THE CONCEPT OF STATUTORY ARBITRATION AND ITS RAMIFICATIONS

by THE HON MR JUSTICE DAVID BYRNE, SUPREME COURT OF VICTORIA

ARBITRATION is traditionally defined as a reference by agreement of a dispute or difference between two or more parties for determination by a third party in a judicial manner.[1] For present purposes it must be emphasised that a concept essential to arbitration is that it is consensual. The parties, having available to them dispute resolution procedures provided by the State, the Courts, have agreed upon another form, namely arbitration.[2] The concept of consent is found in the Statutes under which commercial arbitration is conducted in this State, whether it be domestic arbitration[3] or international arbitration[4] or whether it be the enforcement of an arbitration award conducted within or outside the State.[5]

The subject matter of this paper pre-supposes the existence of an arbitration, but one without this essential feature—an arbitration to which the parties are, directly or indirectly, required by statute to submit. Parliament, however, is not constrained by principles of linguistics or logic.[6] It is not rare to find provision for compulsory arbitration. Such provisions are particularly common these days where courts are perceived to be too rigid, too expensive,[7] too legalistic and insufficiently able to cope with technical areas of conflict. Compulsory arbitration takes one of two forms depending on whether the reference to arbitration is directly by statute, "Statutory Arbitration", or indirectly, by court order, "Court-annexed Arbitration". I propose to consider practical aspects of each of these non-consensual types of arbitration. Then I shall deal with a special form of non-consensual arbitration whereby the court is authorised or directed by statute to appoint itself to act as arbitrator, "Judicial Arbitration".

It must be noted at the outset that the only statutory arbitral regime which is capable of applying to any of these types of compulsory arbitration is that of the Commercial Arbitration Act 1984, unless the statute establishing the arbitration itself provides a regime. Where this statute does not apply we are left with an exceedingly rare procedure—common law arbitration.

I. *Statutory Arbitration*

Despite the belief common among lawyers, statutory arbitrations follow a fairly ancient tradition. The Fourth edition of *Russell on Awards*[8] contains quite an

---

Text of an address to an Advanced Arbitration Course for Barristers in Melbourne, November 1991 arranged by the Victorian Bar Council and The Institute of Arbitrators, Australia.

extensive discussion of these arbitrations which were by the mid-nineteenth century widely used to resolve disputes, usually as to compensation arising out of the compulsory acquisition of land for government[9] or private railway[10] purposes. These statutes set out a comprehensive regime for the conduct of arbitrations, with the power to make the submission a rule of court as a preliminary step to enforcement as an order of the Court.[11] This procedure therefore is similar to but did not draw upon the general law applicable to consensual arbitrations.

As in so many areas of law, a brief examination of historical antecedents enlivens and makes comprehensible the modern law. In their fascinating history of arbitration, Mustill and Boyd[12] summarise the position of arbitration in its relationship with the courts as at the enactment of the Common Law Procedure Act 1854 as follows:

1. Submissions by rule of court in a pending action. This is where the parties to an action in court obtain an order referring the dispute or an issue to arbitration. This procedure which was controlled by the court as part of its own process is the predecessor of the modern court-annexed arbitration which is discussed below.
2. Submissions out of court made a rule of court under the Statute of 1698. The power of the court was conferred by the Statute. This is the procedure that was adopted by the 19th century statutory arbitrations. Little of this procedure remains in modern statutes.
3. Submissions out of court not made rule of court. This is the ancestor of modern commercial arbitration. Prior to 1854 it was an unconventional procedure inasmuch there was limited power of court assistance or supervision. For example, until 1833 such a submission was revocable by either party at any time, even after award.[13] It is this procedure as modified by successive English legislation[14] until the Arbitration Act 1889 which was largely adopted in the Australian States including Victoria[15] until the uniform Commercial Arbitration Act 1984.

The point of this rather long excursus is that, traditionally, statutory arbitration has stood apart from mainstream consensual commercial arbitrations. Modern statutory arbitrations demonstrate an attempt to bring together these essentially different procedures. This is achieved by s. 3(4)(a) of the Commercial Arbitration Act 1984 which provides that the Act should apply to such arbitrations "as if the other Act were an arbitration agreement". Accordingly the statute requires a leap of faith—the command of parliament is deemed to be an agreement between citizens.

