clause was put in the submission.[2] A statutory provision generally similar to section 12 (1) of the Arbitration Act, 1902, was introduced in England in 1854, and has since been retained.[3]

[1] *Ex parte Cuerton* (1826) 7 Dow. & Ry K.B. 774.

[2] *Nickalls* v. *Warren* (1844) 6 Q.B. 615; 115 E.R. 231; *Mills* v. *Bowyers' Society* (1856) 3 K. & J. 66; 69 E.R. 1024; *Hodgkinson* v. *Fernie* (1857) 3 C.B. (N.S.) 189, 202; 140 E.R. 712, 717; *Hogge* v. *Burgess* (1858) 3 H. & N. 293, 297; 157 E.R. 482, 484; *In re Keighley, Maxted & Co. and Durant & Co.* [1893] 1 Q.B. 405; *Jurist* (1843) pp. 59, 74.

[3] Common Law Procedure Act 1854 (U.K.), s. 8; Arbitration Act 1889 (U.K.), s. 10 (1); Arbitration Act 1950 (U.K.), s. 22 (1).

9.7.3 Case-law restrictions. At the end of the nineteenth century the Court of Appeal in England asserted a doctrine that there were four grounds, and four grounds only, on which the Court would make an order of remission.[1] The grounds were—

(a) where the award is bad on the face of it, that is, there is a mistake of law or fact apparent on the face of the award;[2]

(b) where there has been misconduct on the part of the arbitrator;

(c) where there has been an admitted mistake, and the arbitrator himself asks that the matter may be remitted;

(d) where additional evidence has been discovered after the making of the award.

These grounds have been used as guides, but the courts have refused to accept the position that the list is exhaustive, and the refusal is clearly right.[3] Although the courts have broken away from the old restrictions in other respects, it nevertheless remains true that where the only ground of attack on an award is that the arbitrator has gone wrong in law, the award will not be remitted unless either the error appears on the face of the award or the arbitrator admits the error and requests that the award be remitted. There is a marked contrast between this situation, where the error goes directly to the rightness of the award, and the wide discretion exercised by the Court where the arbitrator has been guilty of "misconduct". We put the word in quotation marks because in this context it has an extended meaning. The Court may remit for misconduct where the arbitrator has been a party to any procedural irregularity which may have caused an injustice, whether or not the irregularity can be seen to have affected the decision embodied in the award.[4] There is this further oddity, that it rests with the arbitrator whether there can be a remission for error. of law: it rests with him, that is to say, whether he will express his reasons, or any of them, on the face of his award; and it rests with him whether, seeing that he has made an error not appearing on the face of the award, he admits it and asks for remission.

[1] *In re Montgomery, Jones & Co. and Liebenthal & Co.* (1898) 78 T.L.R. 406, 408, 409.

[2] We take the exegesis from *In re Keighley, Maxsted & Co. and Durant & Co.* [1893] 1 Q.B. 405, 410. Cf. *Margulies Bros Ltd* v. *Dafnis Thomaides & Co. (U.K.) Ltd* [1958] 1 W.L.R. 398, 401, 402.

[3] *In re Baxters and The Midland Rly Co.* (1906) 90 L.T. 20, 22, 23; *Universal Cargo Carriers Corpn* v. *Citati* [1957] 1 W.L.R. 979, 986; *Margulies Bros Ltd* v. *Dafnis Thomaides & Co. (U.K.) Ltd* [1958] 1 W.L.R. 398, 400, 401; *Franz Haniel Ag.* v. *Sabre Shipping Corpn* [1962] 1 Lloyd's Rep. 531, 538; *A. C. Robertson Pty Ltd* v. *Costa Brava Investments Pty Ltd* [1963] S.R. 152, 158, 165–167; *Aktiebolaget Legis* v. *V. Berg & Sons Ltd* [1964] 1 Lloyd's Rep. 203, 215.

[4] Russell (1970) pp. 377, 378.

9.7.4 Utility. The statutory power of remission is a useful one, especially where the award would otherwise be invalid or liable to be set aside. The power should be kept.

9.7.5 Grounds for remission. We have recommended that an award should no longer be liable to be set aside for error on its face and that remission, coupled where appropriate by a direction to state a case, should be the avenue of controlling error of law by an arbitrator.[1] This scheme would fail unless there were some modification of the grounds of remission. An award should not be remitted for error of law or fact, whether the error be demonstrated to the Court or merely appears as a serious possibility, unless the error is a serious one. The parties have agreed to arbitration as an alternative to litigation and the agreement should be observed. But an arbitration agreement, fairly understood, has, we believe, implicit limits on the extent to which the parties submit their rights to determination by an arbitrator. Parties ought not to expect that an arbitrator will achieve perfect correctness in fact or in law, but on the other hand "arbitrators are not selected to act despotically or illegally if that can be reasonably prevented".[2] If an arbitrator is asked to assess the property damage arising out of a minor collision between motor cars, and he makes an award for a million dollars, his award ought to be held bad because, apart from any other reason, the award is beyond anything which could possibly be expected. In our working paper we suggested that there should be a case for remission where there were grounds for apprehending that the arbitrator had, in making his award, committed an error of law or fact with the result that his award was so seriously wrong as to be manifestly beyond the contemplation of a reasonable man knowing the relevant facts concerning the arbitration.

[1] Para. 9.6.17 above.

[2] *Carr* v. *Wodonga Shire* (1924) 34 C.L.R. 234, 242.

9.7.6 Remission to new arbitrator. Occasionally a case arises for remission to an arbitrator or arbitrators who did not make the award remitted.[1] Although this has been held possible in England,[2] a contrary view has been expressed in Canada,[3] and the existence of a power to do so is not easy to maintain in the face of the words "reconsideration of the arbitrators" in section 12 (1). In our working paper we said that the legislation should be expressed in a way which was not restrictive on this question.

[1] *Lord* v. *Hawkins* (1857) 2 H. & N. 55; 157 E.R. 23; *Re Fuerst and Stephenson* [1951] 1 Lloyd's Rep. 429; *City of Vancouver* v. *Brandram-Henderson of B.C. Ltd* (1960) 23 D.L.R. (2d) 161, 165, 166; Russell (1970) pp. 347, 348.

[2] *Lord* v. *Hawkins* (1857) 2 H. & N. 55; 157 E.R. 23.

[3] *City of Vancouver* v. *Brandram-Henderson of B.C. Ltd* (1960) 23 D.L.R. (2d) 161.

9.7.7 Exclusion by agreement. It seems from the wording of section 12 (1) that the power to remit applies notwithstanding contrary agreement.[1] In our working paper we said that it was not easy to see why parties should wish to exclude or restrict the power to remit, but (except in the case of a contract of adhesion) there was no reason why the law should prevent them from doing so.

[1] And see *In re Keighley, Maxsted & Co. and Durant Co.* [1893] 1 Q.B. 405, 409.

9.7.8 Time for application. In our working paper we suggested that a time limit be fixed for an application for remission of an award.[1] The time should, we thought, be 28 days as in the case of an application to set aside an award. The Rule Committee has power to do this.[2]

[1] See also para. 9.6.20 above.

[2] Supreme Court Act, 1970, s. 124 (1) (a).

9.7.9 Comment on the working paper. Comment on the proposals in the working paper was generally favourable, but again there was misgiving about the suggested liberty to contract out. A commentator said that there should not be an appeal from the decision of the Court at first instance on an application for remission.

9.7.10 Recent Australian reports. In South Australia there is a recommendation for adoption of the present English legislation.[1] In Queensland there is a recommendation for adoption of the present English legislation, with two additions. First, not only the "matters referred or any of them", but also "any special case" might be remitted. Second, directions may be given with the order of remission.[2] In Western Australia there is a recommendation for adoption of the present English legislation with the second of the Queensland additions but not the first.[3] In Victoria there is a recommendation that, if stated cases are retained, the Queensland additions should be adopted.[4] In the Australian Capital Territory there is a recommendation that the Court be given power to remit an award or part of an award where it appears to the Court that the award or part is or may be "grossly wrong", and "grossly wrong" is defined; further, the Court is not to remit an award for error on the face of the award. Contracting out would be allowed only by agreement made after the difference has arisen.[5]

[1] *South Australian report* (1969) p. 11; draft Bill s. 29 (1).

[2] *Queensland report* (1970) p. 25; draft Bill s. 29 (1). The recommendation has been adopted: Arbitration Act 1973 (Qd.), s. 30 (1).

[3] *Western Australian report* (1974) draft Bill Appendix B s. 29 (1).

[4] *Victorian report* (1974) p. 15.

[5] *Australian Capital Territory report* (1974) pp. 15–17, paras 62–68. The recommendations are based to some extent on the suggestions in our working paper.

9.7.11 Further consideration.

(a) In general we adhere to the suggestions in our working paper. We are, however, impressed by the sound policy of the two additions recommended, and adopted, in Queensland.[1]

(b) The inclusion of "special cases" as a subject for remission removes an unnecessary distinction in the present law, that an award in the form of a case can undoubtedly be remitted under the statutory power to remit, for it is a kind of award, but it is at least doubtful whether a consultative case can be remitted, for it is not an award.[2]

(c) We think that the power to give directions when making an order of remission is a useful one. In fact orders of remission are frequently accompanied by words showing the purpose of the remission.[3] The new words give a statutory basis for a useful and long standing practice.

(d) We have noted above that the Law Reform Commission of the Australian Capital Territory would permit contracting out after the differences have arisen, but not otherwise. Such a contract would be an exempt contract under our scheme. We think that contracting out by other forms of exempt contract should also be allowed.

(e) We think that there should not be an appeal to the Court of Appeal from the decision of the Court at first instance on the application for remission of an award, except by leave of the Court of Appeal.[4]

[1] See para. 9.7.10 above, text to note 2.

[2] Although the statutory power is to remit "the matters referred", it has been held in England in a slightly different context that only an award can be remitted under the statutory power: *Exormisis Shipping S.A.* v. *Oonsoo* [1975] 1 Lloyd's Rep. 432. *Cf.* Russell (1970) p. 258 and the form of order in *Tuta Products Pty Ltd* v. *Hutcherson Bros Pty Ltd* (1972) 46 A.L.J.R. 549, 559. It may not matter much whether a consultative case can be remitted or not, because a like result might often be reached by a suitably framed order to state a further consultative case under the Arbitration Act, 1902, s. 19.

[3] See, for example, *Tuta Products Pty Ltd* v. *Hutcherson Bros Pty Ltd* (1972) 127 C.L.R. 253.

[4] See para. 8.7 (e) above.

9.7.12 Recommendations. We therefore recommend that—

(a) the Supreme Court should have power to remit an award for further consideration in the arbitration, either to the arbitrator who made the award or to another arbitrator, together with directions;[1]

(b) the grounds for remission should be enlarged so that an award may be remitted where it appears to the Court that the award is or may be "grossly wrong";[2]

(c) subject to (b), error on the face of the award should not be a ground for remission;[3]

(d) "grossly wrong" should be defined as meaning, not merely materially erroneous in law or fact, but manifestly beyond the bounds of reasonable adjudication;[4]

(e) contracting out should be allowed by exempt contract, but not otherwise;[5]

(f) the power of remission should apply to consultative cases as well as to awards;[6] and

(g) there should not be an appeal to the Court of Appeal from a decision of the Court at first instance on an application for remission, except by leave of the Court of Appeal.[7]

[1] Draft Bill s. 57 (1).
[2] Draft Bill s. 57 (2).
[3] Draft Bill s. 57 (5).
[4] Draft Bill s. 5 (3).
[5] Draft Bill s. 57 (7).
[6] Draft Bill s. 49 (3).
[7] Draft Bill Sch. 2, amendment to Supreme Court Act, 1970, s. 101 (2).

SECTION 8.—APPEAL FROM AWARD

9.8.1 Commentator's proposal. It has been put to us that stated cases, setting aside awards, and remissions, each with its own technicalities, could be replaced by a simple appeal. The giving of an appeal would cut out a lot of technical uncertainty. It should include power to order a new trial. The parties might agree to exclude the appeal after the difference under arbitration had arisen, but not before.

9.8.2 Comparative law: Canada. It appears that the laws of a number of Canadian Provinces have provided for appeals in arbitration. For example, Ontario has the following provision—

> (1) Where it is agreed by the terms of the submission that there may be an appeal from the award, an appeal lies to a judge in court and from him to the Court of Appeal.
>
> (2) Where by the agreement of the parties or by the provisions of any statute there is an appeal from an award the party taking up the award shall file it with the registrar of the court and shall serve a copy of it and a notice of its filing upon the opposite party.
>
> (3) Notice of appeal may be served within fourteen days returnable within thirty days after service of the copy of the award and notice of filing.
>
> (4) In all cases in which there is a right of appeal, the evidence of the witnesses shall be taken down in longhand and be signed by the witnesses, or be taken in shorthand.
>
> (5) It is not necessary that evidence taken in shorthand be transcribed unless an appeal is taken.
>
> (6) Upon the request of the party appealing, the exhibits shall be transmitted by the arbitrator to the office of the registrar of the court for the purpose of the appeal.
>
> (7) A stenographer employed to take evidence in shorthand shall be sworn to take down and transcribe the evidence faithfully and shall certify to the accuracy of all copies supplied.
>
> (8) Where the arbitrators proceed wholly or partly on a view or any knowledge or skill possessed by themselves or any of them, they shall also put in writing a statement thereof sufficiently full to enable a judgment to be formed of the weight that should be attached thereto.
>
> (9) The court may require explanations or reasons from the arbitrator and may remit the matter or any part thereof to him for further consideration.
>
> (10) The court may extend the time limited by this section either before or after its expiry or may dispense with compliance with the requirements of this section.[1]

It seems that provisions of this kind have been in force for many years and have not been much used.[2]

[1] Arbitrations Act, R.S.O. 1970 c. 25, s. 16.

[2] So we infer from a reading of the Canadian Abridgement, 2nd edn Vol. 2 (1966) pp. 174–203, 207–210.

9.8.3 Consideration. We do not favour the proposal. We have in several places in this report acted on the view that one of the main objectives people have in agreeing to arbitration is early finality, and that another is for determination of the difference outside the courts. We have recommended changes in the law whereby avenues of judicial review are restricted (no setting aside or remission of an award for error on its face; no appeal to the Court of Appeal except by leave) or may be restricted or closed by exempt contract. To permit appeals generally would go quite the other way and we are against it. It is true that the present law, and the changes we recommend, have some technicality. But the technicality is, we believe, inescapable if there are to be limits on the scope of judicial review.

9.8.4 Recommendation. We recommend that there should not be provision for an appeal from an award of an arbitrator.

SECTION 9.—CORRECTION OF AWARD

9.9.1 Present law: correction by the Court. Apart from any statutory restraint, there appears to be no ground of principle why an award, like other private instruments, should not be rectified by a court of equity.[1] However, we have found no reported instance of rectification of an award in England, Canada or Australia. And Russell denies a power in the courts to rectify an award.[2] Whatever the law may be, the equitable remedy of rectification is not used in relation to a defective award. In a sense the Court exercises a limited power to rectify an award where it sets aside part of an award[3] or allows enforcement of part only of an award in the manner of a judgment[4] or, in an action on an award, gives judgment for the plaintiff on part only of the award.[5] The common occasion for thus dealing with part of an award is that the part concerned (or the remainder of the award) is beyond jurisdiction, but part of an award could no doubt be set aside on other grounds, for example, error on the face of the award. This separate treatment of parts of an award is only done when the parts are severable. The Court has amended an award by consent.[6] Except as mentioned in this paragraph, it does not appear that the Court has power to correct an award. The law in England is the same as the law in New South Wales.

[1] There is some discussion of an equitable jurisdiction to rectify in *Anon* (1748) 3 Atk. 644; 26 E.R. 1170; *Mordue* v. *Palmer* (1870) L.R. 6 Ch. 22, 27 and *Vernon* v. *Oliver* (1884) 11 Can. S.C.R. 156. Perhaps the Arbitration Act 1698 precluded rectification of awards to which that Act applied.

[2] Russell (1970) p. 314. The authorities cited (*Hall* v. *Alderson* (1825) 2 Bing. 476; 130 E.R. 390 and *Moore* v. *Butlin* (1837) 7 A. & E. 595; 112 E.R. 594) do no more than support the proposition that in those days a court of common law did not have jurisdiction to rectify an award.

[3] *Nils Heime Akt.* v. *G. Merel & Co. Ltd* [1959] 2 Lloyd's Rep. 292.

[4] *Prestige & Co. Ltd* v. *Brettel* [1938] 4 All E.R. 346.

[5] *Selby* v. *Whitbread & Co.* [1917] 1 K.B. 736, 748.

[6] *Rogers* v. *Dallimore* (1815) 6 Taunt. 111; 128 E.R. 975.

9.9.2 Present law: correction by the arbitrator. Unless otherwise agreed, an arbitrator may correct in an award any clerical mistake or error arising from any accidental slip or omission.[1] There is no limit of time on this power. It is a limited power: it is practically confined to matters of expression.[2] The law in England is the same as the law in New South Wales,[3] except that an arbitrator may, on application to him within fourteen days after publication of the award, amend the award so as to repair an omission to deal with costs.[4]

[1] Arbitration Act, 1902, s. 9 (b). *Cf.* Supreme Court Rules, 1970, Pt 20 r. 10 (1). A provision along these lines is called a "slip rule". Its original was an Order in Chancery of April, 1828, for the correction of decrees and decretal orders. The Order was substantially declaratory of an existing practice: Smith (1844) Vol. 2 p. 15.

[2] *Sutherland & Co.* v. *Hannevig Bros Ltd* [1921] 1 K.B. 336; *Falk* v. *Sernack Manufacturing Co. Pty Ltd* [1965] N.S.W.R. 17; Russell (1970) pp. 371, 372.

[3] Arbitration Act 1950 (U.K.), ss. 17, 22 (1), 23 (2).

[4] Arbitration Act 1950 (U.K.), s. 18 (4).

9.9.3 Comparative law: United States of America. In the United States there is an equitable jurisdiction to reform an award[1] and the Uniform Arbitration Act gives a power to modify or correct an award where there is an evident miscalculation or evident misdescription.[2] There are at common law rules similar to those in England and in New South Wales for severing a good part of an award from a bad part and enforcing the good part:[3] a similar power is given by the Uniform Act.[4] The Court may also make formal corrections.[5] It seems that at common law an arbitrator has a very limited power to correct an award:[6] by the Uniform Act an arbitrator has a power co-extensive with the power of the Court to correct a miscalculation or misdescription and to make formal corrections.[7] The Uniform Act also enables an arbitrator to modify or correct an award for the purpose of clarification.[7]

[1] Sturges (1930) pp. 806, 807. "Rectification" in English law corresponds to "reform" in American law.

[2] Uniform Arbitration Act (U.S.A.), s. 13 (a) (i). The section is expressed in mandatory terms. A miscalculation or misdescription is "evident" if it is admitted by the arbitrator: Sturges (1930) p. 807. But perhaps it could become evident in other ways, as for example by appearing on the face of the award.

[3] Sturges (1930) p. 574.

[4] Uniform Arbitration Act (U.S.A.), s. 13 (a) (2).

[5] Uniform Arbitration Act (U.S.A.), s. 13 (a) (3).

[6] Sturges (1930) pp. 513, 532.

[7] Uniform Arbitration Act (U.S.A.), s. 9.

9.9.4 Working paper proposals: powers of arbitrator.

(a) In our working paper we proposed that, subject to a limit of time, an arbitrator should have power to alter his award in any way. This power should, we said, be exercisable within fourteen days after he makes his award, or afterwards provided a request for reconsideration is made to him within fourteen days after he makes his award.

(b) This proposal was a modification of the ordinary practice of the Court, that a judgment might be altered in any way at any time before the judgment was entered.[1] Properly limited in time, such a power would make unnecessary many applications to the Court for the remission or setting aside of awards.[2] The postponement of finality for fourteen days was a disadvantage, but the postponement was short and should not be really troublesome. The proposal escaped the need for the arid and unreal distinctions occasioned by the slip rule.[3]

(c) The time allowed to an arbitrator need not, we said, be susceptible of extenison by the Court. Cases where a defect was not perceived for a long time could be dealt with by remission.

(d) The means whereby an arbitrator altered his award should, we said, be a further award. This would attract the law relating to awards generally, for example, the rules relating to the setting aside or remission of awards.

(e) The present slip rule,[4] unlimited in time, should be kept for what it is worth.

(f) We said that the proposed power should be susceptible of limitation or exclusion by agreement, but not by contract of adhesion.

(g) Failing acceptance of the proposed general power mentioned above, we would have proposed a power enlarged in a number of specific ways. Within similar limits of time, an arbitrator should have power, in addition to his power under the slip rule,[4] to alter his award for the purpose of—

(i) clarifying the award or otherwise giving effect to his intention at the time of making the award;[5]

(ii) exercising a power relating to the costs of the arbitration, so far as costs not dealt with by the award;[6]

(iii) correcting a defect of form.[7]

[1] Supreme Court Rules, 1970, Pt 40 r. 9 (1), (3) (b); *In re Harrison* [1955] Ch. 260; [1954] 3 W.L.R. 156.

[2] See, for example, *The Mello* (1948) 81 Ll.L.Rep. 230; *Margulies Bros Ltd* v. *Dafnis Thomaides & Co. (U.K.) Ltd* [1958] 1 W.L.R. 398.

[3] Arbitration Act, 1902, s. 9 (b). See for example *Sutherland & Co.* v. *Hannevig Bros Ltd* [1921] 1 K.B. 336. Russell (1970) pp. 371, 372.

[4] Arbitration Act, 1902, s. 9 (b).

[5] *Cf.* Uniform Arbitration Act (U.S.A.), s. 9.

[6] *Cf.* Arbitration Act 1950 (U.K.), s. 18 (4).

