ARBITRATION ACT 1928.

An Act to consolidate the Law relating to Arbitration. 19 GEORGE V. No. 3637.

[12th *February*, 1929.]

BE it enacted by the King's Most Excellent Majesty by and with the advice and consent of the Legislative Council and the Legislative Assembly of Victoria in this present Parliament assembled and by the authority of the same as follows (that is to say) :— *Arbitration Act* 1915.

1. This Act may be cited as the *Arbitration Act* 1928, and shall come into operation on a day to be fixed by proclamation of the Governor in Council published in the *Government Gazette*. Short title and commencement

2. The Act mentioned in the First Schedule to this Act to the extent thereby expressed to be repealed is hereby repealed. Such repeal shall not affect any rule made or any thing done or suffered or any right acquired or duty imposed or liability incurred under the said repealed Act before the commencement of this Act or the institution or prosecution to its termination of any legal proceedings or other remedy for ascertaining or enforcing any such liability. Repeal.

3. In this Act unless inconsistent with the context or subject-matter— Definitions. *Ib. s.* 3. 52 & 53 Vict. c. 49 s. 27.

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

"Court" means the Supreme Court.

"Judge" means a Judge of the Supreme Court.

"Rules of Court" means the Rules of the Supreme Court made by the proper authority under the *Supreme Court Act* 1928 or any corresponding previous enactment.

References by Consent out of Court.

4. (1) A submission unless a contrary intention is expressed therein shall be irrevocable except by leave[a] of the Court or a Judge and shall have the same effect in all respects as if it had been made an order of the Court. Submission to be irrevocable, and to have effect as an order of Court. *Ib. s.* 4. Ib. s. 2.

(a) Under the provision of a former Act, where one of the contracting parties had become insolvent, it was said that such leave should be given.—*In re Freeman v. Kempster*, 1909 V.L.R., 394.

Arbitration Act 1915. Provisions implied in submissions. 52 & 53 Vict. c. 49 s. 2 Second Schedule.

(2) A submission unless a contrary intention is expressed therein shall be deemed to include the provisions set forth in the Second Schedule to this Act so far as they are applicable to the reference under the submission.

Power to stay proceedings where there is a submission. *Ib.* s. 5. *Ib.* s. 4.

5. If any party to a submission or any person claiming through or under him commences any legal proceedings in any court(*a*) 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 thereof 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.(*b*)

(*a*) *Quære*, whether this section applies to an action in the High Court.—*Lady Carrington S.S. Co.* v. *The Commonwealth*, 29 C.L.R., 596 (N.S.W.).

(*b*) Under a former Act it was held that before exercising the power to stay proceedings, the Court required to be satisfied (1) that no sufficient reason existed why the matters in dispute could not be or ought not to be referred, and (2) that the defendant was willing to concur in all acts necessary for the arbitration, and that the burden of satisfying the Court upon both these points rested upon the defendants.—*Thomson* v. *Tasmanian Fire Insurance Company*, 11 V.L.R., 54.

Where the parties to a contract have bound themselves to refer all matters in dispute thereunder to arbitration, the jurisdiction of the Court to stay proceedings in an action depends upon there being no sufficient reason for not referring and the willingness at all times of the defendant to proceed with the reference. Where the matters had been referred, and a defective award made in favour of the defendant, which he had not taken proceedings to rectify, it was held the Court would not stay proceedings in an action afterwards commenced.—*Martin* v. *The Board of Land and Works*, 5 V.L.R. (L.), 117.

Proceedings will be stayed notwithstanding that the reference is, by the contract, to be made to a referee hostile to the plaintiff or not an indifferent person.—*Evans* v. *The Board of Land and Works*, 5 A.J.R., 182.

One of the conditions of a contract between a Shire Council and a contractor for building a bridge provided that the contractor should complete the whole of the works on a certain day. Another condition provided that, if the contractor should, in the opinion of the engineer, fail to make such progress with the works as the engineer should deem sufficient to insure their completion within the specified time, and should fail or neglect to rectify such cause of complaint for seven days, after being thereunto required in writing by the engineer, it should be lawful for the Council to determine the contract. A third condition provided should "any doubt dispute or difference arise or happen touching or concerning the said works . . . . or in relation to the exercise of any of the powers of the Council or the engineer under this contract or any claim made by the contractor in consequence thereof or in any way arising therefrom or in relation to any impediment prevention or obstruction to or in the carrying on of the works of this contract or any part thereof (or any extras additions enlargements deviations or alterations thereon or thereof or any of them or any part thereof) by the Council or the engineer . . . . or any claim made by the contractor in consequence thereof or in any way arising therefrom or touching or concerning the meaning or intention of this contract or of the specifications or conditions or any other part thereof . . . . or respecting any other matter or thing not hereinbefore left to the decision or determination of the engineer," every such doubt, dispute, and difference should from time to time be referred to, and settled and decided by the engineer. Subsequently the Council agreed to extend the time for completion, and by an indenture between the parties, the condition for completion on a certain day was rescinded, and a new condition was substituted identical in terms except that a new date for completion was inserted. The Council, after the original date of completion and before the new date, purported to determine the contract in pursuance of the conditions in that behalf.