Disputes which are required by Victorian Statute to be referred to arbitration[16] include the following: many civil disputes for less than $5000 brought in the Magistrates' Court[17], disputes with respect to the descriptions of land sold[18], disputes with respect to retail tenancies[19], disputes under the Sale of Land Act 1962[20], disputes regarding settled land[21], disputes between adjoining owners regarding proposed protection of land from building activities on adjoining land[22], certain disputes with respect to specific development projects[23], disputes between members and a Society under the Co-operation Act 1981[24], disputes

between residents of a retirement village or between residents and the manager or the owner[25], disputes as to the value or the price of property acquired or purchased under various statutes[26], disputes with respect to primary products and their distribution[27] and claims for compensation for loss and damage suffered as a result of the exercise of statutory powers[28].

We have seen that the Commercial Arbitration Act regime applies to statutory arbitrations unless the other Act provides otherwise. It is necessary now to consider how this regime applies to such arbitrations:

1. *Express qualifications.* In two minor respects the Commercial Arbitration Act has no application to statutory arbitrations. Each of these is rather convoluted:
   (a) Where an arbitrator is removed pursuant to s. 44 the court may order under s. 11(1)(b) that the arbitration agreement shall cease to have effect. This is presumably to permit the parties to litigate without fear of a stay application under s. 53. This power is not exercisable unless all parties are Australian residents at the time of the arbitration agreement: s. 11(2). This qualification does not apply in the case of a statutory arbitration: s. 11(3). This has the surprising consequence that in the case of statutory arbitrations the court has the power under s. 11(1)(b) to order that the reference to arbitration created by the other Act cease to have effect whether the disputants are Australian residents or not.
   (b) Section 55 modifies the effect of *Scott v. Avery* clauses whereby arbitration is a condition precedent to litigation. Under the Uniform Acts such a clause does not operate as a bar to legal proceedings. The clause merely provides the basis for a stay under s. 53. This modification to the *Scott v. Avery* clause is not effective unless all parties are Australian residents at the time of the agreement: s. 55(2), but this qualification to s. 55(1) does not apply in the case of statutory arbitrations: s. 55(3). Again the position is that a non-resident can bar litigation by a *Scott v. Avery* clause, but not in the case of a statutory arbitration.
2. *Indirect qualifications.* A feature of consensual arbitration is that the parties may be a very large extent design their own procedure. The scheme of the Commercial Arbitration Act 1984 is to enable this to be done by agreement, but in many cases the agreement modifying the statutory procedures must be the arbitration agreement itself.[29] Obviously it is not possible to modify these procedures in a statutory arbitration for the arbitration agreement is the statute establishing the arbitration.
3. *Implicit qualifications.* The courts have frequently relied upon the concensual foundation of arbitration in order to provide relief. The most notable example of this is the House of Lords decision in the *Bremer Vulkan* case[30]. The case concerned the power of the arbitrator to dismiss a claim for want of prosecution, a matter governed in Victoria by s. 46 of the Commercial Arbitration Act 1984. The House of Lords denied the power to the arbitrator but observed that inordinate delay may in the appropriate case amount to repudiation entitling the innocent party to terminate the arbitration agreement in accordance with

conventional contract principles. This analysis of the contractual basis of arbitration has given rise to the idea that the arbitration agreement could be affected by other incidents of contract, such as termination by frustration, illegality, discharge by agreement. By further analogy with conventional contracts the powers of arbitrators have been analysed by reference to terms to be implied in the arbitration agreement.[31] It is difficult to imply terms in a statute. Finally, the traditional and basic, but not the most common[32] method of enforcing an arbitral award is by action on the award. This action is predicated upon a contract to abide the award. It is evident that such a jurisprudential foundation is not available in the case of a statutory arbitration.