[7] *Cf.* Uniform Arbitration Act (U.S.A.), ss. 9, 13 (a) (3).

9.9.5 Working paper proposals: powers of the Court.

(a) In our working paper we proposed that the Court should be given a limited power to alter an award. The power should be directed to specific purposes, expressed in a way which would show that the power did not enable the

Court to alter the merits of the arbitrator's decision nor to decide any difference agreed to be referred to arbitration. The power should, we said, incorporate the slip rule[1] and extend to the correction of defects of form.

(b) We went on to say that a power in the Court could be used in cases where the award would otherwise be set aside or remitted.[2] Expense and time would be saved. Suppose a claimant with an award in his favour applied for leave to enforce the award in the manner of a judgment and that the respondent opposed the giving of leave on the ground of some manifest mistake. Today the award would have to be remitted for correction. When the award was corrected, the application for leave to enforce the award could be renewed. All this would take time and money. The lapse of time might enable the respondent to evade enforcement of the award. Or the arbitrator might be dead or otherwise unavailable. The Court should, we said, have power to correct the award and forthwith give leave to enforce the award as corrected.

(c) We proposed that the powers of the Court to alter an award discussed above should not have a time limit. The corresponding power of the Court to amend a judgment or order[3] had no time limit.[4] The occasion for exercise of the power might arise years after the date of the award, and the Court would be able to impose terms so as not unnecessarily to affect settled expectations.

(d) The Court should, we suggested, have a further power to correct an award as an alternative to setting aside or remission. A power of correction should be available as an alternative to setting aside or remitting an award where the Court saw that the arbitrator had made a material error and saw how the error should be corrected, and, if the error were corrected, there was only one way in which the arbitrator might lawfully have determined the difference.[5] In that case the Court should be empowered to make the relevant correction to the award, so as to save the time and expense involved in going back to the arbitrator or leaving the difference to be resolved by litigation. The power should be available only where it was the duty of the arbitrator to determine the difference by reference to law. Where the error was one of fact, the power should be exercisable only by consent.

(e) We proposed that the powers of the Court might be limited or excluded by contract, except a contract of adhesion.[6]

[1] *Cf.* Arbitration Act, 1902, s. 9 (b).

[2] See *The Mello* (1948) 81 Ll.L.Rep. 230.

[3] Supreme Court Rules, 1970, Pt 20 r. 10 (1).

[4] *Hatton* v. *Harris* [1892] A.C. 547, 564.

[5] For example, by awarding that the respondent had no liability towards the claimant.

[6] Working paper draft Bill s. 51 (3)

9.9.6 Comment on the working paper. There was little comment but, of that comment, most was favourable to our primary proposals.[1] There was criticism of the proposal that contracting out be permitted, except by contract of adhesion.

[1] That is, those in para. 9.9.4 (a)–(f) above.

9.9.7 Recent Australian reports: correction by arbitrator. In South Australia, Queensland and Western Australia there are recommendations for adoption of the present English legislation.[1] In Victoria there already is a provision like the English for correction by the arbitrator, and there is a recommendation for a provision enabling an arbitrator to repair an omission to deal with costs.[2] In the Australian Capital Territory there are recommendations substantially in line with the proposals in our working paper.[3]

[1] *South Australian report* (1969) p. 10 draft Bill ss. 24, 25 (3); *Queensland report* (1970) pp. 23, 24 draft Bill ss. 24, 25 (4) (see now Arbitration Act 1973 (Qd) ss. 25, 26 (4); *Western Australian report* (1974), draft Bill appendix B ss. 23 (d), 24 (4).

[2] *Victorian report* (1974) pp. 12, 13.

[3] *Australian Capital Territory report* (1974) p. 33, paras 129–131.

9.9.8 Recent Australian reports: correction by the Court. In South Australia, Queensland and Western Australia there are recommendations for a grant to the Court of a power to modify or correct an award where—

(a) 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 if it is a matter not affecting the merits of the decision upon the matter submitted;

(c) where the award is imperfect in a matter of form not affecting the merits of the controversy.[1]

The precedent for giving these powers to the Court is America.[2] In Victoria the Chief Justice's Law Reform Committee found little merit in the provision: paragraph (a) appeared to cover cases where the arbitrator had a power of correction, and he was best qualified to make the corection; paragraph (b) posed difficulties of interpretation and application, and some of the cases covered were more properly cases for remission; it was difficult to see what cases would be comprehended by paragraph (c).[3] In the Australian Capital Territory there is a recommendation in line with the proposal in our working paper, save that contracting out would not be allowed.[4]

[1] *South Australian report* (1969) p. 11 draft Bill s. 30; *Queesland report* (1970) p. 25 draft Bill s. 30 (see now Arbitration Act 1973 (Qd.) s. 31); *Western Australian report* (1974) draft Bill appendix B s. 30.

[2] United States Code, article 9, s. 11.

[3] *Victorian report* (1974) p. 15.

[4] *Australian Capital Territory report* (1974) p. 33, paras 129–131.

9.9.9 Recommendation. We recommend that powers to alter an award be given to the Court and to the arbitrator as proposed in our working paper, save that contracting out would be permitted by exempt contract but not otherwise.[1]

[1] Draft Bill ss. 55, 56.

SECTION 10.—INTEREST ON AWARD

9.10.1 Present law. An award for the payment of money *prima facie* does not carry interest for the period after the date of the award until payment. However, if authorized by the arbitration agreement, the arbitrator may award interest for this period,[1] and the Court might allow interest in proceedings for judgment on the award, notwithstanding that there is no award of interest[2] but there appears to be no power in the Court to order payment of interest when giving leave to enforce an award in the manner of a judgment.[3]

[1] *In re Morphett* (1845) 14 L.J.Q.B. 259; *Evans* v. *National Pool Equipment Pty Ltd* [1972] N.S.W.L.R. 410.

[2] Supreme Court Act, 1970, s. 94 (1).

[3] Under the Arbitration Act, 1902, s. 14 (1).

9.10.2 Developments in England. "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".[1] The effect of this provision is that a sum directed to be paid by an award either carries interest as from the date of the award and at the same rate as a judgment debt or, because the arbitrator has otherwise directed, carries no interest at all. The arbitrator cannot direct payment of interest from a different date or at a different rate.[2]

[1] Arbitration Act 1950 (U.K.), s. 20.

[2] *London & Overseas Freighters Ltd* v. *Timber Shipping Co. S.A.* [1972] A.C. 1. It seems that the decision was unexpected: *Jugoslovenska Oceanska Plovidba* v. *Castle Investment Co. Inc.* [1973] 2 Lloyd's Rep. 1, 12.

9.10.3 Working paper proposal. In our working paper we proposed the adoption of the substance of the English arrangement as a neat solution of the problems and complexities of the present law. The proposal attracted no comment.

9.10.4 Recent Australian reports. In South Australia, Queensland, Western Australia and the Australian Capital Territory there are recommendations for adoption of the English provision.[1] In Victoria the Chief Justice's Law Reform Committee did not deal with the matter in its report on arbitration.[2]

[1] *South Australian report* (1969) p. 11 draft Bill s. 27; *Queensland report* (1970) p. 24 draft Bill s. 27 (see now Arbitration Act 1973 (Qd.) s. 28); *Western Australian report* (1974) draft Bill appendix B s. 26; *Australian Capital Territory report* (1974) p. 32 pars 123, 124.

[2] *Victorian report* (1974).

9.10.5 Further consideration. When writing our working paper we did so on the assumption that under the English provision the arbitrator might direct that interest be paid from a date after the date of the award or that the rate of interest be more or less than the rate payable on a judgment debt. This assumption has turned out to be unfounded.[1] We think that the law should be what we assumed the law of England to be. The parties should be competent to exclude this power by agreement.

[1] See par. 9.10.2 above.

9.10.6 Recommendation. We recommend that—

(a) where an arbitrator makes an award for the payment of money, he should have power to direct by the award that the money shall not carry interest or shall carry interest (i) from the date of the award or a later date and (ii) at such rate as he may direct;[1]

(b) subject to (a), money payable under an award should carry interest as does money payable under a judgment;[2]

and

(c) (a) and (b) should have effect except so far as otherwise agreed.[3]

[1] Draft Bill s. 60 (1).
[2] Draft Bill s. 60 (2).
[3] Draft Bill s. 60 (4).

SECTION 11.—ENFORCEMENT OF AWARD

9.11.1 Present law in general. There are four ways of enforcing an award. In order of their times of origin, they are as follows. In the first place, an action can be brought to enforce the promise in the arbitration agreement to perform the award.[1] In the second place, an application may be made for attachment of the party in default. In the third place, where the award directs payment of a sum of money, an application can be made for an order for payment, and that order can be enforced as a judgment. In the fourth place, the award can, by leave of the Court, be enforced in the same manner as a judgment or order of the Court to the same effect. We deal with each of these ways in the following paragraphs.

[1] There was another way, now obsolete: a bond might be taken, conditioned for forfeiture on failure to perform the award, and an action brought on the bond.

9.11.2 Action on the award. An arbitration agreement has a promise in it, express or implied, to perform the award.[1] Depending on the nature of the award and the breach (or threatened breach), the promise may be enforced by action for debt or damages, for specific performance or for injunction. An action on the award is the only means of enforcing an award where the arbitration agreement is not in writing. It is the appropriate means of enforcement of an award under an arbitration agreement in writing, where there is a question of substance touching the validity of the award.[2] The defences to such an action do not include all the grounds on which an award may be set aside: misconduct of the arbitrator, while a ground for setting the award aside, is not in itself a defence to an action on the award.[3] We do not recommend any change in the law relating to an action on an award.

[1] *Bremer Oeltransport G.m.b.H* v. *Drewry* [1933] 1 K.B. 753.

[2] *In re Boks & Co. and Peters, Rushton & Co. Ltd* [1919] 1 K.B. 491.

[3] *Thorburn* v. *Barnes* (1867) L.R. 2 C.P. 384.

9.11.3 Attachment for non-performance. Where a submission to arbitration had been made a rule or order of court under the Acts in force in England before 1889,[1] disobedience to an award on the submission was punishable as for contempt[2] and, in particular, was punishable by attachment. A submission now has effect as if made an order of court[3] and a person disobeying an award is thus liable to attachment.[4] The practice relating to attachment became exceedingly technical,[5] and this means of enforcement has fallen into disuse. Cases for punishment as for contempt can be dealt with by obtaining leave to enforce the award in the manner of a judgment or order of the Court.[6] There is no need to retain this means of enforcement. It would disappear in consequence of our recommendation that a submission no longer have effect as if made an order of the Court.[7]

[1] Arbitration Act 1698 (U.K.), s. 1; Commonwealth Law Procedure Act 1854 (U.K.), s. 17.

[2] Arbitration Act 1698 (U.K.), s. 1.

[3] Arbitration Act, 1902, s. 4.

[4] Russell (1935) p. 257. *Albeck* v. *A.B.Y.-Cecil Manufacturing Co. Pty Ltd* [1965] V.R. 342, 358. In New South Wales non-compliance with an award for the payment of money cannot be treated as contempt of court: Arbitration Act, 1902, s. 14 (2).

[5] Russell (1935) pp. 257–272.

[6] Arbitration Act, 1902, s. 14 (1).

[7] Para. 3.10 above.

9.11.4 Order for payment of sum awarded. Where a submission has been made a rule or order of court, or has effect as if so made, and an award is made directing the payment of money, the Court has an inherent jurisdiction to make an order for payment in accordance with the award.[1] Such an order has the effect of a judgment at law,[2] and therefore supports the ordinary processes of execution. This means of enforcement also is superseded by the procedure for enforcing the

award, by leave of the Court, in the manner of a judgment or order of the Court.[3] It would disappear on removal of the provision that a submission shall have effect as if made an order of the Court.[4]

[1] Russell (1900) p. 339. *Albeck* v. *A.B.Y.-Cecil Manufacturing Co. Pty Ltd* [1965] V.R. 342, 358, 359.

[2] Supreme Court Act, 1970, s. 96 (1).

[3] Arbitration Act, 1902, s. 14 (1). This means of enforcement has occasionally been useful in overcoming formal defects in an award: see for example *Ex parte Greville* (1868) 8 S.C.R. 27. But the draft section 61 (2) would be an adequate replacement.

[4] See para. 3.10 above.

9.11.5 Enforcement in the manner of a judgment. This is the most important means of enforcing an award. An award on a submission may, by leave of the Court, be enforced in the same manner as a judgment or order of the Court to the same effect,[1] but non-compliance with an award for the payment of money is not contempt of court.[2] This section does not apply where the arbitration agreement is not in writing,[3] and it is not applicable to some awards because of their nature: for example, an award merely assessing a money sum but not creating a liability to pay the sum assessed.[4] Further, it has been held in England that the Court will not give leave under the section if there is a substantial question touching the validity of the award: the claimant is left to bring an action on the award.[5] The section only enables the claimant to enforce the award as if it were a judgment: it does not make the award a judgment.[6] Therefore leave under the section would not enable the award to be enforced under the Service and Execution of Process Act 1901–1968[7] nor, presumably, to be enforced abroad under the law of another country for the enforcement of foreign judgments.[8] But where leave is given to enforce an award for the payment of money the award has effect as a final order so as to ground a bankruptcy notice.[9] Troubles occasionally arise because an award is not expressed with the precision, unambiguity and certainty appropriate to a judgment or order of the Court.[10]

[1] Arbitration Act, 1902, s. 14 (1).

[2] Arbitration Act, 1902, s. 14 (2).

[3] See the definition of "submission": Arbitration Act, 1902, s. 3.

[4] *In re Willesden Local Board and Wright* [1896] 2 Q.B. 412.

[5] *In re Boks & Co. and Peters, Rushton & Co. Ltd* [1919] 1 K.B. 491. This practice must rest on the fact that the Court has a discretion to give or not to give leave. Where, in proceedings on an application for leave, the procedure is unfit for determining the validity of the award, that unfitness weighs against dealing with the question in those proceedings. The matter is therefore one of court procedure, not of the law or arbitration. Compare *Modern Building Wales Ltd* v. *Limmer & Trinidad Co. Ltd* [1975] 1 W.L.R. 1281.

[6] *In re a Bankruptcy Notice* [1907] 1 K.B. 478, 482.

[7] See the Service and Execution of Process Act 1901, s. 3 (h).

[8] Foreign law may equate to a judgment an award enforceable in the manner of a judgment. See for example the Administration of Justice Act 1920 (U.K.), s. 12 (1). The 1920 Act extends to New South Wales. Cf. the Administration of Justice Act, 1924, s. 3 (1).

[9] Bankruptcy Act 1966, s. 40 (3) (a). For the former law see *Re Stanton Hayek* (1957) 19 A.B.C. 1.

[10] *Grech* v. *Board of Trade* (1923) 130 L.T. 15; *Margulies Bros Ltd* v. *Dafnis Thomaides & Co. (U.K.) Ltd* [1958] 1 W.L.R. 398.

9.11.6 Developments in England. In England, where leave has been given to enforce an award in the manner of a judgment or order, judgment may be entered in terms of the award.[1] This arrangement is an adoption of a recommendation of the MacKinnon Committee, for the reasons that such a judgment would support a bankruptcy notice and may be enforceable in some other countries more readily than a mere award.[2] The fact that an award for the payment of money is for payment in a foreign currency is not an obstacle to the grant of leave: the foreign money is converted into sterling at the rate of exchange at the date of the award and execution may be had for the sterling sum.[3]

[1] Arbitration Act 1950 (U.K.), s. 26. Entry of judgment is a ministerial act, not requiring an application to a Judge or Master: Supreme Court Practice, 1976, para. 3787.

[2] *MacKinnon Report* (1927), para. 17. Judgment on the award is not necessary in Australia for the issue of a bankruptcy notice: Bankruptcy Act 1966, s. 40 (3) (a).

[3] *Jugoslovenska Oceanska Plovidba* v. *Castle Investment Co. Inc.* [1974] Q.B. 292. The case turned in part on a statutory context absent in New South Wales.

9.11.7 Comparative law: United States of America. Under the Uniform Arbitration Act, upon application by a party, the Court must confirm the award unless, within limits of time, grounds are urged for vacating[1] or modifying or correcting the award[2] Upon the granting of an order confirming, modifying or correcting an award, judgment or decree must be entered in conformity with the award, and the judgment or decree may be enforced as any other judgment or decree.[3] Apart from the modification or correction of an award, which we discuss elsewhere,[4] the significant differences between this and the present English law are, first, that under the United States Act the Court has no discretion to refuse confirmation (and hence judgment) and, second, that under the United States Act there is not a possibility of retaining the award as an award yet having it enforceable in the manner of a judgment.

[1] Vacating an award, in United States usage, is similar to setting aside an award in English and Australian usage.

[2] Uniform Arbitration Act (U.S.A.), s. 11.

[3] Uniform Arbitration Act (U.S.A.), s. 14.

[4] Paras 9.9.1–9 above.

9.11.8 Working paper proposals.

(a) In the first place, we suggested that a new Act should retain the present arrangement whereby an award might, by leave of the Court, be enforced in the manner of a judgment or order of the Court.[1] Not only was the arrangement a useful one for enforcement in New South Wales by the ordinary means of enforcement of judgments and orders, but legislation of the Commonwealth and of other countries operated by reference to the existence of such an arrangement.[2]

(b) In the second place we suggested in our working paper that a new Act should drop the restriction that non-compliance with an award for the payment of money shall not be contempt of court.[3] We suggested this because the general restriction on attachment for judgment debts was, we thought, appropriate to awards,[4] and because the restriction might put in doubt the applicability of the laws of other legislatures relating to bankruptcy[5] and the enforcement of awards.[6]

(c) In the third place, we suggested in our working paper that the Court should be given power to make orders necessary or convenient for carrying the award into effect. We made this suggestion on the view that there was a rigidity in the present provision which might sometimes be a nuisance. The framing of an effective judgment or order called for skill and it was likely that occasionally the precise terms of an award would not be adequate for the Court's processes of execution and other enforcement.[7] The power suggested would supplement the power to modify an award which we discuss elsewhere.[8]

(d) In the fourth place, we suggested in our working paper that the English arrangement for entry of judgment on the award[9] ought not to be adopted. We saw the English arrangement as merely procedural: a summary means of getting judgment in a case where otherwise an action would be necessary. We thought that there was sufficient power in the Rule Committee of the Supreme Court to provide a simple and quick procedure for proceedings for judgment on the award, for example, proceedings by summons and motion for summary judgment.[10] To treat the matter as one of procedure might obviate some incidental problems. For example, judgment in an action on an award no doubt effected a merger of the award:[11] probably judgment entered in England under the statutory power did likewise, but it was better not to leave room for such a question.

[1] Arbitration Act, 1902, s. 14 (1).

[2] Bankruptcy Act 1966, s. 40 (3) (a); Administration of Justice Act 1920 (U.K.), s. 12 (1). The Act of 1920 has counterparts in many countries now or formerly in the British Commonwealth of Nations. See also the definition of "judgment" in the Foreign Judgments (Reciprocal Enforcement) Act, 1973, s. 4 (1).

[3] Arbitration Act, 1902, s. 14 (2).

[4] Supreme Court Act, 1970, s. 98.

[5] Bankruptcy Act 1966, s. 40 (3) (a).

[6] See for example the Administration of Justice Act 1920 (U.K.), s. 12 (1); Administration of Justice Act 1956 (U.K.), s. 51 (a).

[7] See also footnote 3 to para. 9.11.4 above.

[8] Paras 9.9.1–9 above.

[9] Arbitration Act 1950 (U.K.), s. 26.

[10] See the Supreme Court Rules, 1970, Pts 4, 13.

[11] *Cf.* Domke (1968), § 39.03.

9.11.9 Comment on the working paper: single procedure. One commentator said that, rather than have numerous common law and statutory provisions each dealing to some extent with the problem of enforcement, an Arbitration Act should provide a simple exhaustive procedure whereby an award might speedily receive the sanction of the State in the event of non-compliance. Enforcement procedures should, he said, resemble those of the United States,[1] with the exception that the award should remain an award but be enforceable in the same manner as a judgment. A comparable policy may be seen in the Foreign Judgments (Reciprocal Enforcement) Act, 1973.[2] We are, however, inclined to adhere generally to the proposals in the working paper. Under these, the only means of enforcing an award would be an action on the award, enforcement by leave in the manner of a judgment and obtaining a special order for carrying the award into effect followed by enforcement of that order. Of these by far the most common would be the second. The others would have occasional utility and should, we think, be available for special cases.

[1] By the Uniform Arbitration Act, ss. 11, 14, upon application by a party, the Court shall confirm the award (unless grounds are urged for vacating, modifying or correcting the award) and judgment or decree shall be entered in conformity with the award.

[2] Para. 13.2.5 below. See especially s. 10.

9.11.10 Comment on the working paper: enforcement on registration. A commentator said that an award for the payment of money should be as readily enforceable as a judgment and that a simple procedure should be introduced to enable registration of an award as a judgment. In our view there is this important difference between an award and a judgment, that a judgment is the product of carefully thought out court procedures designed to lead to a just result, with numerous opportunities for appeal and review, and administered by judges and skilled and experienced professional officers, but an award may be the product of the most informal procedures conducted by an arbitrator with neither skill nor experience. The means for enforcement of a judgment can be drastic. We think that a judicial order for enforcement of an award should precede the use of these means. Whether the order for enforcement should be made by a judge, by a master, or by a registrar or other officer of the Court, and whether the procedure should be elaborate or simple, are matters, not for an Arbitration Act, but for the Rule Committee of the Court.