An action having been brought by the contractor claiming (*inter alia*) damages for breach of contract, for wrongful prevention of due and complete performance, and for wrongful determination of the contract, and upon a *quantum meruit* for work and labour done:

Held, that the matters in dispute were referable to the arbitration of the engineer, notwithstanding that the original time for completion had passed when the contract was determined, and, therefore, that the action should be stayed under section 152 of the *Supreme Court Act* 1890

Arbitration Act 1915 s. 6.
Power for the Court in certain cases to appoint an arbitrator, umpire, or third arbitrator.
52 & 53 Vict c. 49 s. 5.

6. In any of the following cases:—

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

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

(*c*) Where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator and do not appoint him:

(*d*) Where an appointed umpire or third arbitrator refuses to act[a] or is incapable of acting or dies and the submission does not show that it was intended that the vacancy should not be supplied and the parties or arbitrators do not supply the vacancy:

any party may serve the other parties or the arbitrators (as the case may be) with a written notice to appoint an arbitrator umpire or third arbitrator.

If the appointment is not made within seven clear days after the service of the notice the Court or a Judge may on application by the party who gave the notice appoint an arbitrator umpire or third arbitrator who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties.

Power for party in certain cases to supply vacancy.
Ib. s. 7.
Ib. s. 6.

7. Where a submission provides that the reference shall be to two arbitrators, one to be appointed by each party, then unless the submission expresses a contrary intention—

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

(*b*) If on such a reference one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, for seven clear days after the other party, having appointed his arbitrator, has served the party making default with notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and his award shall be binding on both parties as if he had been appointed by consent:

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

(the corresponding section of a former Act). —*Burton* v. *The Shire of Bairnsdale*, 7 C.L.R., 76.

An application under this section for the purpose of having legal proceedings stayed on the ground that the matters in dispute should have been submitted to arbitration pursuant to agreement must be made after appearance if appearance be requisite, and in cases in which appearance is not requisite the application may be made at any time before taking any other step in the proceedings. The court has a discretion whether or not it will stay proceedings.—*Harrisons, Ramsay Pty. Ltd.* v. *Crespin*, 1921 V.L.R., 643.

(*a*) Under a former Act it was held that upon a reference to three arbitrators, the award to be made by the three or any two of them, the award of two of the arbitrators would not be invalidated if the third arbitrator, having notice of a final meeting, voluntarily absented himself from it, thereby depriving his brother arbitrators of the opportunity of holding a joint final consultation, though, as a general rule in such a case, an award made by two arbitrators, in the absence of the third, and without final consultation between the three, could not be supported.—*Glenny* v. *The Eglinton Land Company Limited*, 17 V.L.R., 676.

Arbitration Act 1915 *s.* 8. Powers of arbitrators. 52 & 53 Vict. c. 49 *s.* 7

8. The arbitrators or umpire acting under a submission shall unless the submission expresses a contrary intention, have power—

(*a*) to administer oaths or to take the affirmation of the parties and witnesses appearing ; and

(*b*) to state an award as to the whole or part thereof in the form of a special case for the opinion of the Court ; and

(*c*) to correct in an award any clerical mistake or error arising from any accidental slip or omission.

Witnesses may be summoned by subpœna. *Ib.* s. 9. *Ib.* s. 8.

9. Any party to a submission may sue out a writ of *subpœna ad testificandum* or a writ of *subpœna duces tecum*, but no person shall be compelled under any such writ to produce any document which he could not be compelled to produce on the trial of an action.

Power to enlarge time for making award. *Ib.* s. 10. *Ib.* s. 9.

10. The time for making an award may from time to time be enlarged by order of the Court or a Judge, whether the time for making the award has expired or not.

Power to remit award. *Ib.* s. 11. *Ib.* s. 10

11. (1) In all cases of reference to arbitration the Court or a Judge may from time to time remit the matters referred or any of them to the reconsideration of the arbitrators or umpire.(a)

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

Power to remove arbitrator. *Ib.* s. 12. *Ib.* s. 11.

12.(b) (1) Where an arbitrator or umpire has misconducted himself, the Court may remove him.

Power to set aside award.

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

(*a*) It was held that an application under a former section to have matters referred to arbitrators remitted to them for their reconsideration and redetermination must be made within a reasonable time.—*Shirrefs* v. *Johnson*, 17 V.L.R., 225.

The Court may remit an award to an arbitrator for reconsideration on the ground that material evidence has been discovered since the award was published, although such evidence might, by the use of due diligence, have been discovered and adduced at the hearing.

An arbitrator has no power to amend an award after its publication.—*In re Bennett Brothers*, 1910 V.L.R., 51. But see now section 8 (*c*).

An award may be remitted if the arbitrator has without severing them dealt with matters over which he had no jurisdiction, or, *semble*, if serious questions are raised which can be properly dealt with on a case stated only.—*Bland* v. *Inglewood*, 1918 V.L.R., 467.