4. *Practical Considerations.* It is a matter of general experience that frequently one or more of the parties to a consensual arbitration is a reluctant participant. Nevertheless, that party can usually be persuaded to accept the situation when reminded that this is the consequence of a contract freely entered into. This argument is entirely unavailable in the case of a statutory arbitration. So the Retail Tenancies Act 1986, under which most disputes must go to arbitration, has produced the very surprising and generally unsatisfactory result that it is very frequent to find challenges to the arbitrator's jurisdiction. These essentially unproductive arguments have been supported by a very restrictive interpretation of the relevant sections by Judges who seem unwilling to relinquish jurisdiction over retail tenancy disputes. This phenomenon is not found generally in consensual arbitrations, except perhaps certain international arbitrations.
5. *Consensual Extensions.* Let us suppose that the parties accept that they are obliged to resolve their dispute by statutory arbitration, for example, under the Retail Tenancies Act 1986. This Act gives the arbitrator the power to award injunctive relief and to make a declaration, a power not conferred by the Commercial Arbitration Act upon a commercial arbitrator. Is it possible for the parties to agree to enlarge the statutory arbitration to cover other disputes between them which are not retail tenancy disputes? Would the arbitrator, in such an extended arbitration, be entitled to award injunctive and declaratory relief in respect of these added disputes? Would the fact of the extension mean that the whole arbitration would be carried out in accordance with the Commercial Arbitration Act and not under the Retail Tenancies Act? May the arbitrator make the usual order for costs in favour of the successful party in accordance with Commercial Arbitration Act s. 34, given the restraints imposed by the Retail Tenancies Act s. 22(2)(c)? There are obvious advantages in extending a statutory arbitration in this way, for it is in the interest of the parties that all disputes between them be resolved as far as possible at the same time. Section 22(1) of the Retail Tenancies Act requires that the statutory arbitration be conducted "in accordance with and subject to the provisions of the Commercial Arbitration Act 1984". This includes s. 25 of that Act which permits the extension of the ambit of an arbitration proceeding where there is "some other dispute between those same parties . . . being a dispute to which the same agreement applies". For the present

purposes, the agreement is to be treated as a reference to the statute. The Retail Tenancies Act by definition does not apply to the added dispute. It would follow therefore that on a strict reading of s. 25 it would not be possible to enlarge the ambit of the statutory arbitration using this power. It may be that the solution lies in a generous application of s. 26 dealing with the consolidation of arbitration proceedings. If it were possible to analyse the situation on the basis that there were two arbitration proceedings, one statutory and one consensual, and if there were common questions of law or fact or for some other reason it is desirable to make an order, the two proceedings could be consolidated by order of the court. In making such an order the court could give directions as to the mode of hearing, although, it seems to me, the court could not confer upon an arbitrator dealing with the extended dispute the powers which are conferred only upon an arbitrator under s. 21 of the Retail Tenancies Act 1986.

II. *Court-annexed Arbitrations*

Again it is necessary to look back to the historical origins of these arbitrations. At the outset it is necessary to draw a distinction between two similar but distinct manifestations:

1. At common law the Supreme Court[33] has inherent jurisdiction, exercisable with the consent of the parties, to refer their dispute[34] to arbitration. This is essentially a consensual arbitration in the sense that the arbitrator is bound by the agreement of the parties and by the terms of that agreement.[35] The essential difference, however, is that the jurisdiction of the arbitrator depends, not on an arbitration agreement, but on the order of the court. It would have been a matter of some delicacy therefore whether the Commercial Arbitration Act 1984 applied to such an arbitration, at least until the 1990 amendment to s. 3(4)(a). This common law power presumably still exists and nothing more need be said about it in this Paper since it is essentially a consensual reference. In the County Court the award of such an arbitrator is liable to be set aside upon application to the County Court.[36]
2. By statute which dates back to 1873 the Supreme Court had power in certain circumstances to refer certain matters for trial to "a special referee or arbitrator respectively agreed on by the parties or without such agreement before a special referee or officer of the court".[37] This power was rarely used in Victoria,[38] preference being given to a reference to a special referee for enquiry or report.[39] It is clear that in the exercise of either of these powers the arbitration was treated as part of the process of the court and the arbitrator as special referee was considered an officer of the court.[40]

With the repeal of the Arbitration Act 1958 and of the old Rules, the position in Victoria has become somewhat obscure. 0.50 deals with references to a Special Referee. It rolls up ss. 14 and 15 in the sense that the referee may be empowered to give an opinion (cf. "report" in Arbitration Act 1958 s. 14) or to decide the question (cf. "trial" in Arbitration Act 1958 s. 15).[41] But there are two limits—first under Rule 50.01 the court may refer only a "question of fact".[42] Second,

the reference is to a special referee, not an arbitrator, is clearly intended to be an officer of the court under the control of the court. Except insofar as the court confers by reference on the special referee the powers of an arbitrator under the Commercial Arbitration Act 1984 the trial or inquiry conducted by such person cannot be described as an arbitration in any accepted sense of that term. The determination of the special referee is not binding on the parties.[43]