9.11.11 Recent Australian reports: general. In South Australia, Queensland, Western Australia and Victoria there are recommendations for adoption of the English provisions.[1] In the Australian Capital Territory there are recommendations generally in line with the proposals in our working paper. The recommendations would, however, adopt the English provision for entry of judgment on the award, and would forbid contracting out except after the dispute has arisen.[2]

[1] *South Australian report* (1969) p. 13 draft Bill s. 34; *Queensland report* (1970) p. 26 draft Bill s. 34 (see now Arbitration Act 1973 (Qd) s. 35); *Western Australian report* (1974) draft Bill appendix B, s. 27; *Victorian report* (1974) p. 17.

[2] *Australian Capital Territory report* (1974) pp. 33, 34, paras 132–136.

9.11.12 South Australian report: enforcement against the Crown. In South Australia there is a recommendation for an enactment that an award against the Crown or an instrumentality of the Crown be paid and satisfied as provided in respect of judgments by the Supreme Court Act, 1935–1967, and that revenue be appropriated accordingly.[1]

[1] *South Australian report* (1969) p. 5, draft Bill s. 5 (2).

9.11.13 Further consideration.

(a) We adhere generally to the proposals in our working paper, save that we think that there should be a provision saying that an award for the payment of foreign money should be enforceable under the Act, and that contracting out should be allowed by exempt contract but not otherwise.[1]

(b) We do not think it necessary to legislate for the enforcement of a money award against the Crown. Such an award should of course be enforceable, but an effective means of enforcement is required rather on grounds of constitutional propriety than on grounds of a foreseeable need for its use. There is, however, an effective means already available, that is, proceedings against the Crown on the award.[2]

[1] Draft Bill s. 61.

[2] Claims against the Government and Crown Suits Act, 1912.

9.11.14 Recommendations. We recommend that—

(a) an award should, by leave of the Court, be enforceable in the manner of a judgment or order of the Court to the same effect;[1]

(b) the Court should have power to make orders necessary or convenient for carrying an award into effect;[2]

(c) (a) and (b) should apply except so far as otherwise agreed by exempt contract;[3]

(d) the foregoing should apply to a money award whether or not the money is Australian money;[4]

(e) the cause of action on an award should not be abolished;

(f) special provision ought not to be made for the enforcement of an award against the Crown.

[1] Draft Bill s. 61 (1).

[2] Draft Bill s. 61 (2).

[3] Draft Bill s. 61 (3).

[4] Draft Bill s. 61 (4) (c).

PART 10.—JUDGE–ARBITRATOR

10.1 Developments in England. Provision has been made for a Judge of the Commercial Court to act as arbitrator or umpire.[1] The change is an adoption of the substance of a recommendation of the Commercial Court Users' Conference made in 1962. The relevant passage in the report[2] is as follows—

> One of the important reforms of the practice of the Commercial Court, upon which we are all agreed, is that the Commercial Judge should have power, upon the application of both parties, to sit in private as an Arbitrator. We are of opinion that this practice would greatly enhance the attraction of the Court to the commercial community, as it would meet the objection of that community, to which we have already referred, to the publicity and formality of proceedings in open Court. We think that the attraction might well extend to foreign mercantile interests who trade with this country or who do business on the London Markets.
>
> It may be that such a power already exists, and we are advised that there is a precedent for a High Court Judge sitting in this capacity in the "Admiralty Short Cause Rules" originally framed in 1908 and amended in 1931. Under Rule 10 a Judge may hear and determine matters agreed to be referred to him by the parties. We urge that, if it be necessary so to do, the Supreme Court of Judicature (Consolidation) Act, 1925, and the Rules of the Supreme Court be suitably amended so as to enable commercial cases to be so referred.
>
> We are also advised that under the Restrictive Practices Court Rules, 1957, Rule 60, the Court has power to direct that the hearing, or part of it, shall take place in private. We understand that in a recent case the Court has exercised this power. We are, therefore, encouraged to view our recommendation that commercial cases should be capable of being tried without publicity and with the Commercial Judge acting in the capacity of an Arbitrator as being neither revolutionary nor without precedent.
>
> We think that the Judge's award in such cases should not be published without the consent of the parties; but that, if it were stated in the form of a Special Case on a point of law, there should be an appeal direct to the Court of Appeal. We are advised that this would entail an amendment of the Supreme Court of Judicature (Consolidation) Act, 1925, so that the Judge's award should be deemed to be a 'judgment or order of the High Court' within section 27 (1) of that Act.
>
> We are also advised that the Judge's award would be enforceable in the many countries which are parties to the Geneva Convention, 1927; this advantage over a High Court judgment is a matter to which we attach very great importance.

[1] Administration of Justice Act 1970, s. 4, Sch. 3. See Appendix E.

[2] *Commercial Court Users' Conference Report* (1962) pp. 8, 9.

10.2 Working paper discussion. We said that we understood that little use had yet been made of the legislation for a judge-arbitrator.[1] It might be that the commercial community in England was not yet familiar with it nor aware of its advantages. A leading advantage was that a stated case went first to the Court of Appeal, not to a single judge, so that one appellate step was cut out. This advantage had, we said, less weight in New South Wales than in England, because in New South Wales the Court in a Division might order that proceedings on a stated case be removed into the Court of Appeal.[2] There remained, however, the advantages of skilled legal adjudication, privacy, and easy enforceability of an award abroad (as compared with a judgment).

And there was the advantage that the powers of the Court in aid of an arbitration (for example, to make orders for discovery) could be exercised by the judge-arbitrator: this should save time and expense. We did not make any suggestion in our working paper for adoption of the scheme, but we invited comment on it.

[1] See the article in the *Times*, 14th May, 1973. The article said that not one judge had yet been offered an appointment as an arbitrator, but we understood at the time of writing our working paper that there had been a few cases in which a judge had been asked to accept an appointment and that an appointmnt had been accepted in one case.

[2] Supreme Court Act, 1970, s. 51 (5).

10.3 Comment on the working paper. Commentators in England thought that the scheme had promise, but experience so far was small. Commentators in Australia did not favour adoption of the scheme.

10.4 Recent Australian reports. None of the recent reports by Australian law reform agencies gives consideration to the scheme.

10.5 Recommendation. We think that the development and utility of the scheme in England should be watched, but recommend that it should not at present be adopted here.

PART 11.—REFERENCE BY THE COURT

11.1 Present law: inherent jurisdiction. In proceedings in the ordinary jurisdiction of the Court at law and in equity, the Court has an inherent jurisdiction, by consent, to refer matters to arbitration. The matters referred may be those in difference in the proceedings, or all matters in difference between the parties. The parties have considerable freedom of choice on the terms of the reference, but (before the procedure fell into disuse) the usual terms enabled the arbitrator to direct entry of judgment for either party and other usual terms were substantially similar to those of the Arbitration Act, 1902.[1] A reference by consent under the inherent jurisdiction has a dual character: it is based both on the agreement of the parties and on the order of the Court.[2] Being so based, such a reference involves a submission within the meaning of the Arbitration Act, 1902, and the provisions of that Act apply to the reference. This procedure has no significant advantages over an ordinary submission by consent out of court. It has fallen into disuse. There is no need to legislate in support of it or to abolish it.

[1] Russell (1900) pp. 53–55.

[2] Russell (1923) pp. 515, 516. It seems also that the Arbitration Act, 1902, s. 17, is wide enough to apply to such a reference (as well as to a reference for trial under s. 15): *cf. Darlington Wagon Co. Ltd* v. *Harding* [1891] 1 Q.B. 245, 249.

11.2 Present law: reference for trial. In civil proceedings the Court may, in specified cases, refer the proceedings or any question of fact in the proceedings for trial before an arbitrator agreed on by the parties or before a referee appointed by the Court.[1] In some cases, though not in all, the reference cannot be made except by consent.[2] The report or award of the referee or arbitrator is equivalent to the verdict of a jury.[3] The referee or arbitrator is deemed to be an officer of the Court,[4] the proceedings may be regulated by rule of court or by direction of the Court,[5] the remuneration of the referee or arbitrator is to be fixed by the Court,[6] and the Court has the same powers as it has under an ordinary submission to arbitration.[7] These provisions have occasional use but, we believe, are rarely used except by consent of the parties.

[1] Arbitration Act, 1902, s. 15. The only difference drawn by the Act between a reference under s. 15 to an arbitrator and one to a referee is that the parties must agree on an arbitrator, but the referee is appointed by the Court. Thus the Court can refer some cases for trial to a referee (but not to an arbitrator) against the will of the parties.

[2] Arbitration Act, 1902, s. 15.

[3] Arbitration Act, 1902, s. 16 (2).

[4] Arbitration Act, 1902, s. 16 (1).

[5] Arbitration Act, 1902, s. 16 (1).

[6] Arbitration Act, 1902, s. 16 (3).

[7] Arbitration Act, 1902, s. 17.

11.3 Reference for trial in England. In England the High Court, in the Chancery Division or the Queen's Bench Division, may refer for trial the whole of, or any question of fact in, any proceedings other than criminal proceedings by the Crown, but subject to any right to trial with a jury. The reference can be made to an official referee, with or without assessors, or, with the consent of the parties, to a special referee.[1]

[1] Rules of the Supreme Court, 1965 (U.K.) O.36, rr. 1, 8.

11.4 Official referee in England. The office of official referee was constituted in 1875.[1] By a recent Act, no more appointments of official referees are to be made, but their functions are to be discharged by certain of the circuit judges.[2] A circuit judge is a full time professional judge ranking next after a puisne judge of the High Court.[3] It seems that a circuit judge acting as an official referee is still spoken of as an official referee.

[1] Supreme Court of Judicature Act 1873 (U.K.), s. 83. For a history of the office and a description of the powers and functions of an official referee in 1940 see Burrows (1940). See also the *Beeching Report* (1969) pp. 132, 133, paras 419–221, and the *Supreme Court Practice* 1976 pp. 555–562 (Order 36).

[2] Court Act 1971 (U.K.), s. 25 (1), (2).

[3] Cretney (1971) p. 716.

11.5 Special referee in England. Any person may, it seems, be chosen and appointed as a special referee. A special referee has powers like those of an official referee, but he may not make an order of committal and he is not given powers with respect to claims by a party against a stranger.[1]

[1] Rule of the Supreme Court 1965 (U.K.), O. 36, r. 8 (3).

11.6 Working paper proposals. We suggested in our working paper that the provisions for reference by the Court should be dropped. If the parties consented to arbitration, there was adequate provision elsewhere in the Act and under the inherent jurisdiction. If the parties did not consent, it was, we said, contrary to the ordinary arrangements for the administration of justice that parties to litigation should be called upon to pay the remuneration of the tribunal. If cases arose which were unfit for determination by a judge, there were means whereby matters might be referred to a Master or to a Registrar or other officer of the Court.[1]

[1] Supreme Court Act, 1970, ss. 118, 121, 124 (1) (e); Supreme Court Rules, 1970, Pt 60. Note also the Supreme Court Rules, 1970. Pt 39,, relating to court experts.

11.7 Comment on the working paper.

(a) There was some support for our proposal, but the weight of opinion favoured retention of the present arrangements. One commentator said that it would be open to the Court to compile lists of special referees, expert in particular fields. Another conceded the possibility of referring matters to a Master or to a Registrar or other officer of the Court, but said that this would not meet the need for expert adjudication.

(b) A third commentator had as a first preference the dropping of the present scheme, coupled either with the establishment of an office of official referee (that is, a permanent salaried judicial officer) and appointment to the office of one or more specialists in particular fields such as building disputes and shipping disputes, or with the appointment of one or more Masters to deal with litigation in particular fields such as the above. As a second preference, this commentator would favour a modification of the present scheme, whereby the present cases for reference without consent would be dropped, and in their place there would be a new formulation. The new formulation was not put to us as a formal piece of legislative expression, but it would enable the Court to make a compulsory reference in proceedings arising out of contract, where any question arose of quality or quantity or value of building or other work or of goods. He envisaged that such a power would call for some judicial restraint in its exercise. The latter scheme might, he said, be supplemented by the establishment of a panel of experts in various fields willing to act as special referees and by an arrangement under which the remuneration and expenses of a special referee under a compulsory reference might be met out of public funds.

11.8 Recent Australian reports.

(a) We must be cautious in our treatment of the recent Australian reports on arbitration, because the matter of references by the Court stands on the border between the law of arbitration and the law of the jurisdiction and procedure of the courts. The recent reports are made against a background of an assumed knowledge in the reader of the jurisdictions and procedures of the courts in the States concerned. We do not have that knowledge.

(b) In South Australia there is a recommendation for new provisions in terms similar to existing legislation. Under the recommendations there would be a power in the Court to refer for trial the whole of, or any question of fact in, proceedings in the Court, except criminal proceedings. The reference could be made in like cases to those in which a reference can be made in New South Wales. The reference could be made to a special referee agreed on by the parties or to an arbitrator so agreed, or to an officer of the Court.[1]

(c) In Victoria under the present law there is a power in the Court to refer for trial the whole of, or any question of fact in, proceedings in the Court, except criminal proceedings. The reference can be made in like cases to those in which one may be made in New South Wales. The reference can be made to a special referee agreed on by the parties or to an arbitrator so agreed on, without such agreement, to a special referee or officer of the Court.[2] The Chief Justice's Law Reform Committee saw utility in these provisions and recommended that they be retained. The report added that there was room for statutory provisions for the appointment of an official referee to whom parties to a dispute might refer their dispute or to whom the Court might refer a dispute when the parties could not agree on an arbitrator.[3]

(d) These matters were not considered in the *Queensland report* (1970), *the Western Australian report* (1974) or in the *Australian Capital Territory report* (1974).

[1] *South Australian report* (1969) pp. 14 (draft Bill s. 39), 20.

[2] Arbitration Act 1958 s. 14. See also s. 15.

[3] *Victorian report* (1974) pp. 2, 3, 24.

11.9 Further consideration.

(a) We find this question difficult, but have come to the view that the substance of the present law should be maintained.

(b) In favour of dropping the provisions for compulsory reference, we repeat what we said in our working paper that it is contrary to the ordinary arrangements for the administration of justice that parties to litigation should, without their consent, be called upon to pay the remuneration of the tribunal. We add that it is against general principles of justice that a person should be bound, without his consent, by the adjudication of another person who is not part of the established judicial organization of the State. A party so bound may believe, on good grounds or not, that the referee is dishonest or incompetent or both.

(c) In favour of keeping the provisions for compulsory reference, it may be urged that technical questions are better decided by persons expert in the technical matters involved. It may further be urged that the services of a judge, skilled as he is in matters of law and in the evaluation of evidence on matters of common understanding and perhaps in some technical extra-legal fields, are best used if directed to those matters in which he is skilled: if the judge is skilled in matters of accountancy it is fitting that he use that skill in cases before him, but if his skills lie elsewhere, better and swifter justice may be done by referring a case of complicated accounts to an expert accountant for decision.

(d) We give weight to the views expressed by the Chief Justice's Law Reform Committee in Victoria and by the commentators on our working paper. We note also that the present provisions for compulsory reference have been in force for many years but have not given rise to noticeable dissatisfaction: this may, however, be an indication of judicial restraint in exercise of the powers, rather than of justice in their conception.

(e) We have remarked already on the circumstance that the question of compulsory reference stands on the border between the law of arbitration and the law of the jurisdiction and procedures of the courts. We think that there is a case to be examined, whether Masters, or official referees, of the Supreme Court with special technical skills should be appointed, and whether other arrangements should be made for the determination of technical or other matters unfit for determination by the ordinary procedures of the Court. But the present report is not the occasion for this.

(f) We have, as we have said, come to the view that the present arrangements should be continued. We do not at present recommend any change in the cases in which a compulsory reference can be made. To do that would require consultation on matters not raised by our working paper and may embarrass future consideration of compulsory references in the context of court procedures generally.

(g) To apply the general law of arbitration, as embodied in the Bill we recommend, to compulsory references would go far beyond continuing the present arrangements. In particular, we have recommended that arbitrators should not be bound by the laws of evidence[1] and that an award should not be liable to be remitted or set aside for error on the face of the award.[2] We think that these changes are justified in a reference to arbitration by consent, but we think that a compulsory reference should be subject to the laws of evidence and should not be relieved from the present consequences of an error of law.

[1] Para. 6.8.19 (a) above.
[2] Paras 9.6.24 (a), 9.7.12 (c) above.

11.10 Recommendations. We recommend that—

(a) the substance of the present provisions for reference by the Court should be retained;[1] and

(b) in a compulsory reference, the referee should be bound by the laws of evidence and his award should be liable to be set aside or remitted for error on the face of the award.[2]

[1] Draft Bill ss. 62, 63.
[2] Draft Bill s. 63 (10).

PART 12.—DISTRICT COURT

12.1 Present law. The District Court does not have a general jurisdiction in relation to arbitration. It has jurisdiction under the Agricultural Holdings Act, 1941, to give an opinion on a consultative case, to set aside an award for misconduct or improper procurement, and in relation to costs, in an arbitration under that Act.[1] The District Court has jurisdiction as an arbitrator under a statutory reference of some disputed claims for compensation under the Local Government Act, 1919.[2] The District Court may refer an action in the Court to arbitration, but only with the consent of all parties.[3] Save as mentioned above, the District Court is not concerned with arbitrations.

[1] Agricultural Holdings Act, 1941, s. 17 (1), (4), Sch. 2, paras 10, 15, 16.
[2] Local Government Act, 1919, s. 581.
[3] District Court Act, 1973, s. 63.

12.2 Working paper generally. In our working paper we did not deal generally with the role of the District Court in arbitrations. We raised the question whether it would be useful to authorize the District Court to issue subpoenas for the purposes of arbitrations.[1] We referred to the power of the District Court to refer matters to arbitration and suggested that there be no change.[2]

[1] Working paper para. 184.
[2] Working paper para. 289.

12.3 Working paper: Agricultural Holdings Act, 1941. The Agricultural Holdings Act, 1941, has a set of provisions governing arbitrations under the Act.[1] These provisions largely displace the Arbitration Act, 1902.[2] Under the law as it stands there is an inconvenient division of jurisdiction to set aside an award made under the Agricultural Holdings Act: in cases of misconduct or improper procurement the District Court has jurisdiction, but in other cases, where there is error on the face of the award, the Supreme Court has exclusive jurisdiction.[3] In our working paper we suggested that the Agricultural Holdings Act should be brought into line with a new Arbitration Act, subject to any matters of policy special to the law of agricultural holdings.[4] One such matter, it seemed, was that judicial supervision of arbitrators should, at first instance at least, be by the District Court, not by the Supreme Court. We did not make specific suggestions for amendment of the Agricultural Holdings Act, but we invited comment.

[1] Agricultural Holdings Act, 1941, ss. 17–20, Sch. 2.

[2] Presumably the Arbitration Act, 1902, applies except in so far as that Act is inconsistent with the Agricultural Holdings Act, 1941: Arbitration Act, 1902, s. 27. Contrast the position in England, where it is provided that the Arbitration Act shall not apply to an arbitration under the Agricultural Holdings Act 1948 (U.K.): s. 77 (1).

[3] *In re Poyser and Mills* [1964] 2 Q.B. 467. The division of jurisdiction would disappear if our recommendation in para. 9.6.24 is adopted, that the Supreme Court no longer have power to set aside an award for error on its face.

[4] Working paper para. 290.

12.4 Working paper: Local Government Act, 1919. The Local Government Act, 1919, provides for the arbitration of some claims for compensation under that Act. Failing other agreement to arbitrate, the claim may be brought before a District Court Judge as arbitrator.[1] In our working paper we said that amendment of the provision as an incident of a new Arbitration Bill raises problems of accommodation to the District Court Act, 1973.[2] Rather than formulate an amendment to preserve as nearly as might be the present law, which might be out of date anyway, we merely note that some change ought to be made.

[1] Local Government Act, 1919, s. 581. See *Rose* v. *Commissioner for Main Roads* (1936) 12 L.G.R. 174; *Brighton* v. *Dungog Municipal Council* (1943) 15 L.G.R. 74.

[2] Working paper para. 291.

12.5 Comment on the working paper. An informed commentator gave us some useful views on matters raised in the working paper. The Agricultural Holdings Act gave little business to the District Court. No record was found of an arbitration by a District Court judge under the Local Government Act in recent years. Other commentators said that, outside the Sydney area, the District Court should have powers like those of the Supreme Court in relation to arbitrations generally, and that powers of compulsory reference to arbitration should be conferred on the District Court.

12.6 General jurisdiction. We have considered whether we should recommend that, within the money limits of its general jurisdiction, the District Court should have a general jurisdiction like that of the Supreme Court in relation to arbitrations on money claims. The idea had some support amongst commentators on the working paper and we can see that its adoption might sometimes be useful in the country. On the other hand, the volume of business in the Supreme Court in arbitration matters is small and the business which would go to the District Court would be smaller still. The change in question would not significantly lighten the burden of work on the Supreme Court. While the idea has some attractions, we doubt that the advantages to people in the country are sufficient to justify the elaborate legislation which would be needed. The considerations are nicely balanced. We have come to the view that we should not recommend that such a general jurisdiction should be given to the District Court.

12.7 Consent jurisdiction. We think that the District Court should have powers like those of the Supreme Court in relation to arbitrations where the parties so agree. We have it in mind that such an agreement might be made at any time. For example, parties might so agree by an arbitration clause for the determination of future differences, by an agreement for arbitration on an existing difference, or by an agreement made in the course of an arbitration.

12.8 Reference by the Court. The present jurisdiction of the District Court to refer matters to arbitration depends on the consent of the parties. Further, the legislation is altogether too brief to establish a workable procedure. We suspect that the reason why it has given little trouble is that it is little used. We think that the powers of the Supreme Court to refer matters to arbitration should be given also to the District Court and that the same statutory provisions should apply. The effect would be that the arrangements would be spelled out in some detail by statute and by rules of court and that, with co-operation between the rule-making authorities, procedures would be much the same in both courts.

12.9 Agricultural Holdings Act, 1941. This Act should be amended so as to drop provisions which cover the same ground as that covered by our draft Bill for arbitrations generally. The District Court would have a general jurisdiction in relation to arbitrations under the Act like that of the Supreme Court in relation to arbitrations generally.

12.10 Local Government Act, 1919, s. 581. We do not make any recommendation in relation to this provision. If an occasion arises for its use, it seems to be usable.

12.11 Recommendations. We recommend that—

(a) where the parties so agree, whether before or after differences arise, the District Court should have jurisdiction in relation to an arbitration similar to the jurisdiction of the Supreme Court;[1]

(b) the provisions of a new Arbitration Act for reference to arbitration by the Supreme Court should apply to the District Court;[2]

(c) the Agricultural Holdings Act, 1941, should be amended so as to drop matter covering the same ground as that covered by the draft Bill we recommend and so as to give to the District Court a general jurisdiction in relation to arbitrations under that Act like that of the jurisdiction of the Supreme Court in relation to arbitrations generally.[3]

[1] Draft Bill s. 8 (2).
[2] Draft Bill ss. 62, 63.
[3] Draft Bill Sch. 2.

PART 13.—CONFLICT OF LAWS

SECTION 1.—GENERAL

13.1.1 Introduction. Problems arise where a foreign element touches an arbitration or an award. The arbitration agreement may be governed by foreign law, and an award may be made so as to be governed by foreign law. *Prima facie* a New South Wales Act is read as referring to things having some connection with New South Wales.[1] Thus the New South Wales provisions which take the place of what otherwise might be dealt with by agreement, and those which give powers to the Court, are as a rule concerned with arbitrations which are in some sense New South Wales arbitrations, not with other arbitrations.

[1] Interpretation Act, 1897, s. 17; *Kay's Leasing Corporation Pty Ltd* v. *Fletcher* (1964) 116 C.L.R. 124, 142.

13.1.2 The governing law. We have spoken of arbitrations which are "in some sense New South Wales arbitrations". An arbitration has this character if the law governing the proceedings in the arbitration is the law of New South Wales. As a rule the parties may stipulate by agreement that some identified system of law is to govern the proceedings. The parties may so stipulate expressly or impliedly. An implied

stipulation will readily be found in a provision that the arbitration is to be held at a specified place: there is an implied stipulation that the law of that place is to govern the proceedings. Ordinarily such an implication is irresistible. A number of other factors may be taken into account in order to see whether the parties have impliedly chosen some system of law to govern the proceedings. If no such stipulation, express or implied, can be found, a court will hold that some identified system of law governs the proceedings, making the choice by reference to some such test as seeing which system of law has the nearest connection with the transaction.[1]

[1] See generally *James Miller & Partners Ltd* v. *Whitworth Street Estates (Manchester) Ltd* [1970] A.C. 583; *Compagnie d'Armement Maritime S.A.* v. *Compagnie Tunisienne de Navigation S.A.* [1971] A.C. 572.

13.1.3 Stay of litigation. One provision of the Arbitration Act, 1902, operates by reference to an arbitration agreement whether or not the agreement has any connection with New South Wales. That is the provision for a stay of litigation commenced in respect of a matter agreed to be referred to arbitration.[1] It was, we suggested in our working paper, manifestly right that this provision should have this extensive operation. We suggested an express enactment on the question.

[1] Arbitration Act, 1902, s. 6.

13.1.4 Recognition of foreign arbitration agreements. In general, the law affords no less recognition to an arbitration agreement with foreign elements than it does to arbitration agreements without foreign elements.

13.1.5 Other matters. We suggested in our working paper that some provisions of the new Bill (in addition to those relating to stay of litigation)[1] should be expressed to apply notwithstanding foreign elements. These provisions were those relating to subpoenas, refusal to be sworn, etc., and rules of court for evidence on commission or by deposition, and interim preservation, discovery, inspection, etc. In this connection we noted that, under recent legislation, a foreign arbitrator or a person authorized by him might, with the consent of the Chief Justice, administer an oath in New South Wales.[2]

[1] See para. 13.1.3 above.

[2] Oaths Act, 1900, s. 26B.

13.1.6 Comment on the working paper. There was little comment on the working paper. What there was generally favoured the suggestions in the working paper.

13.1.7 Recent Australian reports.

(a) In South Australia there is a recommendation that a new Arbitration Act should apply to submissions (that is, arbitration agreements) 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.[1]

(b) The Law Reform Commission of the Australian Capital Territory thought it unnecessary to enact that the provisions for stay of litigation applied whatever was the proper law of the arbitation agreement or the law governing the proceedings in the arbitration.[2] That Commission also thought it against sound policy that the Court should issue a subpoena to give evidence in New South Wales for an arbitration whose proceedings were governed by a foreign law under which a person could not be summoned to give evidence.[3] With that reservation, the Commission concurred with our suggestion relating to subpoenas. With a like reservation, it concurred with our suggestion relating to refusal to be sworn as a witness and refusal to answer a question.[4]

[1] *South Australian report* (1969) pp. 4, 5 (draft Bill s. 4 (1)), 17.

[2] *Australian Capital Territory report* (1974) p. 22, para. 84.

[3] *Australian Capital Territory report* (1974) p. 22, para. 85.

[4] *Australian Capital Territory report* (1974) pp. 22, 23, para. 85.

13.1.8 Further consideration.

(a) In general, we adhere to the suggestions in our working paper.

(b) We do not favour the South Australian recommendation that an Arbitration Act should be made generally applicable in specified cases where there is some connection with the State.[1] It seems to us that such a provision would not go far enough in some cases and would go too far in others. For example, it would implicitly deny a power to stay litigation in breach of an arbitration agreement having none of the specified connections with South Australia, and it would enable, or purport to enable, the Supreme Court of South Australia to modify an award in a case not having any connection with South Australia relevant by the ordinary rules of the conflict of laws.

(c) We agree with the Law Reform Commission of the Australian Capital Territory that the provision for stay of litigation does not of itself require an express statement that it has effect notwithstanding that the arbitration agreement has a foreign element. However, we think that other provisions should have such a statement and we fear that, in that context, a provision for stay of litigation lacking such a statement might be read as limited to arbitration agreements having a relevant connection with New South Wales.

(d) We see the force of the reservations of the Law Reform Commission of the Australian Capital Territory on the suggestions in our working paper relating to subpoenas, refusal to be sworn as a witness, and refusal to answer questions. However, as regards subpoenas, we think it better to keep the provision simple so as not to require a judicial consideration of an application for the issue of a subpoena: subpoenas are issued by administrative officers and we would not disturb this practice. In the sort of case adverted to by the Commission, the facts could be made the ground for setting aside the subpoena or for resisting punishment for disobedience. In the same way, the facts could be made the ground for resisting punishment for refusal to be sworn as a witness or to answer a question.

(e) We think that the provision we recommend for avoidance of a *Scott* v. *Avery* clause should have effect as regards the effect of such a clause in the courts of New South Wales whether or not the arbitration agreement has any relevant connection with New South Wales. This may look like rough treatment of foreign agreements, but it is no more than an application of the public policy which for many years has been embodied in the provision[2] under which litigation can be allowed to continue notwithstanding that it is in breach of a foreign arbitration agreement which does not have such a clause.

(f) We think it useful to allow an arbitrator to state a consultative case to the Supreme Court on a question of the law of New South Wales whether or not the arbitration agreement or the arbitration has any other connection with New South Wales.

[1] See para. 13.1.7 (a) above.

[2] Arbitration Act, 1902, s. 6.

13.1.9 Recommendation. We recommend that where appropriate a new Arbitration Act should deal with problems in the conflict of laws. The following are the provisions of our draft Bill which, we recommend, should be coupled with legislative statements relating to the conflict of laws—

(a) Draft Bill s. 15—stay of litigation—see s. 15 (10);

(b) Draft Bill s. 16—avoidance of arbitration as condition precedent—see s. 16 (2);

(c) Draft Bill s. 39—subpoenas—see s. 39 (3);

(d) Draft Bill s. 40—refusal to be sworn, etc.—see s. 40 (5);

(e) Draft Bill s. 49—consultative case—see s. 49 (2);

(f) Draft Bill s. 61—enforcement of award—see s. 61 (4);

(g) Draft Bill s. 68—perjury—see s. 68 (2); and

(h) Draft Bill s. 72—Rules of court—see s. 72 (3).

SECTION 2.—FOREIGN AWARDS

13.2.1 Introduction. In this section we deal with the enforcement in New South Wales of an award made under a system of law other than the law of New South Wales. We shall use "domestic award" to describe an award made under the law of New South Wales and "foreign award" to describe an award made under some other system of law.

13.2.2 Common law. Subject to the rules of private international law concerning contracts generally, which it is not our concern to discuss here, a foreign award is, under the common law, enforceable here by action in the same way as is a domestic award.

13.2.3 Arbitration Act, 1902. There are two provisions of the Arbitration Act, 1902, under which an award can be enforced. The first is the provision that a submission shall have effect as if it had been made an order of the Court.[1] This provision supports procedures, now obsolete, whereby an award can be enforced by attachment.[2] We have recommended that a new Arbitration Bill should not have such a provision.[3] But whether the provision is retained or not, we do not think that it can be used for the enforcement of a foreign award: there must, we think, be an agreement or an imputed agreement that the proceedings in the arbitration are to be governed by the law of New South Wales. The second provision under which an award can be enforced is that by which an award on a submission may, by leave of the Court, be enforced in the same manner as a judgment or order of the Court to the same effect.[4] Russell says that there would seem to be no reason why a foreign award should not be enforceable under the similar English provision[5] in the same manner as a domestic award.[6] We said in our working paper that we thought that the question might well be decided the other way. We thought that the Arbitration Act, 1902, should not be treated as providing adequately for the enforcement of foreign

awards. It has recently been decided in England that the general provision there for the enforcement of an award in the manner of a judgment applies to a foreign award.[7] The decision was, however, based in part on a statutory context and legislative history absent in New South Wales.[8]

[1] Arbitration Act, 1902, s. 4.
[2] See paras 9.11.3, 4 above.
[3] Para. 3.10 above.
[4] Arbitration Act, 1902, s. 14 (1).
[5] Arbitration Act 1950 (U.K.), s. 26.
[6] Russell (1970), p. 337.
[7] *Dalmia Cement Ltd* v. *National Bank of Pakistan* [1975] Q.B. 9.
[8] See [1975] 1 Q.B. 9, 19–23.

13.2.4 Administration of Justice Act, 1924. Part II of this Act provides for the enforcement in New South Wales of judgments of superior courts of other parts of Her Majesty's Dominions. "Judgment" is defined as a judgment for the payment of money and as including an award, if the award has, in pursuance of the law of the place where it was made, become enforceable in the same manner as a judgment given by a court in that place.[1] The Act goes on to provide for the registration in the Supreme Court of a judgment of a superior court in another part of Her Majesty's Dominions.[2] A judgment registered in the Supreme Court under the Act is assimilated to a judgment of the Supreme Court.[3] We said in our working paper that there was a difficulty in applying these provisions to an award for the payment of money because, even if enforceable in the manner of a judgment of a court, an award was not made by a "court", let alone a "superior court". To make the Act workable in relation to an award, there must, it seemed to us, be a bold construction, implying in the Act something to the effect that an award which was enforceable in the manner of a judgment of a court must be taken, not only to be a judgment, but to be a judgment of that court. On such a construction, the Act no doubt provided useful machinery for the enforcement of an award to which it applied. We did not comment further on this Act in our working paper because it would, we said, be amended, on the commencement of the Arbitration (Foreign Awards and Agreements) Act, 1973, so as not to apply to an award.[4] Legislation now provides for a diminishing operation of the Act and it seems that after some lapse of time it will be ripe for repeal as spent.[5]

[1] Administration of Justice Act, 1924, s. 3 (1).
[2] Administration of Justice Act, 1924, s. 5 (1), (2).
[3] Administration of Justice Act, 1924, s. 5 (3) (a), (b).
[4] Arbitration (Foreign Awards and Agreements) Act, 1973, s. 8 (1).
[5] Foreign Judgments (Reciprocal Enforcement) Act, 1973, ss. 15–17.

13.2.5 Foreign Judgments (Reciprocal Enforcement) Act, 1973. This Act is designed to extend to judgments of countries outside and inside the British Commonwealth of Nations and to supersede Part II of the Administration of Justice Act, 1924. The Act has a definition of "judgment" by which the expression includes an award which has,

under the law of the place where it was made, become enforceable in the same manner as a judgment of a court in that place.[1] Giving this Act a bold construction similar to that suggested in our working paper for the Administration of Justice Act, 1924,[2] the Act may be read as treating the award as a judgment of the court referred to. The Act provides for the registration of foreign judgments for the payment of money[3] in the Supreme Court[4] and assimilates a registered foreign judgment to a judgment of the Supreme Court.[5] The Act forbids proceedings in a court in New South Wales for money payable under a judgment to which the registration provisions apply, other than proceedings by way of registration of the judgment.[6] In our working paper we did not comment further on this Act because it would, we said, be amended, on the commencement of the Arbitration (Foreign Awards and Agreements) Act, 1973, so as to withdraw awards from its operation.[7]

[1] Foreign Judgments (Reciprocal Enforcement) Act, 1973, s. 4 (1).

[2] See para. 13.2.4 above.

[3] Foreign Judgments (Reciprocal Enforcement) Act, 1973, s. 5 (4) (b).

[4] Foreign Judgments (Reciprocal Enforcement) Act, 1973, s. 6 (1).

[5] Foreign Judgments (Reciprocal Enforcement) Act, 1973, s. 6 (3).

[6] Foreign Judgments (Reciprocal Enforcement) Act, 1973, s. 10.

[7] Arbitration (Foreign Awards and Agreements) Act, 1973, s. 8 (2).

13.2.6 New York Convention, 1958. In New York in 1958 the United Nations Conference on International Commercial Arbitration adopted a Convention on the recognition and enforcement of foreign arbitral awards.[1] Australia has acceded to the Convention. An Act was passed in New South Wale to give effect to the Convention and for other purposes, but it is not to commence until a date to be proclaimed, and a date for commencement has not been proclaimed.[2] A Commonwealth Act to give effect to the Convention has been passed and has commenced.[3] The Commonwealth Act applies to the exclusion of any provisions made by the law of a State "with respect to the recognition of arbitration agreements and the enforcement of foreign awards, being provisions that operate by reference to the Convention".[4]

[1] The English text of the Convention is set out in the Schedule to the Arbitration (Foreign Awards and Agreements) Act, 1973.

[2] Arbitration (Foreign Awards and Agreements) Act, 1973. For commencement see s. 8 (2).

[3] Arbitration (Foreign Awards and Agreements) Act 1974 (Cth).

[4] Arbitration (Foreign Awards and Agreements) Act 1974 (Cth), s. 12 (1). The Act gives special meanings to several expressions in the words quoted: s. 3 (1), (2).

13.2.7 Arbitration (Foreign Awards and Agreements) Act, 1973.

(a) We have referred briefly to this Act above. At the time of our working paper the outlook was uncertain how far it would remain a matter for State legislation to give effect to the New York Convention of 1958. We therefore merely appended a copy of the Act and some notes on the Act.[1]

(b) If the State Act of 1973 were to commence, its operation would be curtailed by the Commonwealth Act of 1974.[2] The extent of that curtailment would itself be a matter for debate, but it seems that the State Act would have a significant operation in cases outside the Commonwealth Act.

(c) In the first place, a foreign arbitration agreement would make it near enough to mandatory on a New South Wales court to stay litigation on a claim agreed to be referred.[3]

(d) In the second place, enforcement of a foreign award would be mandatory on the Supreme Court unless one or more of a list of specific cases was made out.[4]

(e) In the third place, a foreign award would be binding on the parties to the agreement for all purposes, except that enforcement might be withheld as mentioned in (d).[5]

(f) In the fourth place, it would be a condition of the enforcement of a foreign award (but not of its binding effect in other respects) that the applicant for enforcement produce specified documents, including the arbitration agreement and the award, or copies of them.[6] It is no doubt implicit that these documents would be evidence of the agreement and the award.

(g) In the fifth place, the Administration of Justice Act, 1924, and the Foreign Judgments (Reciprocal Enforcement) Act, 1973, would be amended so as to exclude foreign awards from enforcement under those Acts.[7]

[1] Appendixes B and C to the working paper.

[2] See para. 13.2.6 above.

[3] Arbitration (Foreign Awards and Agreements) Act, 1973, s. 4 (1) (a), (2), (4).

[4] Arbitration (Foreign Awards and Agreements) Act, 1973, s. 5 (1) (a), (4)–(6).

[5] Arbitration (Foreign Awards and Agreements) Act, 1973, s. 5 (1) (b).

[6] Arbitration (Foreign Awards and Agreements) Act, 1973, s. 6.

[7] Arbitration (Foreign Awards and Agreements) Act, 1973, s. 8.

13.2.8 Australian States and Commonwealth Territories. None of the Acts we have mentioned, the Administration of Justice Act, 1924, the Foreign Judgments (Reciprocal Enforcement) Act, 1973, the Arbitration (Foreign Awards and Agreements) Act, 1973, and the Arbitration (Foreign Awards and Agreements) Act 1974 (Cth), provides for the enforcement in New South Wales of an award made under the law of another State or of a Territory of the Commonwealth. The Service and Execution of Process Act 1901 does not provide for the enforcement of awards. We said in our working paper that it seemed that if a claimant under an award made under the law of another State or of a Territory wished to enforce the award in New South Wales, he would have to get a judgment on the award (not just leave to enforce the award in the manner of a judgment), and then enforce the judgment.[1]

[1] But see para. 13.2.3 above.

13.2.9 Commonwealth places. Attention has recently been drawn to the legal position of places acquired by the Commonwealth for public purposes. Where a place in a State is thus acquired, the federal Parliament has exclusive powers to make laws with respect to the place.[1] This involves not only that State laws made after acquisition do not apply, but also that State laws made before acquisition cease to apply, although it seems that the place remains part of the territory of the State.[2] The discovery of this state of affairs has led to Commonwealth legislation which may be said, by way of broad description, to apply with respect to a Commonwealth place laws in terms similar to the laws of the State of which the place forms part.[3] Since, however, the laws so applied are Commonwealth laws, those laws constitute a system of laws distinct from the system of laws of the State containing the place. It may be that, for the purposes of the conflict of laws, a Commonwealth place is not part of the "country" of the State of whose territory it is a part. More particularly, it may be that an award made in a Commonwealth place in a State is a foreign award in the eye of that State and is not an award of that State in the eye of another State. It is not necessary to reach firm views on these matters. However the possibilities put forward in the preceding sentences should be borne in mind when framing legislation for the enforcement of awards.

[1] Constitution, s. 52 (i).

[2] *Worthing* v. *Rowell and Muston Pty Ltd* (1970) 123 C.L.R. 89; *R.* v. *Phillips* (1970) 125 C.L.R. 93; *A.G.* v. *Stocks and Holdings (Constructors) Pty Ltd* (1970) 124 C.L.R. 262.

[3] Commonwealth Places (Application of Laws) Act 1970.

13.2.10 The outlook at the time of the working paper. The outlook was that, either by State or Commonwealth legislation, the *New York Convention* of 1958 would be implemented so far as concerned New South Wales and that neither the Administration of Justice Act, 1924, nor the Foreign Judgments (Reciprocal Enforcement) Act, 1973, would cover the enforcement of foreign awards in New South Wales. The *New York Convention,* if implemented by equitable legislation, would deal with the enforcement of a great variety of foreign awards, but would leave important classes of foreign award untouched. First in importance amongst these were, we said, awards under the laws of other States or of Territories of the Commonwealth or of Commonwealth places. Other classes included awards outside the Convention for want of world-wide adoption of the Convention, or by reason of reservations by Contracting States.[1]

[1] Articles I (3), XIV of the Convention.

13.2.11 Working paper proposal. We suggested in our working paper paper that, whatever might be done towards giving effect to the *New York Convention* of 1958, a foreign award should be made enforceable in the same ways as a domestic award.[1] There were clear grounds of convenience for doing so. It was safe to do so, we suggested, because a judicial order of leave must be obtained before an award could be enforced.

[1] Draft section 55.

13.2.12 Comment on the working paper. A commentator suggested that it might be useful to legislate to the effect that rules like those of the *New York Convention* of 1958 should apply, not to foreign awards to which the Convention applied, but to all foreign awards.[1] The Convention was, he said, a compromise amongst nations having a wide range of legal systems: its rules would be appropriate for awards under a wide variety of national legal systems.

[1] This would be more or less the consequence of the commencement of the Arbitration (Foreign Awards and Agreements) Act, 1973. See para. 13.2.7 above.

13.2.13 Recent Australian reports. In South Australia there is a recommendation for adoption of provisions based on English legislation enacted to give effect to international arrangements to which the United Kingdom is a party.[1] In Queensland there is a like recommendation.[2] The Victorian report discussed the *New York Convention* of 1958 and the relevant provisions of the Bill for the Queensland Act.[3]

[1] *South Australian report* (1969) pp. 14–16 (draft Bill ss. 41–45), 20. *Cf.* Arbitration Act 1950 (U.K.) ss. 36–40.

[2] *Queensland report* (1970) pp. 15, 27–29, draft Bill ss. 40–44. The Queensland Parliament did not adopt this recommendation, but enacted provisions to give effect to the *New York Convention* of 1958: Arbitration Act 1973 (Qd.), ss. 41–44.

[3] *Victorian report* (1974) pp. 17–23.

13.2.14 Further consideration: Arbitration (Foreign) Awards and Agreements) Act, 1973.

(a) We think that the Act ought to be repealed.

(b) As regards stay of litigation on a matter arbitrable under a foreign arbitration agreement, we echo the view put with force in the Victorian report that the Court should always have an ultimate discretion to stay or not to stay. The Act sets up an unjust and undesirable difference between domestic and foreign agreements.