For the present purposes, the power to set up a court-annexed arbitration is that conferred on the Supreme Court and on the County Court by the Courts (Amendment) Act 1990.[44] So far as the Supreme Court is concerned the Statute conferred on the judges the power to make rules to refer any proceeding or any part of a proceeding to arbitration.[45] The same Act conferred a like power on the County Court.[46] At the same time it amended the Commercial Arbitration Act 1984 by providing that the Act shall apply to a reference to arbitration by court order as if the order were an arbitration agreement.[47]

This new court-annexed arbitration immediately raises a number of interesting problems to which I will venture tentative solutions. Let us assume for the present purposes that the power is exercised without the consent of one or more of the parties:

(i) *What about County Court annexed arbitrations?*

It may be thought that s. 47A, which was introduced by the Act of 1990 together with s. 25(ea) of the Supreme Court Act and the amendment to s. 3(4) of the Commercial Arbitration Act, was intended to introduce a form of court-annexed arbitration for the County Court which would be conducted under the statutory regime established by the Commercial Arbitration Act 1984. But s. 3(6) of this last mentioned Act expressly excludes from its regime arbitrations under County Court Act Part II Division 6, which includes s. 47A.[48] It is therefore not clear what regime the County Court appointed arbitrator is to follow. At common law, an arbitrator under a parol arbitration agreement must conduct the reference in accordance with the principles of natural justice and decide questions in accordance with law. Such an arbitrator does not obtain the procedural advantages of the Commercial Arbitration Act. It may therefore be supposed that the arbitrator charged with the Court-annexed arbitration under s. 47A is similarly constrained but no more. Furthermore, such an arbitrator does not have the benefit of the coercive powers of the court, nor the assistance of the court in the various other ways that it is able to assist arbitrators under the Commercial Arbitration Act. Finally, the award of such an arbitrator would not be appellable under s. 38 or enforceable in a summary way in accordance with the provisions of s. 33. This then raises the other interesting question as to how the award might be enforced. Since it is not based upon an agreement, it is difficult to see that the award would be enforced in the manner which parol arbitration agreements are enforced, namely by action. Perhaps this will require some reconsideration of s. 3(6) of the Commercial Arbitration Act.

(ii) *What matter may be referred?*

At common law the court may refer to arbitration a dispute beyond the subject

matter of this cause. In the supposed case this could not be done since the power conferred by the County Court Act s. 47A and to be conferred by the Rules of the Supreme Court will be exercised in the context of existing litigation. The words "any proceeding or... any part of a proceeding" in s. 25(ea) and "the whole or any part of a civil proceeding" in s. 47A are of wide compass,[49] but they are unlikely to support an interpretation which will enable the court to act with respect to a dispute beyond the issues joined in the pleadings.

(iii) *What powers may be conferred on or denied the arbitrator?*

The Commercial Arbitration Act, as has been seen, conferred powers and obligations on the arbitrator and the arbitrating parties. A number of these powers may be modified only in the arbitration agreement.[50] Given the terms of s. 3(4), any modification to these powers must be contained in the order, although there is something odd about treating a procedure which is imposed on a non-consenting party by court order as if that party had agreed to include it in an arbitration agreement. Other powers under the Commercial Arbitration Act may be conferred or varied by agreement in writing made at any time between the parties.[51] A notable example is the power of the arbitrator to proceed otherwise than by the rules of evidence—"to inform him or herself in relation to any matter in such manner as the arbitrator... thinks fit".[52] It may be supposed that the court would want the arbitrator in a court-annexed arbitration to act only on admissible evidence, especially as one of the parties is calling in vain for a trial in court. It would seem, however, that the court could not modify these provisions since it is one thing for the statute to deem the court order to be an arbitration agreement, and an entirely different thing to use that provision to deem the court order to be an agreement in writing between non-consenting parties.