(c) As regards enforcement of foreign awards and their binding effect, we are not aware of any particular matters affecting foreign awards which call for treatment different from that which the law gives or on our recommendations would give, to domestic awards.

(d) As regards the production of documents as a condition of enforcement, the proof of foreign private instruments can of course be difficult, but arbitration agreements and awards stand in no worse case than other private instruments. We do not see the need for special legislation as regards evidence for enforcement of awards, as distinct from asserting the binding effect of an award, or seeking a stay of litigation, or indeed any other occasion for reliance in a court on a foreign private instrument.

(e) As regards amendment of the Administration of Justice Act, 1924, and the Foreign Judgments (Reciprocal Enforcement) Act, 1973, so as to withdraw awards from their ambit, we think that these Acts make generally appropriate provision for the enforcement of awards and that it would be better if the amendments were not made.

(f) We refer also to the notes on the Act appended to our working paper.[2]

[1] *Victorian report* (1974) pp. 81–21.

[2] Appendix C to the working paper.

13.2.15 Further consideration: Foreign Judgments (Reciprocal Enforcement) Act, 1973.

(a) We have noted a difficulty of construction of this Act.[1] A foreign judgment is registrable and enforceable under the Act if it is the judgment of a superior court, and there is machinery for defining what is a "superior" court.[2] "Judgment" includes an arbitrable award which has, in pursuance of the law of the place where it was made, become enforceable in the same manner as a judgment given by a court in that place.[3] The award is not, however, expressly equated to a judgment given by the lastmentioned court and this equation must be made if the award is to be registrable. We think that an amendment should be made to that effect.

(b) We think that amendments should be made to clarify matters relating to the jurisdiction of the arbitrator to make the award.

[1] Para. 13.2.5 above.

[2] Foreign Judgments (Reciprocal Enforcement) Act, 1973, s. 5 (2), (3), (4), (7).

[3] Foreign Judgments (Reciprocal Enforcement) Act, 1973, s. 4 (1).

13.2.16 Further consideration: general. In other respects we adhere to the suggestions in our working paper.

13.2.17 Recommendations. We recommend that—

(a) a foreign award be made enforceable in the same way as a domestic award;[1]

(b) the Arbitration (Foreign Awards and Agreements) Act, 1973, be repealed;[2]

(c) the Foreign Judgments (Reciprocal Enforcement) Act, 1973, be amended to clarify matters relating to awards.[2]

[1] Draft Bill s. 61 (4).

[2] Draft Bill s. 73 (1), Sch. 2.

PART 14.—OTHER ACTS

SECTION 1.—STATUTORY ARBITRATIONS

14.1.1 Present law. The Arbitration Act, 1902, applies to an arbitration under another Act as if the arbitration were pursuant to an arbitration agreement, except in so far as the Arbitration Act is inconsistent with the Act regulating the arbitration or with rules or procedure authorized or recognized by that Act.[1] This provision, and similar provisions in other places, have, it seems, worked well enough: at least they have been the subject of few reported cases. Extraneous Acts providing for arbitration usually make their own provision concerning the extent to which the Arbitration Act, 1902, is to apply and concerning special modifications of that Act,[2] sometimes the extraneous Act is silent on the subject,[3] but the elaborateness of the special provisions may impliedly oust the Arbitration Act.[4]

[1] Arbitration Act, 1902, s. 27.

[2] See—Church of England in Australia Constitution Act, 1961, s. 9.
Companies Act, 1961, s. 270 (5).
Conveyancing Act, 1919, s. 84A (a).
Credit Union Act, 1969, s. 70 (7).
Local Government Act, 1919, ss. 317X, 317AN, 341K.
Municipal Council of Sydney Electric Lighting Act, 1896, s. 39.

[3] See the District Court Act, 1973, s. 63. We recommend, however, that this section be repealed: para. 14.2.1 below.

[4] See the Public Works Act, 1912, ss. 109–123.

14.1.2 Developments in England. In England there is a provision similar to that in New South Wales, but the Arbitration Act is expressed to apply as if the extraneous Act were an arbitration agreement,[1] and some provisions of the Arbitration Act are expressly excluded.[2] These excluded provisions had their origin in the Arbitration Act 1934 (U.K.): the exclusions look haphazard in the Act of 1950, probably because it was a mere consolidation.[3]

[1] Arbitration Act 1950 (U.K.), s. 31 (1).

[2] Arbitration Act 1950 (U.K.), s. 31 (2). The excluded provisions are these—

s. 2 (1)—Arbitration agreement not discharged by death.
s. 3—Bankruptcy of a party.
s. 4 (2)—Mandatory stay of litigation in Protocol cases.
s. 5—Interpleader.
s. 18 (3)—Stipulation for party to pay his own costs.
s. 24—Bias of arbitrator; questions of fraud.
s. 25—Matters consequential on revocation or removal.
s. 27—Time for commencing arbitration.
s. 29—Amendment of Merchant Shipping Act 1894 (U.K.).

[3] See the long title. See also Russell (1970), p. 8.

14.1.3 Working paper proposals. We suggested in our working paper that a new Bill should maintain the substance of the present provision,[1] but adopting the English provision that the Arbitration Act should apply as if the extraneous Act were an arbitration agreement.[2] We suggested that the express exclusions in the English provision[3] should not be adopted. We did so for two reasons. In the first place the exclusions were likely to be mischievous in relation to some extraneous Acts.[4] In the second place the express exclusion of some provisions invited argument that other provisions did apply, however badly (short of repugnancy) they fitted the scheme of the extraneous Act. It was better, we said, to insert general words to the effect that the provisions of the Arbitration Act applied except in so far as the extraneous Act or its subject matter otherwise indicated or required.[5]

[1] Arbitration Act, 1920, s. 27.

[2] Arbitration Act 1950 (U.K.), s. 31 (1).

[3] Arbitration Act 1950 (U.K.), s. 31 (2).

[4] Thus an arbitration under section 63 of the District Court Act, 1973, should, we suggested, be subject to all the relevant provisions of an Arbitration Act. However, we now recommend repeal of s. 63 of the District Court Act, 1973: para. 14.2.1 below.

[5] We prefer the wording indicated in the text, adapted from the introductory words for an interpretation section in an Act, to the test of inconsistency in the present Acts (Arbitration Act, 1902, s. 27; Arbitration Act 1950 (U.K.), s. 31 (1)) because that test may invite the interpretation, too narrow for the present purpose, given to section 109 of the federal Constitution. The section should rather aim to adopt the ordinary presumption that a general provision does not derogate from a special one.

14.1.4 Comment on the working paper. There was little comment on the working paper, but what there was favoured the proposals.

14.1.5 Recent Australian reports. In Western Australia there is a recommendation for a provision based on the English section, including a specification of sections and subsections (drawn largely from the English section) which are not to apply to a statutory arbitration.[1] The other reports do not deal with the matter.

[1] *Western Australian report* (1974) draft Bill appendix B s. 3 (3).

14.1.6 Recommendation. We recommend that there be a provision in a new Act to the effect that the Act applies to an arbitration under any legislation as if the legislation were an arbitration agreement by exempt contract, except in so far as that legislation or its subject matter otherwise indicates or requires. "Legislation" would include any Act, ordinance or regulation.[1]

[1] Draft Bill s. 9.

SECTION 2.—SUNDRY ENACTMENTS

14.2.1 General. A number of other Acts touch arbitrations in one way or another or are candidates for amendment in relation to arbitrations. The following table lists these Acts,[1] tells whether we recommend an amendment, and adds some further comment.

Enactment	*Amendment suggested*	*Comment*
Administration of Justice Act, 1924, Pt. II.	No.	See paragraph 13.2.4 above.
Agricultural Holdings Act, 1941, ss. 17–20.	Yes.	See paragraph 12.11 above.
Arbitration (Foreign Awards and Agreements) Act, 1973.	Repeal it.	See paragraph 13.2.17 (b) above.
Builders Licensing Act, 1971, ss. 45 (2) (b), 46.	No.	Draft Bill s. 73 (2) would apply.
Church of England in Australia Constitution Act, 1961, s. 9.	No.	Draft Bill s. 73 (2) would apply.
City of Sydney Improvement Act (1879), ss. 62–64.	No.	Obsolete provisions in an obsolete Act. Draft Bill s. 9 would apply.
Companies Act, 1961, s. 270 (5).	No.	Draft Bill s. 73 (2) would apply.
Conveyancing Act, 1919, ss. 84 (1) (a), 84A (a).	No.	Draft Bill s. 73 (2) would apply.
Co-operation Act, 1923, s. 91	No.	s. 91 (4) (c): Draft Bill s. 73 (2) would apply. s. 91 (5A): "for determination by" might be substituted for "for the opinion of" (see para 8.1, 8.8 (c) above), but subs. (5A) in its present terms is consistent with the policy of subs. (6).
Court of Petty Sessions (Civil Claims) Act, 1970, s. 71.	No.	Consistent with draft Bill.
Credit Union Act, 1969, s. 70.	No.	See comment on the Co-operation Act, 1923, s. 91.
Crimes Act, 1900, s. 407.	No.	Consistent with draft Bill.
District Court Act, 1973, s. 63.	Omit.	See para 12.11 above.
Evidence Act, 1898, ss. 3 (1), 14A.	No.	Definitions of "Court", "legal proceeding" and "proceedings" are consistent with the draft Bill.
Foreign Judgments (Reciprocal Enforcement) Act, 1973.	Yes.	See para 13.2.17 (c) above.
Friendly Societies Act, 1912, ss. 72–74.	No.	Probably these provisions do not involve arbitration within the meaning of an Arbitration Act.
Insurance Act, 1902, ss. 19, 21.	No.	Recent consideration by Parliament.

Interpretation Act, 1897, s. 33.	No.	Unnecessary for arbitrations to which the draft Bill would apply (draft s. 35 (4)), but still required for other arbitrations. E.g., Main Roads Act, 1924, s. 15.
Legal Practitioners Act, 1898, s. 39A.	Yes.	See paras 7.5.4 (c), 7.5.7. above.
Limitation Act, 1969—		
ss. 69, 70	No.	Consistent with draft Bill.
s. 71	Omit.	Spent. See draft Bill s. 16.
s. 72	No.	Consistent with draft Bill.
s. 73	Yes.	Extend to other cases. Compare working paper draft Bill s. 14 (3).
Local Government Act, 1919, s. 581.	No.	See paragraph 12.4 above.
Main Roads Act, 1924, s. 15.	No.	Draft Bill s. 73 (2) would apply.
Merchant Shipping Act 1894 (U.K.), s. 496.	No.	See paragraphs 14.3.1–3 below.
Mining Act, 1973, s. 127.	No.	Draft Bill s. 9 would apply.
Municipal Council of Sydney Electric Lighting Act, 1896, s. 39.	No.	Draft Bill s. 9 would apply.
Oaths Act, 1900, s. 26 (1).	Yes.	Affidavits in arbitrations should be equated to other affidavits.
Permanent Building Societies Act, 1967, s. 85 (4) (c).	No.	See comment on the Co-operation Act, 1923, s. 91.
Public Works Act, 1912, ss. 107, 109–123.	No.	See paragraph 14.2.2 below.
Sydney Collieries, Limited Enabling Act, 1924, s. 4 (5).	No.	Draft Bill s. 73 (2) would apply.
Trustee Act, 1925, s. 49 (1) (d).	No.	Consistent with draft Bill.
Water Act, 1912, s. 64.	No.	Draft Bill s. 73 (2) would apply.
Wentworth Irrigation Act (1890) s. 21.	No.	Draft Bill s. 73 (2) would apply.

[1] Or those of them that have come to our notice.

14.2.2 Public Works Act, 1912. The Public Works Act, 1912, contains elaborate provisions for settling disputes over compensation for resumption.[1] These provisions are, for most purposes at least, superseded by the Land and Valuation Court Act, 1921.[2] We understand that the Public Works Act is under review by others and we make no recommendations for amendments incidental to a new Arbitration Bill.

[1] Public Works Act, 1912, ss. 107, 109–123.

[2] Land and Valuation Court Act, 1921, s. 9. A case for arbitration may perhaps still arise under the Public Works Act, 1912, s. 85.

14.3.1 Merchant Shipping Act 1894 (U.K.). The Merchant Shipping Act 1894 (U.K.) enacts a scheme to deal with the claims of a shipowner for freight and other charges on goods landed from the ship and not delivered to the owner but put into the custody of a wharfinger or warehouseman.[1] If the shipowner gives due notice to the wharfinger (henceforward we use "wharfinger" to include a warehouseman), the shipowner's lien on the goods continues notwithstanding that the shipowner has given possession to the wharfinger.[2] The owner of the goods may obtain a release of the goods by depositing with the wharfinger the amount of the shipowner's claim.[3] The owner of the goods may give notice to the wharfinger that he disputes the claim of the shipowner, wholly or in part.[4] The wharfinger is to apprise the shipowner of the dispute and is to retain the deposit (or the disputed part) for thirty days from the date of the goods-owner's notice.[5] Unless, within the thirty days, the shipowner commences legal proceedings against the owner to enforce his claim, the wharfinger must pay the amount retained to the owner of the goods.[6]

[1] Merchant Shipping Act 1894 (U.K.), ss. 494–496. The account in the text is not complete: it is intended merely as an introduction to the change made by the Arbitration Act 1934 (U.K.), s. 16 (3), (4), (5) and continued by the Arbitration Act 1950 (U.K.), s. 29.

[2] Merchant Shipping Act 1894 (U.K.), s. 494.

[3] Merchant Shipping Act 1894 (U.K.), s. 495 (2).

[4] Merchant Shipping Act 1894 (U.K.), s. 496 (1).

[5] Merchant Shipping Act 1894 (U.K.), s. 496 (2).

[6] Merchant Shipping Act 1894 (U.K.), s. 496 (3).

14.3.2 Amendment by Arbitration Acts (U.K.). The operation of the provisions of the Merchant Shipping Act 1894 (U.K.) has been altered so that not only the commencement by the shipowner of legal proceedings, but also the commencement of an arbitration, has the consequence that the wharfinger must retain the money in dispute.[1]

[1] Arbitration Act 1934 (U.K.), s. 16 (3), (4), (5); Arbitration Act 1950 (U.K.), s. 29.

14.3.3 The position in New South Wales. We think that the relevant provisions of the Merchant Shipping Act 1894 (U.K.)[1] are not in force in New South Wales. In the first place, the Part of that Act in which those provisions occur is not expressly extended to New South Wales, although other provisions of the Act are so extended.[2] In the second place, the presumption is that United Kingdom legislation does not extend to a colony.[3] In the third place, some local references in the Part concerned suggest that the Part has an operation not extending beyond the United Kingdom.[4] In the fourth place, the leading provision of the Part is expressly confined to importation into the United Kingdom,[5] and the better view is that the other provisions of the Part are, on their true construction, confined to cases where that leading provision applies.[6] If the provisions in question[7] are in force in New South Wales, they are not alterable by the Parliament of New South Wales except as

regards ships registered in New South Wales or as regards the coasting trade of New South Wales.[8] All in all, we do not recommend legislation along the lines of section 29 of the Arbitration Act 1950 (U.K.).

[1] Merchant Shipping Act 1894 (U.K.), ss. 494–496.

[2] See the Merchant Shipping Act 1894 (U.K.), ss. 91, 509, 712.

[3] *Halsbury on Statutes* (1961), pp. 428, 429.

[4] Merchant Shipping Act 1894 (U.K.), ss. 493 (1), 497 (2).

[5] Merchant Shipping Act 1894 (U.K.), s. 493 (1).

[6] *Dennis & Sons Ltd* v. *Cork S.S. Co. Ltd* [1913] 2 K.B. 393; Carver (1971) paras 1026, 1027.

[7] Merchant Shipping Act 1894 (U.K.), ss. 494–496.

[8] Merchant Shipping Act 1894 (U.K.), ss. 735 (1), 736.

PART 15.—CONCILIATION

15.1 Conciliation described. People may settle their differences by agreement rather than by arbitration or litigation. It is better in their own interests that they should do so. Time and money are saved. Hostility is likely to be dispelled rather than exacerbated. It is better in the interests of the State that differences should be settled by agreement rather than by litigation: the work of the courts is to that extent reduced. There is a case for saying that the law should, therefore, do what it can to promote such agreements. One way of aiding agreement is to have a third person look at the cases of both sides and mediate between the parties and persuade them to accept a settlement. This is the process of conciliation and the third person is a conciliator.[1]

[1] Compare para. 5.2.2 above.

15.2 International Chamber of Commerce Conciliation. The International Chamber of Commerce provides a conciliation procedure for business disputes of an international character. It seems that the procedure has been a success: in about 60 per cent of the cases where the parties agree on the procedure there is an agreed settlement of differences.[1] Somewhat similar arrangements are made by the Convention on the Settlement of Investment Disputes between States and Nationals of other States made in Washington in 1965.[2]

[1] *Guide to ICC Arbitration* (Revised Edition—1972) p. 11.

[2] The text appears in the schedule to the Arbitration (International Investment Disputes) Act 1966 (U.K.).

15.3 Proposal. Some commentators have proposed that the law should make provision for conciliation. In addition to the advantages outlined above, the process would encourage disputants to look dispassionately at their cases at an early stage and thus promote early settlement of differences, rather than settlements at the door of the court after much time has passed and much money has been spent.

15.4 Australian Capital Territory report. The Law Reform Commission of the Australian Capital Territory recommended that, on an experimental basis, it be made an implied term of an arbitration agreement (unless otherwise agreed) that, on request by a party, the parties would put their cases before a conciliator with a view to an agreed settlement of the difference. If the conciliation failed, the difference would go to arbitration.[1]

[1] *Australian Capital Territory report* (1974) p. 24, paras 91, 92.

15.5 Consideration. Since everything depends on agreement, first to put the case before a conciliator and second to accept the settlement he proposes, there is not much that the legislature can do. It could legislate for an implied term in an arbitration agreement along the lines of the recommendation of the Australian Capital Territory Law Reform Commission and it could set up a register of conciliators and could deal with incidental matters such as privilege for things said in the course of a conciliation and the liability, or immunity from liability, of a conciliator. A register of conciliators would be a useful adjunct to a register of arbitrators, but we have recommended that there should not, for the present at least, be a statutory register of arbitrators.[1] The matter is, we think, more a matter for education than for legislation. The Institute of Arbitrators Australia may see fit to set up a register of conciliators and to promote public knowledge of the utility of the process.

[1] Para. 5.6.4 above.

15.6 Recommendation. We recommend that there should not, for the present at least, be a statutory register of conciliators nor a statutory implied term in an arbitration agreement that the parties should first attempt a conciliation.

Approved by the Commission in meeting on 29th September, 1976.

R. D. CONACHER, Deputy Chairman.

D. GRESSIER, Commissioner.

J. D. HEYDON, Commisioner.

Report paragraph 1.20

APPENDIX 1

DRAFT ARBITRATION BILL, 1976

ARRANGEMENT

PART I.—PRELIMINARY

Section 1.—Short title
2.—Commencement
3.—Division of Act
4.—Application
5.—Interpretation
6.—Contract of adhesion
7.—The Crown
8.—District Court
9.—Statutory arbitration
10.—Agricultural Holdings Act, 1941
11.—Exempt contract
12.—Order of exemption

PART II.—ARBITRATION AGREEMENT

Section 13.—Revocation of arbitrator's authority
14.—Death of party
15.—Stay of litigation
16.—Avoidance of arbitration as condition precedent
17.—Contractual time bar

PART III.—NUMBER, APPOINTMENT AND REMOVAL OF ARBITRATORS

Section 18.—Application
19.—Interpretation
20.—Single arbitrator
21.—Substituted arbitrator
22.—Concurrent power: want of concurrence
23.—Power not exercised
24.—Default by party

APPENDIX 1—*continued*

25.—General power to fill vacancy
26.—Position of statutory appointee
27.—Removal
28.—Umpire

PART IV.—FEES AND EXPENSES OF ARBITRATORS

Section 29.—Application
30.—Award not binding
31.—Payment into court
32.—Taxation
33.—Time limit for taxation
34.—Saving for voluntary payment

PART V.—CONDUCT OF THE ARBITRATION

Section 35.—General
36.—Injunction; receiver
37.—Security for costs
38.—Evidence
39.—Subpoenas
40.—Refusal to be sworn, etc.
41.—Default award
42.—Punishment for default
43.—Entry by umpire

PART VI.—POWERS OF ARBITRATOR

Section 44.—Action by majority
45.—Basis of decision
46.—Award of interest
47.—Costs of reference and award

PART VII.—STATED CASE

Section 48.—Application
49.—Consultative case
50.—Award in the form of a case
51.—Order although no request to arbitrator

APPENDIX 1—*continued*

PART VIII.—AWARD

Section 52.—Time
53.—Interim award
54.—Finality
55.—Alteration by arbitrator
56.—Alteration by the Supreme Court
57.—Remission
58.—Setting aside
59.—Statement of terms
60.—Interest
61.—Enforcement

PART IX.—REFERENCE BY THE SUPREME COURT OR THE DISTRICT COURT

Section 62.—Power to refer
63.—General

PART X.—GENERAL

Section 64.—Extension of submission
65.—Partiality of arbitrator
66.—Costs of abortive arbitration
67.—Privacy
68.—Perjury
69.—Order on terms
70.—Service of notice
71.—Regulations
72.—Rules of court
73.—Repeals and amendments

SCHEDULE 1.—CERTAIN EXEMPT CONTRACTS
2.—REPEALS AND AMENDMENTS

PART I.

PRELIMINARY

1. This Act may be cited as the "Arbitration Act, 1976". Short title.

2. (1) Section 1 and this section shall commence on the date of assent to this Act. Commencement.

(2) Subject to subsection (1), this Act shall commence on such day as may be appointed by the Governor in respect thereof and as may be notified by proclamation published in the Gazette.