(iv) *What is the status of the arbitrator?*

Although the statutes of England and Australia, of which the provisions under consideration are the lineal descendants, all contain an express provision making the arbitrator an officer of the court, these provisions do not. Nevertheless, it seems likely that the Supreme Court would wish to maintain some residual power over its own process even though it has conferred power on a person who is not a judge. The difficulty about such a conclusion is that the statutory regime established by the Commercial Arbitration Act is not consistent with this. Except as provided by that Act the practice of the supervisory court has been to maintain a hands-off approach. Let us assume that the court-appointed arbitrator is asked for an order that a party supply further particulars or other information to the other party. Let us assume that the arbitrator makes an order but it is not complied with. Under the Commercial Arbitration Act the parties agree to co-operate[53] but the only sanction is an order for costs[54] or resort to the cumbrous procedure under s. 18. In such a case could the judge who made the original order bring the matter on and deal with the defaulter? Probably not. Take another case. Let us assume that the arbitrator refuses to make an order for particulars as

requested. Under the Commercial Arbitration Act the aggrieved party can do virtually nothing. It has been said that the court might itself make an order under Commercial Arbitration Act s. 47,[55] but it is likely that s. 47 cannot be invoked for that purpose.[56] The only other resort for the aggrieved party is the drastic step of applying to remove the court-appointed arbitrator for misconduct.[57]

The traditional hands-off approach of the court towards arbitrations is always justified on the ground, inappropriate in the case under consideration, that the parties have agreed to resolve their dispute outside the court system.

I am sure that the Supreme Court would want to preserve for itself some power in such a case to ensure that its process is effective, but it is not clear how this could be done unless it treated the arbitrator as an officer of the court who is subject generally to its direction and who might approach the court for assistance should that be necessary. An alternative procedure might be to include in the order establishing the arbitration liberty to any party, or even perhaps to the arbitrator, to apply. But to apply for what? If the court cannot deal with the problem in the original order it is difficult to see how it could do so by an order varying that order.

(v) *What is the status of the Award?*

Given the application of the Commercial Arbitration Act, the award in a court-ordered arbitration is final and binding subject to three matters:

(a) a contrary intention expressed in the order.

(b) subject to the Act.[58]

(c) the statutory power to correct it.[59]

The Act provides for a limited right of appeal, usually by leave,[60] unless there is in place an exclusion agreement.[61] It would seem, then, that the award does not need to be adopted by the court as has always been the case under Arbitration Act 1958 s. 15 and its predecessors.[62] This means that the reference of a proceeding to arbitration has the consequence that the court has effectively rid itself of the proceeding beyond recall. The right of the party to impugn the award must fall to be determined upon the exercise of the discretion of the court to grant leave.[63] It may be supposed, however, that the fact that the arbitration has been established by court order would make the judge hearing the application for leave to view the matter rather more benevolently than might be the case in a consensual arbitration.[64]

(vi) *How is the award enforced?*

The award of the court-appointed arbitrator is enforceable by summary procedure.[65] But as has been noted in the context of statutory arbitrations this may not always be applicable.[66] Again, there may be problems in treating the non-consensual court order as an agreement which should be enforced by court action in cases where the summary procedure is not appropriate. Likewise in cases where enforcement is sought outside the jurisdiction under the New York Convention or under the UNCITRAL Model Law if applicable, under the local equivalent of our Enforcement of Judgments Act 1962 or by action, the procedure lacks the necessary consensual element.

III. *Judicial Arbitration*

The practice of judges acting as arbitrators is one which has found little favour in Victoria.[67] In England a judge of the Commercial Court in certain circumstances can accept appointment as arbitrator under an arbitration agreement.[68] Under s. 47 of the County Court Act the parties may likewise refer their dispute to a judge for arbitration. As mentioned above such an arbitration is not conducted under the regime of the Commercial Arbitration Act.[69] The judge's award is not subject to appeal. These arbitrations, being essentially consensual, are not within the scope of this Paper.

In the Magistrates' Court, however, there is a statutory arbitration procedure which is non-consensual. In every case where the amount of monetary relief sought is less than $5,000, the court must refer the complaint to arbitration in accordance with Part 5 Division 2.[70] This obligation does not apply where the complaint is of a class prescribed by the regulations as a complaint to which this Division does not apply,[71] or the court orders that the complaint be heard and determined by it pursuant to s. 102(3). The court may hear and determine the matter itself as a court if it is satisfied that the complaint falls into one of the following categories:

(a) it is not disputed
(b) it relates to the enforcement of an order which has not been set aside
(c) it involves complex questions of law or fact
(d) a question of fraud is in issue
(e) the parties agree that the matter should not be referred to arbitration
(f) it would be unreasonable for the complaint to be referred to arbitration having regard to its subject matter, the circumstances of the parties or the interests of any other person likely to be affected by an award.[72]

It will be seen from the above list that there is generous scope for the magistrate to decide to hear the matter sitting as a court. Indeed, I am informed that it is not common for complaints which are capable of being referred to arbitration to be determined by the arbitral procedure.

It is a surprising feature of this type of Court-annexed arbitration that the arbitrator is the court itself constituted by a magistrate. Such an arbitration therefore cannot be directed to the traditional area of arbitration, where technical matters needed to be determined by specialist arbitrators. The advantage in the arbitration procedure in the Magistrates' Court must be found in the procedures which are available for the determination of complaints in this forum.

Section 103 deals with these procedures. The magistrate, sitting as arbitrator, is given greater flexibility than would be the case when sitting as a court. Essentially, the advantages of the arbitral procedure are threefold:

1. The magistrate/arbitrator is not bound by rules of evidence but may inform itself on any matter in such manner as it thinks fit.[73]
2. Is bound by the rules of natural justice.
3. Is not required to conduct any proceedings in a formal manner.

It may be supposed that of these three procedural advantages it is only the first which is of any substance in the Magistrates' Court. It should be noted

also that the arbitrator/magistrate must determine any issue of law in accordance with law. In this regard, there is less flexibility than the option available to a commercial arbitrator.[74]

The Magistrates' Court Act expressly provides that the Commercial Arbitration Act 1984 does not apply to a Court-annexed arbitration under these provisions.[75]

The award of the magistrate/arbitrator must be in writing, but there is no requirement for written reasons.[76] Since the award of the court has effect as if it were an order made by the Magistrates' Court, the normal procedures for appeal[77] from that court are presumably available.

ANNEXURE

The following are the rights and powers which will be available in any arbitration under the Commercial Arbitration Act unless excluded by the terms of the arbitration agreement[78] or by the terms of the order referring the matter to arbitration.

1. Subject to the Act the arbitrator or umpire may conduct proceedings in such a manner as he or she thinks fit.[79]
2. Where there are three or more arbitrators the decision of the majority or of the chairperson shall prevail.[80]
3. Where any person refuses to attend or to give evidence or to produce a document the arbitrator, the umpire or a party may seek a court order that the person attend the Supreme Court for examination or to produce the document.[81]
4. Evidence may be given orally or in writing and where the arbitrator or umpire so requires shall be given on oath or affirmation or by affidavit.[82]
5. The arbitrator or umpire may administer an oath or affirmation or take an affidavit.[83]
6. The arbitrator or umpire may make an interim award.[84]
7. The arbitrator or umpire may award specific performance.[85]
8. The arbitrator or umpire may extend the ambit of the arbitration to deal with other disputes between the same parties arising out of the same agreement.[86]
9. Subject to the Act the arbitrator's or umpire's award is final and binding on the parties.[87]
10. The arbitrator or umpire may include in a money award a term for interest up to the date of the award.[88]
11. The arbitrator or umpire may direct that interest shall accrue on the sum awarded from the date of the award.[89]
12. The arbitrator or umpire may award costs but the power of the parties to over-ride this statutory right is circumscribed except in the case of existing disputes.[90]
13. There is an implied term in the arbitration agreement that the claimant shall prosecute the claim with due diligence.[91]
14. The authority of the arbitrator or umpire is irrevocable.[92]
15. The arbitration agreement is not discharged by the death of a party.[93]