3. This Act is divided as follows:— Division of Act.

PART I.—PRELIMINARY—*ss.* 1–12.

PART II.—ARBITRATION AGREEMENT—*ss.* 13–17.

PART III.—NUMBER, APPOINTMENT AND REMOVAL OF ARBITRATORS—*ss.* 18–28.

PART IV.—FEES AND EXPENSES OF ARBITRATORS—*ss.* 29–34.

PART V.—CONDUCT OF THE ARBITRATION—*ss.* 35–43.

PART VI.—POWERS OF ARBITRATOR—*ss.* 44–47.

PART VII.—STATED CASE—*ss.* 48–51.

PART VIII.—AWARD—*ss.* 52–61.

PART IX.—REFERENCE BY THE SUPREME COURT OR THE DISTRICT COURT—*ss.* 62, 63.

PART X.—GENERAL—*ss.* 64–73.

SCHEDULE 1.—CERTAIN EXEMPT CONTRACTS.

SCHEDULE 2.—REPEALS AND AMENDMENTS.

4. This Act does not apply in relation to— Application. 1950 c. 27, s. 33.

(a) an arbitration agreement made before the appointed day, an arbitration under such an agreement, or an award in such an arbitration; or

(b) an arbitration under any Act, ordinance or regulation (other than the Arbitration Act, 1902, and this Act), being an arbitration commenced before the appointed day, or an award in such an arbitration.

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

"adherent party" means a party to a contract of adhesion made by him as mentioned in section 6 (1) (c) and includes a person claiming through or under such a party.

"appointed day" means the day appointed under section 2 (2).

"arbitration agreement" means an agreement to submit present or future differences to arbitration, whether an arbitrator is named in the agreement or not. Act No. 29, 1902, s. 3; 1950 c. 27, s. 32.

"award" includes an interim award. 1950 c. 27, s. 14.

"contract of adhesion" has the meaning given by section 6 (1).

"Supreme Court" means the Supreme Court of New South Wales.

(2) The provisions of this Act applying in relation to an arbitrator apply also in relation to an umpire, except in so far as the context or subject-matter otherwise indicates or requires.

(3) For the purposes of this Act, an award or part of an award is not grossly wrong merely because the award or part proceeds upon a material error of law or of fact, but is grossly wrong if it is an award or part which a reasonable arbitrator could not have made.

Contract of adhesion.

6. (1) In this Act, "contract of adhesion" means a contract—

(a) made in the course of business as regards any party to the contract;

(b) containing any provision which—

(i) is a standard provision;

(ii) relates to arbitration of future differences; and

(iii) is put forward by that party or on his behalf; and

(c) made by any other party to the contract (whether or not in the course of business as regards him) in circumstances in which a reasonable man in the position of that other party, and wishing to get the property, services or other benefit accruing or intended to accrue to that other party under the contract, or under any transaction in which the contract is made, would not regard the provision mentioned in paragraph (b) as open to material change (before the making of the contract) by negotiation by him or on his behalf.

(2) For the purpose of subsection (1)—

(a) a contract is made in the course of business as regards a party to the contract—

(i) if made by him in the course of business; or

(ii) if made by him in consequence of any introduction made, auction or negotiation conducted, or other act done, in the course of business, by a person employed or engaged by him; and

(b) a provision is a standard provision if the terms of the provision, or any of those terms, have been fixed in advance with the object of constituting terms of numerous contracts to be made in the course of business.

(3) For the purpose of subsections (1) and (2), "business" includes—

(a) public administration of any country, in New South Wales or elsewhere; and

(b) any business, profession, occupation, calling, trade or undertaking, whether engaged in or carried on—

(i) by the Crown (in right of New South Wales or any other right) or by any other person;

(ii) for profit or not; or

(iii) in New South Wales or elsewhere.

(4) In determining whether a provision of a contract is a standard provision for the purposes of subsection (1), regard may be had to the form of the provision.

(5) Where a question arises whether a provision of a contract is a standard provision for the purposes of subsection (1), and the provision is contained in a document, and the provision or any part of it appears to be produced by a means adapted for producing numerous copies, the document shall be evidence that the provision is a standard provision.

The Crown. Act No. 29, 1902, s. 26; Act No. 60, 1970, s. 5; 1950 c. 27, s. 30.

7. This Act binds the Crown not only in right of New South Wales but also, so far as the legislative power of Parliament permits, the Crown in all its other capacities.

8.

8. (1) Where by this Act the District Court has jurisdiction in relation to any matter, then, in relation to that matter— District Court.

(a) the District Court shall have the same jurisdiction as the Supreme Court; Act No. 9, 1973, ss. 133 (1), 134 (1).

(b) the District Court may exercise all the power and authority of the Supreme Court; and *Ibid.*

(c) references in this Act to the Supreme Court shall be read as extending to the District Court.

(2) The District Court has jurisdiction under this Act, and jurisdiction to set aside an award, to the extent to which the parties have so agreed.

(3) The provisions of this Act giving jurisdiction to the District Court are cumulative, to the intent that none of those provisions is to be limited by reference to any other of them.

9. (1) This Act applies to an arbitration under any legislation (whether passed or made before or after the appointed day, but excepting the Arbitration Act, 1902, and excepting this Act) as if the arbitration were pursuant to an arbitration agreement by exempt contract and as if the legislation were an arbitration agreement by exempt contract, except in so far as the legislation or its subject-matter otherwise indicates or requires. Statutory arbitration. Act No. 29, 1902, s. 27; 1950 c. 27, s. 31 (1).

(2) In subsection (1) "legislation" includes any Act, ordinance or regulation.

10. (1) The Supreme Court shall not exercise— Agricultural Holdings Act, 1941.

(a) its jurisdiction under this Act; or

(b) its jurisdiction to set aside an award—

in respect of an arbitration under the Agricultural Holdings Act, 1941, except on appeal from the District Court. Act No. 55, 1941.

(2)

(2) The District Court has—

(a) jurisdiction under this Act; and

(b) jurisdiction to set aside an award—

in respect of an arbitration under the Agricultural Holdings Act, 1941.

Exempt contract.

11. (1) Each of the following is an exempt contract for the purposes of this Act—

Schedule 1.

(a) a contract which is, at the time when it is made, a contract of a class specified in Schedule 1;

(b) a contract of a prescribed class; and

(c) a contract with respect to the arbitration of a difference, made after the difference has arisen.

(2) A contract in respect of which an order under section 12 is in force is, to the extent specified in the order, an exempt contract for the purposes of this Act.

Order of exemption.

12. (1) In this section "competent person" means a party to a proposed contract, or to a contract, containing in either case any provision relating to arbitration of future differences, being a party—

(a) by whom or on whose behalf that provision is put forward;

(b) as regards whom that provision is reasonable; or

(c) who assents to the terms of the proposed contract, or makes the contract, or after the making of the contract confirms the contract, after due consideration of that provision and after taking any appropriate advice.

(2) Where any persons propose to make a contract containing any provision relating to arbitration of future differences, any of those persons may apply to the Supreme Court for an order under subsection (3).

(3) If, on application under subsection (2), it appears to the Supreme Court that an applicant and any other of those persons are competent persons, the Supreme Court may order that, as between those competent persons and persons claiming through or under them, a contract made pursuant to that proposal shall be an exempt contract for the purpose of this Act.

(4) Where there is a contract containing any provision relating to arbitration of future differences, any party to the contract may apply to the Supreme Court for an order under subsection (5).

(5) If, on application under subsection (4), it appears to the Supreme Court that the applicant and any other party to the contract are competent persons, the Supreme Court may order that, as between those competent persons and persons claiming through or under them, and so far as concerns any difference arising after the making of the order, the contract shall be an exempt contract for the purpose of this Act.

PART II.

Arbitration Agreement

13. (1) Subject to subsection (2), the authority of an arbitrator is irrevocable, except so far as otherwise agreed.

Revocation of arbitrator's authority.

Act No. 29 1902, s. 4; 1950 c. 27, s. 1.

(2) The Supreme Court may give leave to revoke the authority of an arbitrator.

Ibid.

(3)

(3) The Supreme Court may give leave under subsection (2) to revoke such authority if any as a person may have as arbitrator, notwithstanding that the applicant for leave does not admit or does not prove that that person has any authority as an arbitrator.

(4) In determining whether to give leave under subsection (2), the Supreme Court may have regard to (amongst other relevant matters if any) the extent if any to which a party may not, by reason of his want of means, have an opportunity to present his case, in court proceedings if leave is given, or in an arbitration if leave is not given, taking into account the availability or otherwise of legal aid for him in respect of court proceedings and in respect of an arbitration.

(5) The following shall be considerations in favour of giving leave under subsection (2)—

(a) that the authority of the arbitrator arises under a contract of adhesion and the applicant for leave is an adherent party to the contract; and

(b) that the existence or terms of the arbitration agreement are not sufficiently established, or cannot be established without undue expense having regard to the value or importance to the parties of the matter in difference.

(6) Subsections (2) to (5) have effect notwithstanding any agreement.

Death of party. 1950, c. 27, s. 2 (1).

14. (1) Any right, power or duty of a party to an arbitration agreement relating to the commencement or conduct of an arbitration passes on his death to his personal representative.

Ibid. s. 2 (2).

(2) The authority of an arbitrator under an arbitration agreement is not terminated by the death of a party to the agreement.

(3) Subsections (1) and (2) have effect except so far as otherwise agreed.

15. (1) Subject to subsections (3) to (6), where— Stay of litigation. Act No. 29, 1902, s. 6; 1950, c. 27, ss. 4 (1), 5.

(a) there is an agreement that any difference (whether arising before or after the making of the agreement) be referred to arbitration; and

(b) in proceedings in any court a question in respect of a difference so agreed to be referred arises between parties to the proceedings who are parties to the agreement or claim through or under parties to the agreement—

that court shall, on application by such a party to the proceedings, stay the proceedings as between those parties to the proceedings so far as concerns the question so arising, except to the extent to which the court is satisfied that there is sufficient reason why the difference should not be referred in accordance with the agreement.

(2) Subsection (1) has effect notwithstanding any agreement.

(3) (a) Where— 1950, c. 27, s. 24 (1), (3).

(i) an agreement to which subsection (1) applies is for a reference of future differences to an arbitrator designated in the agreement; and

(ii) it appears to the court that the arbitrator is or may be partial—

the court may refuse a stay under subsection (1), notwithstanding that an opponent of the stay has relevant notice.

(b) an opponent has relevant notice for the purpose of paragraph (a) if he is, or claims through or under, a party to the agreement who knew, or ought to have known, at the time when he made the agreement, that the arbitrator was or might be partial.

(4) Subsection (3) has effect except so far as otherwise agreed by exempt contract, but has effect notwithstanding any other agreement.

(5) In determining whether there is sufficient reason for the purposes of subsection (1), the Court may have regard to (amongst other relevant matters if any) the extent if any to which a party may not, by reason of his want of means, have an opportunity to present his case, in an arbitration if the court proceedings are stayed, or in the court proceedings if the court proceedings are not stayed, taking into account the availability or otherwise of legal aid for him in respect of the court proceedings and in respect of an arbitration.

(6) The Court may treat any of the following matters as sufficient reason for the purposes of subsection (1)—

(a) that the arbitration agreement is a contract of adhesion and an adherent party to the contract opposes the stay; and

(b) that the existence or terms of the arbitration agreement are not sufficiently established, or cannot be established without undue expense having regard to the value or importance to the parties of the matter in difference.

(7) Where a court stays proceedings under subsection (1) as between any parties to the proceedings so far as concerns any question, the court may stay the proceedings to any further extent or generally, pending determination by arbitration of the difference so agreed to be referred, so far as necessary for the purpose of doing justice.

(8) Subsections (5), (6) and (7) have effect notwithstanding any agreement.

(9) This section has effect whether the law governing the arbitration agreement or the law governing the proceedings in an arbitration or any other relevant law is or is not the law of New South Wales, and whether any relevant arbitration is held in New South Wales or elsewhere.

16.

16. (1) A provision of an agreement to the effect that a cause of action with respect to any difference, or any matter of defence with respect to any difference, being a difference referred or referable to arbitration under that or some other agreement, does not accrue until the making of an award or the happening of some other event in an arbitration or relating to an arbitration is void.

Avoidance of arbitration as condition precedent.

Act No. 31, 1969, s. 71.

Scott v. *Avery* (1856) 5 H.L.C. 811; 10 E.R. 1121; *Cameron* v. *Cuddy* [1914] A.C. 651.

(2) This section has effect whether the law governing any agreement or the law governing the proceedings in an arbitration or any other relevant law is or is not the law of New South Wales, and whether any relevant arbitration is held in New South Wales or elsewhere.

17. (1) In this section "time bar" means a provision of an agreement whereby a cause of action with respect to any difference which arises after the making of the agreement, or any matter of defence with respect to which a difference so arises, being a difference referable to arbitration under that or some other agreement, does not accrue or is barred or otherwise defeated unless within a limit of time notice to appoint an abitrator is given or an arbitrator is appointed or some other thing is done or some other event happens in an arbitration or relating to an arbitration.

Contractual time bar.

1950 c. 27, s. 27.

Atlantic Shipping and Trading Co. Ltd v. *Louis Dreyfus & Co.* [1922] 2 A.C. 250.

(2) Where there is a time bar and a difference arises to which the time bar relates the Supreme Court may, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, extend any time limited by the time bar with respect to that difference.

(3) The Supreme Court may extend time under subsection (2) whether or not the time has expired and whether or not an application for the extension is made before the time has expired.

(4) Subsections (2) and (3) have effect except so far as otherwise agreed by exempt contract, but have effect notwithstanding any other agreement.

PART

PART III.

NUMBER, APPOINTMENT AND REMOVAL OF ARBITRATORS

18. Subject to section 27 (4), this Part has effect except so far as otherwise agreed. Application.

19. In this Part "power in relation to the appointment of an arbitrator" means a power vested in a person, whether alone or together with others, to appoint an arbitrator, or to consent to or approve an appointment of an arbitrator, or to do any other thing necessary for the appointment of an arbitrator. Interpretation.

20. (1) A reference of a difference to arbitration shall be to a single arbitrator. Single arbitrator. Act No. 29, 1902, s. 5, Sch. 2 (a); 1950 c. 27, s. 6.

(2) Where there is to be a reference of a difference to a single arbitrator, the arbitrator shall be appointed by the parties to the difference. Act No. 29, 1902, s. 7 (a); 1950 c. 27, s. 10 (a).

21. A power in relation to the appointment of an arbitrator implies a like power in relation to the appointment of another arbitrator in the place of an arbitrator who refuses or fails to act or is incapable of acting or is removed or dies. Substituted arbitrator. Act No. 29, 1902, s. 8 (a); 1950 c. 27, s. 7 (a).

22. (1) Where a power in relation to the appointment of an arbitrator is exercisable by two or more persons, any of those persons may exercise the power so far as concerns himself, and serve notice of the exercise on the other person or persons by whom the power is exercisable. Concurrent power: want of concurrence.

(2)

(2) A notice under subsection (1) must be in writing, must describe the exercise of the power, and must warn the person to whom the notice is given that, unless he objects in accordance with this Act to the exercise of the power within a specified time (not less than 7 days after service of the notice), the exercise of the power will have effect as if done with the concurrence of the person on whom the notice is served.

(3) Where a notice is served on a person under subsection (1), he may, within the time specified in the notice, serve on the person who served the notice on him notice in writing of objection to the exercise of the power.

(4) Where a notice is served on a person under subsection (1), and he does not serve notice of objection as mentioned in subsection (3), the exercise of the power shall have effect as if done with the concurrence of the person to whom the notice is given, but subject to the powers of the Supreme Court under subsection (5).

(5) The Supreme Court may, on application by a party to the difference referred or to be referred to arbitration, set aside an exercise of a power having effect by operation of this section and may exercise the power in the place of the parties to the notice under subsection (1). Act No. 29, 1902, s. 7 (a); 1950 c. 27, s. 10 (a).

(6) Where a notice is served on a person under subsection (1), and he serves notice of objection as mentioned in subsection (3), the Supreme Court may, on application by a party to the difference referred or to be referred to arbitration, exercise the power in the place of the parties to the notice under subsection (1). *Ibid.*

23. Where a person has a power in relation to the appointment of an arbitrator, and does not exercise the power, the Supreme Court may exercise the power in his place. Power not exercised. Act No. 29, 1902, s. 7 (b), (c), (d); 1950 c. 27, s. 10 (b), (c), (d).

24.

24. (1) Where there is to be a reference to two or more arbitrators, and one or more arbitrators are appointed, but the number of arbitrators required by the agreement is not appointed by reason of default of a party in the exercise of a power in relation to the appointment of an arbitrator, the party or parties not so in default may, by notice in writing served on all other parties interested in the difference, elect that the appointed arbitrators act in the place of the arbitrators required by the agreement.

Default by party. Act No. 29, 1902, s. 8 (b); 1950 c. 27, s. 7 (b).

(2) For the purpose of subsection (1) a party is in default in the exercise of a power if, after an occasion arises for the exercise of the power, another party serves on him notice in writing requiring him to exercise the power within a specified time (not less than 7 days after service of the notice), and he does not exercise the power within that time.

(3) The Supreme Court may set aside an election under this section and may exercise the power in place of the party in default.

25. (1) Where there is a vacancy in the office of arbitrator, whether original or happening in the course of an arbitration or afterwards and—

General power to fill vacancy.

1950 c. 27, s. 25 (1), (2) (a).

Uniform Arbitration Act (U.S.A.), s. 3.

(a) the provisions of the arbitration agreement and of this Act (other than this section) do not furnish a method for filling the vacancy; or

(b) the provisions of the arbitration agreement and of this Act (other than this section) for filling the vacancy fail or cannot be followed—

the Supreme Court may make an appointment to fill the vacancy.

(2) Where there is a vacancy in the office of arbitrator, whether original or happening in the course of an arbitration or afterwards, a court may, if the parties have so agreed, make an appointment to fill the vacancy.

26. An arbitrator appointed by a court or by any person under the powers in this Act or acting pursuant to an election under section 24 (1) shall have the like powers as if appointed by the parties concurrently.

Position of statutory appointee. 1950 c. 27, s. 25 (3).

27. (1) Where an arbitrator misconducts himself or the proceedings, the Supreme Court may remove him.

Removal. Act No. 29, 1902, ss. 8 proviso, 13 (1); 1950 c. 27, ss. 7 proviso, 23 (1).

(2) The Supreme Court may, under subsection (1), remove a person from such office, if any, as he may have as an arbitrator, notwithstanding that the applicant for removal does not admit, or does not prove, that the person removed is an arbitrator.

(3) Where the Supreme Court removes an arbitrator, then, notwithstanding anything in this Part, a person shall not exercise a power in relation to the appointment of an arbitrator, for the purpose of filling the vacancy, except by leave of the Court.

(4) Subsections (1), (2) and (3) have effect notwithstanding any agreement, except that the operation of those subsections may be modified or excluded in relation to any particular misconduct by agreement made with knowledge of the misconduct.

28. Where there is a reference to two arbitrators, the arbitrators may appoint an umpire.

Umpire. Act No. 29, 1902, s. 5, Sch. 2 (b); 1950 c. 27, s. 8 (1).

PART IV.

Fees and Expenses of Arbitrators

29. This Part has effect except so far as otherwise agreed by exempt contract, but has effect notwithstanding any other agreement.

Application.

30. (1) An award shall not be binding as between the parties, nor as between the parties and an arbitrator, so far as concerns the amount of the fees or expenses of an arbitrator. Award not binding.

(2) Subsection (1) has effect notwithstanding section 47.

31. Where an arbitrator refuses to deliver an award or a statement under section 59 except on payment of an amount for fees or expenses or both of an arbitrator, the Supreme Court may, on application by a party, make orders for the delivery of the award or statement to the applicant on payment into court of a sum equal to that amount and such further sum, if any, for interest and costs as the Supreme Court may direct. Payment into court. 1950 c. 27, s. 19 (1). Act No. 52, 1970, s. 74 (c).

32. (1) The Supreme Court may make orders for the taxation of the fees or expenses or both of an arbitrator and may, as the nature of the case requires, make orders for— Taxation. 1950 c. 27, s. 19 (1).

(a) payment to the arbitrator of the fees and expenses as allowed on taxation, and interest and costs, either out of money paid into court under section 31 or by any person liable to the arbitrator for the fees and expenses or partly in one way and partly in the other;

(b) repayment of money paid into court under section 31, so far as the money paid in is not paid to the arbitrator for fees, expenses, interest, or costs;

(c) repayment of a sum paid for fees and expenses of an arbitrator, to the extent to which the sum paid exceeds the amount allowed on taxation, together with interest if the Court so directs.

(2) The Supreme Court may order that any person interested be made a party to proceedings for taxation under this section, including an arbitrator whose fees or expenses are to be taxed, and any party to the arbitration and any person liable in respect of the fees or expenses. *Ibid.* s. 19 (2), (4).

33. (1) Subject to subsection (2), where any payment of any sum for fees or expenses or both of an arbitrator has been made, proceedings under section 32 for taxation of the fees or expenses shall not be commenced between the parties to the payment, except within 28 days after the date of the payment. Time limit for taxation.

(2) The Supreme Court may, in special circumstances, order that the time fixed by subsection (1) be extended, whether or not— Supreme Court Rules, 1970, Pt. 2 r. 3.

(a) the time has expired;

(b) an application for the extension is made before the time has expired; or

(c) proceedings under section 31 have been commenced.

34. This Part does not affect the finality of a payment voluntarily made of any sum for fees or expenses of an arbitrator. Saving for voluntary payment.

PART V.

Conduct of the Abitration

35. (1) An arbitrator must act fairly between the parties but, subject to that, and subject to this Act and any agreement between the parties, he may conduct the arbitration as he thinks fit. General.

(2) An arbitrator is not liable in damages for breach of his duty under subsection (1), except in the case of fraud on his part.

(3)

(3) A party to an arbitration, and any person claiming through him, shall, subject to any legal objection— Act No. 29, 1902, s. 5, Sch. 2 (f); 1950, c. 27, s. 12 (1).

(a) submit to be examined for the purposes of the arbitration;

(b) produce, as may be required or called for by the arbitrator (or, if so agreed by the parties to the arbitration, by a person authorised by the arbitrator), any document in his possession, custody or power; and

(c) do all other things which may be required by the arbitrator or, if so agreed by the parties to the arbitration, by a person authorised by the arbitrator.

(4) An arbitrator (and, if so agreed by the parties to the arbitration, a person authorised by the arbitrator) may, for the purposes of the arbitration—

(a) take and receive evidence (including evidence by affidavit); Act No. 4, 1897, s. 33; 1950, c. 27, s. 12 (6) (c).

(b) examine witnesses, on oath or not on oath; and Act No. 4, 1897, s. 33; Act No. 29, 1902, s. 5, Sch. 2 (g); 1950, c. 27, s. 12 (2).

(c) administer an oath to a witness. Act No. 4, 1897, s. 33; 1950, c. 27, s. 12 (3).

(5) Subsections (1) to (4) have effect except so far as otherwise agreed.

(6) Subsections (3) and (4) do not limit the operation of section 38.

36. The Supreme Court shall, for the purposes of or in relation to an arbitration commenced or to be commenced, have like powers in respect of injunctions and receivers pending award in the arbitration, and afterwards pending satisfaction of the award, as it has for the purposes of or in relation to proceedings commenced or to be commenced in the Court pending judgment in the proceedings, and afterwards pending satisfaction of the judgment.

Injunction; receiver. 1950, c. 27, s. 12 (6) (h).

37. (1) The Supreme Court may, on application by a person against whom a claim is made in an arbitration, make orders for security for costs of the applicant, and staying the arbitration pending compliance with an order for security for costs—

Security for costs. 1950 s. 27, s. 12 (6) (a).

(a) where a claimant is ordinarily resident outside New South Wales; or

Supreme Court Rules, 1970, Pt 53 r. 2 (1) (a).

(b) where a claimant is a corporation and it appears that there is reason to believe that the corporation will be unable to pay the costs of the arbitration if required to do so by order or by award.

Act No. 71, 1961, s. 363 (1).

(2) Subsection (1) has effect except so far as otherwise agreed by exempt contract, but has effect notwithstanding any other agreement.

38. (1) Matter shall be admissible in evidence in an arbitration as it is admissible in the like case in civil proceedings in the Supreme Court.

Evidence.

(2) Relevant matter may be admitted and acted on in an arbitration as evidence whether or not the matter is admissible by the law of evidence.

(3) Notwithstanding subsections (1) and (2), a person taking evidence in an arbitration may decline to admit as evidence matter which is unnecessary or is tendered vexatiously.

(4) Subsections (1), (2) and (3) have effect except so far as otherwise agreed.

Subpoenas. Act No. 29, 1902, s. 10 (1); 1950 c. 27, s. 12 (4).

39. (1) The Supreme Court may issue subpoenas for testimony and subpoenas for production of any document or thing for the purpose of an arbitration.

(2) Subsection (1) has effect notwithstanding any agreement.

(3) Subsection (1) applies where testimony is required to be given in New South Wales or production is required to be made in New South Wales, whether the law governing the arbitration agreement or the law governing the proceedings in the arbitration or any other relevant law is or is not the law of New South Wales, and whether the arbitration is held in New South Wales or elsewhere.

Refusal to be sworn, etc.

40. (1) Where a person present at proceedings in an arbitration (whether on subpoena or not) refuses—

(a) to be sworn or to take an affirmation as a witness;

(b) to answer a question put to him as a witness; or

(c) to produce any document or thing which he is required to produce—

the Supreme Court, on application by a party to the arbitration—

(d) may order that that person attend before the Court for examination or to produce that document or thing; and

(e) may, if he has no lawful excuse for his refusal, order him to pay to the parties to the arbitration the whole or any part of their costs of the proceedings in the Court under this section.

(2) Where a person has been examined pursuant to an order under subsection (1) (d), a copy, verified as the Court may direct, of a record of the examination shall be admissible in evidence in the arbitration.

(3) Where a person has produced a document or thing pursuant to an order under subsection (1) (d), the Court may make orders for the transmission to the arbitrator of the document or thing, or a copy or photograph of the document or thing, verified as the Court may direct.

(4) Subsections (1), (2) and (3) have effect notwithstanding any agreement.

(5) This section applies where the refusal takes place in New South Wales, whether the law governing the arbitration agreement or the law governing the proceedings in the arbitration or any other relevant law is or is not the law of New South Wales, and whether the arbitration is held in New South Wales or elsewhere.

41. (1) Where a party making, or in a position to make, a claim in an arbitration— Default award.

(a) defaults in compliance with a direction of the arbitrator relating to—

(i) the statement of the facts and matters on which he relies in support of the claim, whether in the first instance or by way of reply or otherwise;

(ii) the definition of the claim;

(iii) particulars of the claim; or

(iv) any matter prescribed for the purpose of this subsection by rules of the Supreme Court; or

(b) defaults in the prosecution of the claim—

the arbitrator may determine the claim adversely to the party in default.

(2)

(2) Where a party against whom a claim is made in an arbitration defaults in compliance with a direction of the arbitrator relating to—

(a) the statement of the facts and matters on which he relies in meeting the claim, whether in the first instance or by way of rejoinder or otherwise;

(b) particulars of those facts or matters; or

(c) any matter prescribed for the purpose of this subsection by rules of the Supreme Court—

the arbitrator may determine the claim adversely to the party in default.

(3) Where a party defaults in compliance with a direction of an arbitrator relating to any question arising in the reference, the arbitrator may determine the question adversely to the party in default.

(4) A determination under any of subsections (1), (2) and (3) shall be made by award.

(5) Subsections (1), (2), (3) and (4) have effect except so far as otherwise agreed.

(6) The Supreme Court may set aside an award on a determination under this section.

(7) Subsection (6) has effect except so far as otherwise agreed after the making of the award, but has effect notwithstanding any other agreement.

Punishment for default.

42. (1) Where a party to an arbitration disobeys a direction of an arbitrator, the Supreme Court may punish him as if the direction were an order of the Supreme Court.

(2) Subsection (1) does not apply to a direction of an arbitrator in an award.

(3) Subsection (1) has effect except so far as otherwise agreed.

43. (1) Where there are arbitrators and an umpire, the Supreme Court may, on application by a party to the reference, order that the umpire shall enter upon the reference in place of the arbitrators and as if he were a sole arbitrator.

Entry by umpire. 1950 c. 27, s. 8 (3).

(2) Subsection (1) has effect except so far as otherwise agreed by exempt contract but has effect notwithstanding any other agreement.

(3) Where there are arbitrators and an umpire and—

Act No. 29, 1902, s. 5, Sch. 2 (d); 1950 c. 27, s. 8 (2).

(a) a time is fixed for making an award and the arbitrators allow the time or any extended time to expire without making an award; or

(b) an arbitrator delivers to any party to the reference or to the umpire a notice in writing that the arbitrators disagree—

the umpire may enter upon the reference in place of the arbitrators.

(4) Where arbitrators make an interim award and afterwards an umpire enters upon the reference, the award shall be binding on the umpire.

(5) Where in the course of a reference arbitrators decide any question otherwise than by award and afterwards an umpire enters upon the reference, the umpire may adopt and act on the decision without applying his own judgment to the question.

(6) Subsections (3), (4) and (5) have effect except so far as otherwise agreed.

PART

PART VI.

POWERS OF ARBITRATOR

44. (1) Where there are two parties to a difference and no more, and there are three or more arbitrators, the arbitrators may act by majority decision.

Action by majority. 1950 c. 27, s. 9 (2).

(2) For the purpose of subsection (1), two or more parties with like interests shall count as one party.

(3) Subsections (1) and (2) have effect except so far as otherwise agreed.

45. (1) Where a question of law arises for decision by an arbitrator, it shall be his duty to decide the question by reference to law.

Basis of decision.

(2) Subsection (1) has effect except so far as otherwise agreed by exempt contract, but has effect notwithstanding any other agreement.

(3) Subject to subsections (1) and (2), an arbitrator may, if so agreed by exempt contract, decide any matter before him according to equity and good conscience, by way of compromise, or on such other basis as may be agreed.

(4) In subsection (1) "law" means the law of New South Wales or such other law as the nature of the case requires.

46. (1) Where an arbitrator makes an award on a claim for any money (including any debt or damages or the value of any goods) the arbitrator may allow interest at such rate as he thinks fit on the whole or any part of the money for the whole or any part of the period from the date when the claim arose to and including the date of the award.

Award of interest. Act No. 52, 1970, s. 94 (1).

(2)

(2) Subsection (1) does not— Act No. 52, 1970, s. 94 (2).

(a) authorise the giving of interest upon interest;

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

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

(3) Subsections (1) and (2) have effect except so far as otherwise agreed.

47. (1) The costs of a reference and award shall be in the discretion of the arbitrator. Costs of reference and award.

Act No. 29, 1902, s. 5, Sch. 2 (i); 1950 c. 27, s. 18 (1).

(2) An arbitrator may— *Ibid.*

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

(b) direct the manner of payment of costs;

(c) tax or settle the amount of any costs directed to be paid;

(d) award costs to be taxed or settled on a party and party basis or on any other basis. Act No. 52, 1970, s. 76 (1) (c).

(3) Costs awarded to be paid shall, except so far as taxed or settled by the arbitrator, be taxable in the Supreme Court. 1950 c. 27, s. 18 (2).

(4) Subsections (1), (2) and (3) have effect except so far as otherwise agreed by exempt contract, but have effect notwithstanding any other agreement.

PART

PART VII.

STATED CASE

48. This Part has effect except so far as otherwise agreed by exempt contract, but has effect notwithstanding any other agreement. Application.

49. (1) Where a question of law arises in the course of a reference, the arbitrator— Consultative case. Act No. 29, 1902, s. 19; 1950 c. 27, s. 21 (1) (a), (3).

(a) may; and

(b) shall if so ordered by the Supreme Court—

state a case for determination of the question of law by the Court.

(2) Subsection (1) (a) has effect in relation to a question of the law of New South Wales whether the law governing the arbitration agreement or the law governing the proceedings in the arbitration or any other relevant law is or is not the law of New South Wales, and whether the arbitration is held in New South Wales or elsewhere, but this subsection does not affect the construction of subsection (1) (b) or of any other provision of this Act.

(3) The Supreme Court may remit a case stated under subsection (1) and section 57 applies in relation to a case stated under subsection (1) as it applies in relation to an award.

50. Where a question of law arises in the course of a reference, the arbitrator— Award in the form of a case. Act No. 29, 1902, s. 9 (a); 1950, c. 27, s. 21 (1) (b), (3).

(a) may; and

(b) shall if so ordered by the Supreme Court—

make

make an award or part of an award in the form of a case for determination of the question of law by the Court.

51. Where the Supreme Court remits an award the Court may order an arbitrator to state a case under section 49 or to make an award or part of an award in the form of a case under section 50, whether or not the arbitrator has been requested to do so before making the award remitted.

Order although no request to arbitrator.

PART VIII.

AWARD

52. (1) Subject to this Part, an arbitrator may make an award at any time.

Time. 1950, c. 27, s. 13 (1).

(2) The Supreme Court may from time to time extend any time for making an award, whether or not the time has expired, and whether or not an application for the extension is made before the time has expired.

Act No. 29, 1902, s. 11; 1950, c. 27, s. 13 (2).

(3) Subsections (1) and (2) have effect except so far as otherwise agreed by exempt contract, but have effect notwithstanding any other agreement.

53. (1) An arbitrator may make an interim award.

Interim award. 1950 c. 27, s. 14.

(2) Subsection (1) has effect except so far as otherwise agreed.

54.

54. An arbitration agreement shall, except so far as a contrary intention appears, have an implied stipulation that, subject to this Act, an award in an arbitration under the agreement shall be final and binding on each party to the arbitration and those claiming under him.

Finality. Act No. 29, 1902, s. 5, Sch. 2 (h); 1950, c. 27, s. 16.

55. (1) An arbitrator may alter his award in any way within 14 days after the date of making the award or on application made to him within 14 days after that date.

Alteration by arbitrator.

(2) An arbitrator may alter his award at any time for any of the following purposes—

(a) correcting a clerical mistake in the award;

Act No. 29, 1902, s. 9 (b); 1950, c. 27, s. 17.

(b) correcting an error in the award arising from an accidental slip or omission;

Ibid.

(c) correcting a defect of form.

Uniform Arbitration Act (U.S.A.), s. 13 (a) (3).

(3) The power of an arbitrator to alter an award under subsection (1) or (2) shall be exercised by making a further award.

(4) Subsections (1), (2) and (3) have effect except so far as otherwise agreed by exempt contract, but have effect notwithstanding any other agreement.

56. (1) The Supreme Court may make orders for the alteration of an award for any of the following purposes—

Alteration by the Supreme Court.

(a) correcting a clerical mistake in the award;

Act No. 29, 1902, s. 9 (b); 1950, c. 27, s. 17.

(b) correcting an error in the award arising from an accidental slip or omission;

Ibid.

(c)

(c) correcting a defect of form.

Uniform Arbitration Act (U.S.A.), s. 13 (a) (3).

(2) Where—

(a) it is the duty of an arbitrator to make his determination by reference to law; and

(b) it appears to the Supreme Court that there are grounds for remitting or setting aside an award of the arbitrator and that, upon correcting any material error of law or of fact, only one determination of the difference referred is open to the arbitrator—

the Supreme Court may alter the award so as to give effect to that determination, but only by consent in relation to an error of fact.

(3) Subsections (1) and (2) have effect except so far as otherwise agreed by exempt contract, but have effect notwithstanding any other agreement.

Remission. Act No. 29, 1902, s. 12 (1); 1950, c. 27, s. 22 (1); Qd. Act No. 34, 1973, s. 30 (1).

57. (1) The Supreme Court may from time to time remit the whole or any part of an award for further consideration in the arbitration, whether by the arbitrator who made the award or by another arbitrator, in such respects or generally as the Court may direct, together with such further directions if any as the Court thinks fit.

(2) The Supreme Court may exercise its powers under subsection (1) where it appears to the Court that the award or any part of the award is or may be grossly wrong.

(3) Subsection (2) has effect whether or not—

(a) an error appears on the face of the award;

(b) the arbitrator admits an error or asks for remission;

(c)

(c) a question of law was specifically referred to the arbitrator; or

(d) any error is identified to the Court.

(4) Subsection (2) does not limit the powers of the Supreme Court under subsection (1).

(5) Subject to subsection (2), the Supreme Court shall not remit an award on the ground—

(a) that there is an error on the face of the award; or

(b) that the arbitrator admits an error and asks for remission.

(6) Where the whole or part of an award is remitted, the Supreme Court may fix a time for making the award on further consideration. Act No. 29, 1902, s. 12 (2); 1950 c. 27, s. 22 (2).

(7) Subsections (1) to (6) have effect except so far as otherwise agreed by exempt contract, but have effect notwithstanding any other agreement.

58. (1) Where it appears to the Supreme Court that an award or part of an award is or may be grossly wrong, and it does not appear to the Court that justice may be done by remitting the award or part for further consideration in the arbitration, the Court may set aside the award wholly or in part as the case requires. Setting aside.

(2) Subsection (1) does not affect the power of the Supreme Court to set aside an award or part of an award in a case to which subsection (1) does not apply.

(3) Subject to subsection (1), the Supreme Court shall not set aside an award for error on the face of the award.

(4) Subsection (3) does not affect the powers of the Supreme Court in relation to—

(a) the determination of a question of law on a case stated by an arbitrator or on an award or part of an award made in the form of a case; or

(b) the remitting of an award.

(5) The grounds on which an award may be set aside by the Supreme Court—

(a) may be limited by exempt contracts; but

(b) may not be limited by any other agreement.

(6) If so agreed by exempt contract, an award shall not be set aside on any ground.

(7) Subsections (5) (a) and (6) do not apply in case of a denial of justice or of fraud, except where the denial of justice or fraud is known to the parties to the exempt contract at the time when the exempt contract is made.

Statement of terms.

59. (1) Where an arbitrator makes an award but does not make the award in writing, the arbitrator shall, upon request by a party within 7 days after the making of the award, make and, subject to subsection (2), give to the party a statement in writing, signed by the arbitrator, of the date and terms of the award.

(2) Subject to section 31, an arbitrator shall have a lien for fees and expenses on a statement made on a request under subsection (1) like to the lien which he would have on the award if the award had been made in writing.

(3) The Supreme Court may withhold making an order in favour of an arbitrator for his fees or expenses, or for taxation of his fees or expenses, pending compliance by the arbitrator with a request under subsection (1).

(4) Subsections (1), (2) and (3) do not affect the validity of an award.

(5) Subsections (1), (2), (3) and (4) have effect except so far as otherwise agreed.

60. (1) Where an arbitrator makes an award for the payment of money, the arbitrator may further award that the money shall not carry interest or shall carry interest— Interest.

(a) from the date of the award or from such later date as the arbitrator may direct; and

(b) at such rate as the arbitrator may direct.

(2) Subject to subsection (1), a sum directed to be paid by an award shall carry interest from the date of the award at the rate prescribed for the purpose of section 95 (1) of the Supreme Court Act, 1970. 1950 c. 27, s. 20.

(3) This section does not require, or authorise an award requiring, the payment of interest on interest payable under this section.

(4) Subsections (1), (2) and (3) have effect except so far as otherwise agreed.

61. (1) The whole or any part of an award may, by leave of the Supreme Court, be enforced in the same manner as may a judgment or order of the Court to the same effect. Enforcement. Act No. 29, 1902, s. 14 (1); 1950 c. 27, s. 26.

(2) The Supreme Court may make orders necessary or convenient for carrying the whole or any part of an award into effect.

(3) Subsections (1) and (2) have effect except so far as otherwise agreed by exempt contract, but have effect notwithstanding any other agreement.

(4)

(4) This section applies—

(a) whether the award was made in New South Wales or elsewhere;

(b) whether the law governing the arbitration agreement or the proceedings in the arbitration or any other relevant law is or is not the law of New South Wales; and

(c) in the case of an award for the payment of money, whether or not the money is Australian money.

PART IX.

REFERENCE BY THE SUPREME COURT OR THE DISTRICT COURT

Power to refer.
Act No. 29, 1902, s. 15.

62. In any proceedings in the Supreme Court or in the District Court (except criminal proceedings by the Crown)—

(a) where all parties interested who are not under disability consent;

(b) where the proceedings require any prolonged examination of documents or any scientific or local investigation which cannot, in the opinion of the court, conveniently be made by the court; or

(c) where the question in dispute consists wholly or in part of matters of account—

the court may at any time make orders for reference to an arbitrator agreed on by the parties, or to a referee appointed by the court, for trial of the proceedings or of any question or issue of fact arising in the proceedings.

63. (1) This section applies in relation to a reference under an order of a court under section 62. General.

(2) The court shall have like powers to the powers which the court has under this Act or otherwise in relation to an arbitration agreement made out of court and in relation to an arbitration or an award under an arbitration agreement made out of court. Powers of the court. Act No. 29, 1902, s. 17.

(3) Where the reference is under an order of the District Court—

(a) the Supreme Court shall not exercise—

(i) its jurisdiction under this Act; or

(ii) its jurisdiction to set aside an award—

except on appeal from the District Court; and

(b) the District Court has—

(i) jurisdiction under this Act; and

(ii) jurisdiction to set aside an award.

(4) The arbitrator or referee shall be deemed to be an officer of the court. Position of arbitrator or referee. Act No. 29, 1902, s. 16 (1).

(5) The arbitrator or referee shall have such powers as may be prescribed by rules of court and, subject to rules of court, as the court may order. Powers of arbitrator or referee. Act No. 29, 1902, s. 16 (1).

(6) The arbitrator or referee shall conduct the reference as may be prescribed by rules of court and, subject to rules of court, as the court may order. Conduct of the reference Act No. 29, 1902, s. 16 (1).

(7) Subject to this Act, the court shall give effect to the award of an arbitrator or referee as nearly as possible as if the award were a verdict of a jury in the proceedings. Effect of award or report. Act No. 29, 1902, s. 16 (2).

(8)

(8) The remuneration of the arbitrator or referee shall be determined by the court.

Remuneration of arbitrator or referee.

Act No. 29, 1902, s. 16 (3).

(9) Subject to this Part and to rules of court, the law relating to arbitration applies to an arbitration or reference under this Part.

Application of laws.

(10) Notwithstanding subsection (9), sections 38 (2), 57 (5) (a) and 58 (3) do not apply to an arbitration or reference under this Part or to an arbitrator or referee under this Part unless the order for reference is made with the consent of all parties interested.

PART X.

GENERAL

64. (1) Where—

Extension of submission.

(a) there is an agreement to submit differences to arbitration;

(b) a difference to which the agreement applies is afterwards submitted to an arbitrator pursuant to the agreement; and

(c) there is some other difference (arising at any time) to which the agreement applies and which, under the agreement, can be submitted to the same arbitrator pursuant to the agreement—

the arbitrator may, on application by a party to the arbitration made before final award, direct that the submission be extended so as to include that other difference.

(2)

(2) An arbitrator may give a direction under subsection (1) on such terms and conditions (if any), relating to costs or otherwise as he thinks fit.

(3) The Supreme Court may set aside or vary a direction, or any terms or conditions of a direction, of an arbitrator under this section.

(4) Subsections (1), (2) and (3) have effect except so far as otherwise agreed.

Partiality of arbitrator.
1950 c. 27, s. 24 (1).