NOTES

[1] *Halsbury's Laws of Australia* (1991) Vol. 1 "Arbitration" para 25-1.
[2] *Russell on Arbitration* (20th Ed) p. 1.
[3] Commercial Arbitration Act 1984, s. 4.
[4] UNCITRAL Model Law Article 1(1).
[5] Enforcement is a form of enforcement of an arbitration agreement. Enforcement of a foreign award under the New York Convention 1958, article IV(i)(b) or under the UNCITRAL Model Law article 35(2). See too International Arbitration Act 1974 (Cth) s. 8(1).
[6] See for example Trade Practices Act 1974 (Cth) s. 6(3).
[7] For the State as well as for the parties.
[8] (1870) at pp. 558ff.
[9] Lands Clauses Consolidation Act 1845.
[10] Railways Clauses Consolidation Act 1845.
[11] This was the conventional method of enforcement of private consensual arbitration awards under the Statute of 9 and 10 Will 3 C 15 (1698).
[12] Mustill & Boyd, *Commercial Arbitration* 2nd ed, 1989 Ch. 29.
[13] Hence Commercial Arbitration Act s. 50 provides that subject to certain exceptions the submission is irrevocable.
[14] Notably the Common Law Procedure Act 1854 which introduced features familiar to modern lawyers, such as the power to remit an award for reconsideration, and the power to stay litigation where there is an applicable arbitration agreement.
[15] The Arbitration Act 1958 substantially followed by the English Statute of 1889.
[16] The list below is taken from *Court Forms, Precedents and Pleadings—Victoria*, Butterworths 1991 Vol. 1, "Arbitration".
[17] Magistrates' Court Act 1989 s. 102, see below Judicial Arbitration.
[18] Transfer of Land Act 1958, 7th Schedule, Table A Clause 3.
[19] Retail Tenancies Act 1986 Part 3.
[20] Sale of Land Act 1962 Part 1 Divison 2.
[21] Settled Land Act 1958 s. 57.
[22] Building Control Act 1981 s 147(9).
[23] South Yarra Project: South Yarra Project Act 1984 Schedule, Clause 13; South Yarra Project (Subdivision and Management) Act 1985 Schedule, Clause 13. Bayside Project: Bayside Project Act 1988 s. 32.
[24] Co-operation Act 1981 s. 114.
[25] Retirement Villages Act 1986 s 35.
[26] Mines Act 1958 s. 57 (value of machinery and tools purchased by incoming lessee from the lessee whose lease has been declared void for breach of terms), Gas and Fuel Corporation Act 1958 s. 25 (assessment of compensation for property acquired by Gas and Fuel Corporation). Local Government Act 1958 s. 526 (value of land formerly used for a road which is purchased by adjoining land owners upon closure of the road, s. 605(9)(c) (value of land not required by Council offered for sale to adjoining land owner). Petroleum Act 1958 s. 8 (compensation for petroleum products acquired in the event of war). Electric Light and Power Act 1958 s. 45 (value of property purchased by Council from Undertakers).
[27] Broiler Chicken Industry Act 1978 s. 13, Tomato Processing Act Industry Act 1976 s. 35. Grain Elevators Act 1958 s. 49(2), ss. 52A.
[28] Essential Services Act 1958 s. 9. Health Act 1958 s. 50. Water Act 1958 s. 275. Electric Light and Power Act 1958 ss. 33, 34. Fuel Emergency Act 1977 s. 8.
[29] These cases are listed in the Annexure to this Paper.
[30] *Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd.* [1981] A.C.909.
[31] See for example, *GIO of N.S.W. v. Atkinson-Leighton Joint Venture* (1980) 146 C.L.R. 206 at 235, 247.

[32] The more convenient procedure of enforcement by leave of the court under s. 33 is the most common. But it is not appropriate where there are issues of fact or complex issues which require a proper trial: *Middlemiss and Gould v. Hartlepool Corporation* [1973] 1 All E.R. 172, [1972] 1 W.L.R. 1643, or where the award is not in a form appropriate to be registered as a judgment.

[33] The power is conferred upon the County Court by the County Court Act 1958 s. 46.

[34] The one exception was a claim on a penal clause by a common informer, but this is no longer relevant.

[35] For example the parties may refer to the arbitrator disputes which are outside the subject matter of the litigation.

[36] Section 46(4). There is no right of appeal under the Commercial Arbitration Act s. 38. See below.

[37] Arbitration Act 1958 s. 15.

[38] In New South Wales where there was no equivalent to our s. 14, the power under s. 15 was used. See for example *Buckley v. Bennell Design* (1978) 140 C.L.R. 1, 19 A.L.R. 257.