65. (1) Where—

(a) there is an agreement for a reference of future differences to an arbitrator designated in the agreement;

(b) a difference so arising is referred to the arbitrator; and

(c) a party to the arbitration applies to the Supreme Court for—

(i) leave to revoke the authority of the arbitrator;

(ii) removal of the arbitrator; or

(iii) restraint of any other party, or the arbitrator, from proceeding with the arbitration; and

(d) it appears to the Court that the arbitrator is or may be partial—

the Supreme Court may grant the application notwithstanding that the applicant has relevant notice.

(2) An applicant has relevant notice for the purpose of subsection (1) if he is, or claims through or under, a party to the agreement who knew, or ought to have known, at the time when he made the agreement, that the arbitrator was or might be partial.

(3) Subsections (1) and (2) have effect except so far as otherwise agreed by exempt contract, but have effect notwithstanding any other agreement.

Costs of abortive arbitration.

66. (1) Where—

(a) the authority of an arbitrator is revoked;

(b) a court refuses an application under section 15 for a stay of proceedings;

(c) a court restrains a party or an arbitrator from proceeding with an arbitration;

(d) the Supreme Court sets aside an award; or

(e) an arbitration otherwise fails —

the Supreme Court shall have the like power in relation to the costs of the reference and of any award (so far as the costs are not dealt with by award) as it has in relation to the costs of proceedings in the Court.

(2) The Supreme Court may exercise its powers under subsection (1) (a) on or after giving leave to revoke the authority of an arbitrator, without waiting until the revocation is carried out.

(3) Subsections (1) and (2) have effect except so far as otherwise agreed.

Privacy.

67. (1) This section applies where—

(a) the authority of an arbitrator is revoked in relation to any difference agreed to be referred to arbitration, and in proceedings in any court a question in respect of a difference so agreed to be referred arises between parties to the proceedings who are parties to the agreement or who claim through or under parties to the agreement;

(b) an application is made to a court under section 15 for a stay of proceedings and the court does not grant the application in full; or

(c) by reason of the removal of an arbitrator under section 27 an arbitration cannot proceed in relation to any difference agreed to be referred, and in proceedings in any court a question in respect of a difference agreed to be referred arises between parties to the proceedings who are parties to the agreement or claim through or under parties to the agreement.

(2) The court may—

(a) order that the business of the court in the proceedings be conducted in the absence of the public; and

(b) make orders restricting or forbidding the publication of any matter arising in the proceedings.

Perjury. Act No. 29, 1902, s. 25.

68. (1) Any person who wilfully and corruptly gives false evidence before any referee, arbitrator, umpire or other person authorised to administer an oath for the purposes of an arbitration shall be guilty of perjury, as if the evidence had been given in the Supreme Court in open court, and may be dealt with, prosecuted, and punished accordingly.

(2) Subsection (1) applies where evidence is given in New South Wales before any referee, arbitrator, umpire or other person authorised by the law of New South Wales to administer an oath for the purposes of an arbitration, whether the law governing the arbitration agreement or the proceedings in the arbitration, or any other relevant law, is or is not the law of New South Wales.

69. An order of a court under this Act may be made on such terms and conditions (if any), relating to costs or otherwise, as the court thinks fit.

Order on terms.
Act No. 29, 1902, s. 24; Act No. 52, 1970, s. 21; 1950 c. 27, s. 28.

70. (1) Any notice required or authorised by this Act to be served may be served in or out of New South Wales and shall be sufficiently served—

Service of notice.
Act No. 6, 1919, s. 170.

(a) if delivered personally;

(b) if left at the last known place of abode or business of the person to be served;

(c) if sent by letter by certified mail addressed to the person to be served by name at his last known place of abode or business and the letter is not returned through the post office undelivered; or

(d) in such manner as the Supreme Court may direct.

(2) Where service is effected as mentioned in subsection (1) (c), the time of service shall be taken to be the time when the letter would in the ordinary course be delivered.

(3) This section does not apply to a notice served in proceedings in a court.

(4) Subsections (1), (2) and (3) have effect except so far as otherwise agreed by exempt contract, but have effect notwithstanding any other agreement.

71. The Governor may make regulations, not inconsistent with this Act prescribing classes of contract for the purpose of section 11 (1) (b).

Regulations.

72. (1) Rules of Court may be made under the Supreme Court Act, 1970, with respect to— Rules of court.

(a) the examination of witnesses before the court or before any other person and the issue of commissions or requests for the examination of witnesses outside the State, for the purposes of an arbitration; Act No. 29, 1902, ss. 21, 23; 1950 c. 27, s. 12 (6) (d).

(b) the prescription of cases in which security may be required for the purposes of an arbitration, and the form of such security, and the manner in which, and the person to whom, it is to be given; Act No. 52, 1970, s. 124 (1) (n); cf. 1950 c. 27, s. 12 (6) (f).

(c) the preservation, detention, custody, management, enjoyment, or sale or other disposal of property the subject of a difference referred or referable to arbitration; 1950 c. 27, s. 12 (6) (e), (g), (h).

(d) discovery and inspection of documents, and interrogatories, for the purposes of an arbitration; 1950 c. 27, s. 12 (6) (b).

(e) the medical examination of any party to an arbitration whose physical or mental condition is relevant to any question arising in the arbitration;

(f) the inspection, sampling or observation of any property, for the purposes of an arbitration; 1950 c. 27, s. 12 (6) (g).

(g) the trying of experiments on or with any property, or the observation of any process, for the purposes of an arbitration; 1950 c. 27, s. 12 (6) (g).

(h) subpoenas for testimony and subpoenas for production of any document or thing for the purposes of an arbitration;

(i) the prescription of matters for the purpose of section 41 (1) or (2);

(j) the time for the making of any application for the setting aside of an award;

(k)

(k) the powers of an arbitrator or referee in a reference under an order in proceedings in the Supreme Court and the conduct of such a reference; and

Act No. 29, 1902, s. 16 (1).

(l) the provision of the services of officers of the Supreme Court and the provision of court rooms and other facilities for the purpose of a reference under an order in proceedings in the Court—

but this subsection does not authorise the making of rules with respect to the practice or procedure of the District Court.

(2) Rules may be made under section 161 of the District Court Act, 1973, with respect to—

(a) the matters mentioned in paragraphs (a) to (h) and (j) of subsection (1) so far as concerns an arbitration agreement, an arbitration or an award in an arbitration in relation to which the District Court has jurisdiction under this Act;

(b) the powers of an arbitrator or referee in a reference under an order in proceedings in the District Court and the conduct of such a reference; and

Ibid.

(c) the provision of the services of officers of the District Court and the provision of court rooms and other facilities for the purpose of a reference under an order in proceedings in the District Court.

(3) Rules made under this section may be made in relation to an arbitration, whether the law governing the arbitration agreement or the law governing the proceedings in the arbitration or any other relevant law is or is not the law of New South Wales, and whether the arbitration is held in New South Wales or elsewhere.

(4) Where a rule of the District Court made under this section is inconsistent with a rule of the Supreme Court made under this section, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid. Commonwealth Constitution s. 109.

(5) This section does not limit the rule-making powers conferred by the Supreme Court Act, 1970, or the District Court Act, 1973.

73. (1) An Act specified in the first column of Schedule 2 is amended or repealed to the extent specified opposite that Act in the second column of Schedule 2. Repeals and amendments. Schedule 2.

(2) Where the Arbitration Act, 1902, or any provision of that Act is referred to in an Act or in an instrument made under an Act, the reference shall, in respect of an arbitration commenced after the appointed day, be read as a reference to this Act or to the corresponding provision of this Act as the case requires. Act No. 4, 1897, s. 25 (1).

SCHEDULE 1

CERTAIN EXEMPT CONTRACTS

Section 11

1. A contract whose parties, or such of them as are interested in the difference in question, fall within one or more of the following descriptions—

(a) the Crown in right of New South Wales or in any other right, or its officer or representative;

(6)

(b) the government of a country (including the government of a state, province or other part of a federation and the government of a federation) or an officer or representative of such a government;

(c) a statutory body representing the Crown;

(d) a corporation or other artificial person created by or under the law of any country, except a corporation which, for the purpose of the Companies Act, 1961, or the Companies Act of any other State of the Commonwealth or the Companies Ordinance of any Territory of the Commonwealth, is a proprietary company and is not a subsidiary of another corporation;

(e) a person resident or carrying on business at a place not in a State or Territory of the Commonwealth.

2. A contract whose parties, or such of them as are interested in the difference in question, carry on the business of making contracts of the kind of the contract in question, where one at least of the parties so interested is resident or carries on business at a place not in a State or Territory of the Commonwealth.

3. A contract for the carriage of goods where by the terms of the contract the place of despatch or of destination is not in a State or Territory of the Commonwealth.

SCHEDULE

SCHEDULE 2

REPEALS AND AMENDMENTS

Section 73.

First Column.		Second Column.	
Year and No. of Act.	Short title.	Extent of amendment or repeal.	
1898, No. 22..	Legal Practitioners Act, 1898	In section 39A, after subsection (1), insert— (1A) Subsection (1) shall apply as if an arbitration were a proceeding in the Supreme Court and the Supreme Court may make declarations and orders accordingly.	1950, c. 27 s. 18 (5).
1900, No. 20..	Oaths Act, 1900	In section 26 (1), after "New South Wales", insert "or for the purpose of any arbitration".	
1902, No. 29..	Arbitration Act, 1902	After section 2, insert the following new section— 2A. This Act does not apply in relation to a submission, an arbitration, a reference or an award in relation to which the Arbitration Act, 1976, applies.	Application.
1941, No. 55..	Agricultural Holdings Act, 1941	In section 17, after subsection (1), insert— (1A) Subject to this Act and the regulations, the Arbitration Act, 1976, shall apply to an arbitration under this Act. In the Second Schedule, omit paragraphs 8, 10, 12, 13, 14, 15, 16 and 18.	
1969, No. 31..	Limitation Act, 1969	Omit section 71. In section 73 (1), omit paragraphs (a), (b) and (c) and "the court may"; insert— (a) gives leave to revoke the authority of an arbitrator or umpire; (b) removes an arbitrator or umpire; (c) restrains a party to or an arbitrator or umpire from proceeding with an arbitration; or (d) sets aside an award in an arbitration, and in consequence the arbitration fails, the court may, and where an arbitration otherwise fails the Supreme Court may,	

SCHEDULE 2—*continued*

REPEALS AND AMENDMENTS—*continued*

First Column.		Second Column.
Year and No. of Act.	Short title.	Extent of amendment or repeal.
1970, No. 52..	Supreme Court Act, 1970	In section 101 (2) (g), omit "Act; or", insert "Act;". In section 101 (2) (h), omit "1902.", insert "1902; or". In section 101 (2), after paragraph (h), insert— (i) a determination in proceedings in the Court on a case stated under section 49 of the Arbitration Act, 1976, on an award or part of an award made in the form of a case under section 50 of that Act, on an application for remission of an award under section 57 of that Act, or on an application for the setting aside of an award to which that Act applies.
1973, No. 9 ..	District Court Act, 1973	In section 3, omit "*Possession of land and equity proceedings*"; insert "*Possession of land, equity and other proceedings*". Omit the heading after section 62, "*Subdivision 6.—Arbitration.*" Omit section 63. In section 130, after subsection (1), insert— (1A) Subsection (1) (a) does not apply to an appeal from a determination of the Judge on a case stated under section 49 of the Arbitration Act, 1976, on an award or part of an award made in the form of a case under section 50 of that Act, on an application for remission of an award under section 57 of that Act, or on an application for the setting aside of an award to which that Act applies. In the heading after section 132, omit "*Possession of land and equity proceedings*"; insert "*Possession of land, equity and other proceedings*". In section 135, after subsection (2), insert— (3) Subject to subsection (4), proceedings in the Court under the Arbitration

SCHEDULE 2—*continued*

REPEALS AND AMENDMENTS—*continued*

First Column.		Second Column.
Year and No. of Act.	Short title.	Extent of amendment or repeal.
1973, No. 9 .. (*continued*)	District Court Act, 1973 (*continued*)	Act, 1976, shall be commenced— (a) where a defendant is resident or carries on business at a place in New South Wales—at the nearest proclaimed place to that place; or (b) where paragraph (a) does not apply —at Sydney. (4) Proceedings in the Court under the Arbitration Act, 1976, in respect of an arbitration under the Agricultural Holdings Act, 1941, shall be commenced at the nearest proclaimed place to the holding to which the arbitration relates.
1973, No. 36..	Arbitration (Foreign Awards and Agreements) Act, 1973	The whole Act is repealed.
1973, No. 39..	Foreign Judgments (Reciprocal Enforcement) Act, 1973	In section 4, after subsection (2) insert— (3) Where an award in proceedings on an arbitration 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 and is by virtue of subsection (1) a judgment for the purposes of this Act, the award is, for the purposes of this Act, a judgment given by that court. In section 8 (2) (b), omit "court; and", insert "court;". In section 8 (2) (c), omit "State.", insert "State; and". In section 8 (2), after paragraph (c), insert— (d) in the case of an award in proceedings on an arbitration, the award was within the jurisdiction of the arbitrator. In section 8 (3) (b), after "subsection (2) (c)", insert "and in subsection (2) (d)".

APPENDIX 2

Report paragraph 1.3

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INDEX

	Report paragraph	*Draft Bill section etc.*
acknowledgments	1.3	
action on award	9.11.1, 2, 8, 9	
Admiralty arrest and bail	6.6.1–7	
advocate, arbitrator as..	5.2.2	
affidavit—*see* evidence.		
aequo et bono, decision *ex*—*see* basis of decision		45
alteration of award—*see* correction of award.		
amendments to other Acts	14.2.1, 2	73 (1)
amiable compositeur—*see* basis of decision.		
appeal—		
award, from	9.8.1–4	
leave, by	8.3, 6–8 9.6.23, 24 9.7.11, 12	Sch. 2
appointment of arbitrator	5.1.1–10	18–26, 27 (3)
arbitration—		
description	1.6, 7	
statutory definition?..	1.8	
arbitration agreement—		
difficulty of proof	2.1.13, 14 4.1.16, 18	13 (5) (b), 15 (6) (b)
setting aside	2.6.1–6	
and see form, and other particular entries.		
Atlantic Shipping clause	4.3.1–6	17
attachment to enforce—		
arbitration agreement	3.4	
award	3.5 9.11.1, 3	61
direction of arbitrator	3.7 6.3.1–6	42
Australian Capital Territory report (1974)	1.4	
authority of arbitrator in doubt ..	2.3.15, 16	13 (3)
award—		
statement of terms of	9.3.7, 8	59
grossly wrong	9.4.7	5 (3), 57 (2), 58 (1)
and see setting aside, and other particular entries.		
bankruptcy of party	2.5.1–3	
basis of decision	7.1.1–10	45
bias of arbitrator	2.3.8, 13, 14, 16 4.1.16	15 (3), 65
binding effect of award	9.1.1–5	30, 54
bond to support submission	3.3 9.11.1	
case stated	8.1–8 9.6.17	48–51
commencement of new Act		2
comment on the working paper ..	1.3	
common law, arbitration a hindrance to development	1.15	
Commonwealth places	13.2.9	
comparative law	1.19	

INDEX—*continued*

	Report paragraph	*Draft Bill section etc.*
compromise—*see* basis of decision.		
conciliation	5.2.2 15.1–6	
condition precedent, award as—*see* *Scott* v. *Avery* clause		
conduct of arbitration	6.1.1–6.12.1	35–43.
conflict of laws	13.1.1–13.2.17	(See report paragraph 13.1.9).
contract, freedom and control ..	1.9–12	
contract of adhesion	1.12 2.2.1–6, 8 15–19 2.3.14, 16 4.1.16, 18	6, 13 (5) (a), 15 (6) (a).
correction of award	9.9.1–9	55, 56
costs of arbitration—		
general	7.5.1–8	47, 66
security for	6.7.1–7	37
Court—		
officers and facilities..		72 (1) (1)
reference by	11.1–10	62, 63, 72 (1) (k)
role of..	1.13, 8.7	
Crown	1.18 9.11.12–14	7
death of party	2.4.1–7	14
default award	6.3.1–6	41, 72 (1) (i)
default by party	6.3.1–6	41, 42, 73 (1) (ix)
directions on procedure	6.1.1–4 6.3.1–6	35 (1), (3), 41, 42
disbursements of arbitrator—*see* fees and expenses of arbitrator		
discovery	6.10.1–8	72 (1) (d)
District Court—		
general	12.1–11	8, 10 (2), 62, 63, 72 (2)–(5).
subpoena	6.8.12, 16	
enforcement of award	9.11.1–14	61
equity and good conscience—*see* basis of decision.		
error on face of award..	9.6.1–24 9.7.1–12	57 (5) (a), 58 (3)
evidence	6.8.1–19	35 (4), (5), 38, 39, 40, 72 (1) (a), (h).
exempt contract	1.10 2.2.1–14, 19	11, 12 (and see report paragraph 2.2.14).
expenses of arbitrator—*see* fees and expenses of arbitrator.		
expert assistance	6.11.1–3	
extent of reference	6.2.1–3	64
fees and expenses of arbitrator ..	5.4.1–9 9.3.8	29–34
finality of award	9.1.1–5	30, 54
foreign—		
arbitration	13.1.1	
arbitration agreement	13.1.1–9	
award	13.1.1 13.2.1–17	
and see conflict of laws.		

INDEX—*continued*

	Report paragraph	*Draft Bill section etc.*
form—		
arbitration agreement	2.1.1–14	
award	9.3.1–8	
fraud, questions of	2.3.9	
illegality	7.1.1	
impartiality, arbitrator's want of—*see* bias.		
industrial arbitration	1.2	
injunction, interim	6.4.1–9	36
inspection of property	6.10.1–8	72 (1) (f), (g)
Institute of Arbitrators Australia ..	1.5 5.6.3 15.5	
insurance cases: restriction on arbitration	1.16	
interest on money—		
awarded	9.10.1–6	60
claimed	7.3.1–6	46
interim—		
award	9.5.1–7	43 (4), 53
preservation	4.2.8, 9 6.4.1–9	36, 72 (1) (c)
sale	6.4.1–9	72 (1) (c)
interpretation		5
interrogatories—*see* discovery		
judge-arbitrator..	10.1–5	
judgment on award	9.11.1–14	
law—		
arbitrator must apply it	7.1.1–10	45
objectives of	1.9–14	
legal aid	2.3.14, 16 4.1.16, 18	13 (4), 15 (5)
liability of arbitrator	5.5.1–7	35 (2)
majority decision	7.2.1–8	44
medical examination	6.10.6, 8	72 (1) (e)
misconduct, meaning	5.3.8, 9	
New York Convention of 1958 ..	1.16 13.2.6, 7, 10, 14	
notice, service of	5.1.6, 10	70
number of arbitrators	5.1.1 5.2.1, 6–9, 10, 13	20 (1)
objectives of the law	1.9–14	
order of Court, submission as ..	3.1–10	
partiality of abritrator—*see* bias.		
perjury	6.8.1, 13, 19	68
preservation, interim		72 (1) (c)
privacy—		
of arbitration..	1.15	
of litigation	4.1.13, 16	67
procedure—		
arbitrator's powers	6.1.1–4	35, 36, 41
statutory regulation	6.12.1	
property—		
inspection	6.10.1–8	72 (1) (f)
interim preservation on sale ..	6.4.1–9	72 (1) (c)
public drawbacks of arbitration ..	1.15	
Queensland report (1970)	1.4	
reasons for award	9.4.1–8	
receiver	6.4.1–9	36

INDEX—*continued*

	Report paragraph	*Draft Bill section etc.*
rectification of award—*see* correction of award.		
reference by the Court	11.1–10	62, 63, 72 (1) (k)
register of arbitrators	5.6.1–4	
regulations	2.2.11, 19	11 (1) (b), 71
related differences	4.1.17	
remission—		
award	9.7.1–12	57
consultative case	9.7.10–12	49 (3)
removal of arbitrator	5.3.1–10	27, 67
remuneration of arbitrator—*see* fees and expenses of arbitrator.		
repeals		73 (1)
reports, recent Australian	1.4	
revocation of authority of arbitrator—		
contract of adhesion	2.2.17–19	13 (5) (a)
general	2.3.1–16	13, 66, 67
rule of Court, submission as	3.1–10	
rules of Court		72
sanction for procedural directions ..	6.3.1–6	41, 42
Scott v. *Avery* clause	2.2.18	
	4.2.1–17	16
security for—		
costs	6.7.1–7	37
money claimed	6.5.1–8	72 (1) (b)
service of notice	5.1.6, 10	70
setting aside award	9.6.1–24	41 (6), 58, 66
ship, arrest in Admiralty	6.6.1–7	
shipowner's lien	14.3.1–3	
slip rule	9.9.2–9	55 (2), 56 (1)
solicitor's lien for costs	7.5.2–8	Sch. 2
South Australian report (1969) ..	1.4	
special case—*see* case stated.		
specific performance	7.4.1–9	
stated case—*see* case stated.		
State, award of another	13.2.8	
and see conflict of laws.		
statutes relating to arbitration ..	14.2.1, 2	
statutory arbitration	14.1.1–6	9
stay of litigation	2.2.17–19	15, 66, 67
	4.1.1–18	
subpoena—*see* evidence.		
terms—		
of reference	1.1, 2	
order on		69
Territory of the Commonwealth award of	13.2.8	
and see conflict of laws		
third party claims	6.9.1–3	
time—		
award	9.2.1–8	52
contractual limits	4.3.1–7	17
remission of award	9.7.8	
setting aside award	9.6.20	72 (1) (j)
transition to new Act	1.17	4, 73 (2)
umpire	5.2.1–14	5 (2), 28, 43
and see entries relating to arbitrators.		
uniformity in Australia	1.21	
witness, default by	6.8.11, 19	40