[39] Arbitration Act 1958 s. 14. The distinction between the powers conferred by these two sections is usefully discussed in *Nicholls v. Stamer* [1980] V.R. 479. Reference by the County Court to a special referee is governed by County Court Act 1958 s. 48.

[40] See the old RSC 036 rr36-8.

[41] Order 50 applies to the County Court, but it is doubtful whether the power to make such a rule falls within County Court Act s. 48 unless it is incidentally picked up by s. 78(ha).

[42] Cf. "any question arising in any cause or matter" in Arbitration Act 1958 s. 14, and "the whole cause or matter, or any question or issue of fact arising therein" in Arbitration Act 1958 s. 15, "the whole or any part of the proceeding" in County Court Act 1958 s. 48(1).

[43] R.50.04. But it should be noted that neither was a determination under Arbitration Act 1958 s. 15: *Nicholls v. Stamer* [1980] V.R. 479.

[44] Commenced 1st January 1990.

[45] Supreme Court Act 1986 s. 25(ea).

[46] County Court Act 1958 s. 47A.

[47] Commercial Arbitration Act s. 3(4).

[48] And arbitrations under s. 46 and s. 47.

[49] See too the definition of "proceeding" in Supreme Court Act 1986 s. 3(1).

[50] See Annexure to this Paper.

[51] These are listed in *Halsbury's Laws of Australia* (1991) Vol. 1, "Arbitration" paras [25-420], [25-425].

[52] Section 19(2), (3). This may be modified by agreement in writing.

[53] Section 37.

[54] Section 34(7).

[55] *South Australian Superannuation Fund Investment v. Leighton Contractors Pty. Ltd.* (unreported FCSA 12 Nov. 1990), but see Case Note "The Arbitrator" Vol. 9, Page 175.

[56] *Imperial Leatherware Co. Pty. Ltd. v. Macri & Marcellino* (unreported NSW Rogers CJ Comm D 11 April 1991), but see Case Note "The Arbitrator" Vol. 10, Page 20.

[57] Section 44.

[58] Section 28.

[59] Section 30.

[60] Section 38.

[61] Section 40. It is unlikely that the court order could amount to an exclusion agreement even if it was expressed to be so.

[62] Back as far as 1873 and possibly beyond.

[63] Now, no longer fettered by the *Nema* guidelines: *Kilpatrick Green Pty. Ltd. v. Leighton Contractors Pty Ltd.* (unreported F.C.Vic. 22 October 1991), but see Case Note "The Arbitrator" Vol. 10, No. 4.

[64] See for example *Anduck v. ZDG Nominess Pty. Ltd.* (unreported 19 October 1990, Ashley, J.), but see Case Note "The Arbitrator" Vol. 10, Page 15.
[65] Section 33.
[66] See note 31 above.
[67] Theoretically, there is no reason why a judge could not act as arbitrator, but there are practical complications which render this effectively impossible.
[68] Administration of Justice Act 1970 (UK) S4. In New South Wales a judge has appointed himself to determine a dispute under RSC Pt. 72.
[69] Section 3(6).
[70] Magistrates' Courts Act 1989 s. 102.
[71] Such complaints are complaints for the recovery of rates by the Director-General of the Department of Local Government, a Municipal Council or a person authorised by a Municipal Council, or a complaint for rates by an Authority under the Water Act 1989: Magistrates' Court (Arbitration) Regulations 1990.
[72] Section 102(3).
[73] Cf. Commercial Arbitration Act s. 19(3).
[74] Commercial Arbitration Act s. 22.
[75] Magistrates' Court Act 1989 s. 106.
[76] Cf. Commercial Arbitration Act s. 29.
[77] By Order to Review under Magistrates' Courts Act 1971 Part XI, the procedural constraints imposed upon the right of appeal by Commercial Arbitration Act s. 38 do not apply.
[78] See *Halsbury's Laws of Australia* (1991) Vol. 1 "Arbitration" [25-430].
[79] Section 14.
[80] Section 15.
[81] Section 18.
[82] Section 19(1).
[83] Section 19(2).
[84] Section 23.
[85] Section 24.
[86] Section 25. This is a surprising power, given the fact that it is the court and not the parties who have determined what matter should be referred to arbitration.
[87] Section 28.
[88] Section 31.
[89] Section 32.
[90] Section 34(1).
[91] Section 46(1).
[92] Section 50.
[93] Section 52.