(*b*) See *Bland* v. *Inglewood*, cited in note (*a*), as to the possibility of a refusal to state a case on a question of law being misconduct.

It is no ground for setting aside an award under this section, that an examination of the materials before the arbitrator discloses that his findings are unsupported by, or against, the weight of evidence.

An award will not be set aside on the ground that, without objection, the arbitrator heard evidence not upon oath.

A submission to the arbitration of an engineer in reference to a dispute over a contract for the supply of a machine set out various questions under the contract, some of which might depend upon its construction, having regard to technical matters of fact, and finally included a comprehensive submission of all other matters in difference between the parties arising out of or relating to the said contract or the subject-matter thereof as to the rights, duties or liabilities of either of the parties in connexion with the premises.

Held, that the submission committed finally to the arbitrator the ascertainment and interpretation of the contract, and that his award should not be set aside, even though he had, on the face of the award, followed a line of reasoning which could not be referred to legal principle.

The power of an arbitrator under a submission originally in writing may be effectively added to by parol agreement of the parties during the proceedings before the arbitrator.—*Latham* v. *Foster's Australian Fibres Ltd.* (1926) V.L.R., 427.

See *Melbourne Harbour Trust Commissioners* v. *Hancock*, 39 C.L.R., 570, noted to section 19.

13. An award on a submission may, by leave of the Court or a Judge, be enforced in the same manner as a judgment or order to the same effect.(a) *Arbitration Act 1915 s. 13.* Enforcing award. 52 & 53 Vict. c. 49 s. 12.

References under Order of Court.

14. (1) Subject to Rules of Court and to any right to have particular cases tried by a jury, the Court or a Judge may refer any question arising in any cause or matter (other than a criminal proceeding by the Crown) for inquiry or report to any special referee. Reference for inquiry and report. *Ib. s. 14.* Ib. s. 13.

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

15. In any cause or matter (other than a criminal proceeding by the Crown)— Reference for trial. *Ib. s. 15.* Ib. s 14.

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

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

(*c*) If the question in dispute consists wholly or in part of matters of account,

the Court or a Judge may at any time order the whole cause or matter, or any question or issue of fact arising therein, to be tried before a special referee or arbitrator respectively agreed on by the parties or without such agreement before a special referee or officer of the Court.(b)

16. (1) In all cases of reference to a special referee or arbitrator under an order of the Court or a Judge in any cause or matter, the special referee or arbitrator shall be deemed to be an officer of the Court, and shall have such authority and shall conduct the reference in such manner as may be prescribed by Rules of Court, and subject thereto as the Court or a Judge may direct. Powers and remuneration of referees and arbitrators. *Ib. s. 16* Ib. s. 15.

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

(3) The remuneration to be paid to any special referee or arbitrator to whom any matter is referred under order of the Court or a Judge shall be determined by the Court or a Judge who shall also determine by whom and in what proportions the remuneration shall be paid.

17. The Court or a Judge shall as to references under order of the Court or a Judge have all the powers which are by this Act conferred on the Court or a Judge as to references by consent out of Court. Court to have powers as in references by consent *Ib. s. 17.* Ib. s. 16

(*a*) Where the award is a nullity as having dealt with matters not within the jurisdiction of the arbitrators it will not be enforced or set aside. —*Buckley* v. *The Board of Land and Works*, 19 V.L.R., 522.

(*b*) An order was made referring the matter in dispute to arbitration where on a building contract it appeared th t the work sued for was done, and that only the amount to be paid for such work was in dispute.—*Watson* v. *Donaldson*, 8 A.L.T., 139.

Arbitration Act 1915 s. 18
Witnesses entitled to expenses
52 & 53 Vict. c. 49 s. 18.

General.

18. Every person whose attendance is required as a witness shall be entitled to the like conduct money and payment of expenses and for loss of time as for and upon attendance at a trial of an action in the Supreme Court.

Statement of case pending arbitration
Ib. s. 19
Ib. s. 19.

19. Any referee arbitrator or umpire may at any stage of the proceedings under a reference and shall if so directed by the Court or a Judge state in the form of a special case for the opinion of the Court any question of law[a] arising in the course of the reference.[b]

Costs.
Ib. s. 20.
Ib. s. 20.

20. Any order made under this Act may be made on such terms as to costs or otherwise as the authority making the order thinks just.

Exercise of powers by masters and other officers.
Ib. s. 21.
Ib. s. 21.

21. Provision may from time to time be made by Rules of Court for conferring on any master or other officer of the Supreme Court all or any of the jurisdiction conferred by this Act on the Court or a Judge.

Penalty for perjury.
Ib. s. 22.
Ib. s. 22.

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

Application of Act to references under statutory powers
Ib. s. 23.
Ib. s. 23.

23. This Act shall apply to every arbitration under any Act passed before or after the commencement of this Act as if the arbitration were pursuant to a submission except in so far as this Act is inconsistent with the Act regulating the arbitration or with any rules or procedure authorized or recognised by that Act.

(a) Where in proceedings before arbitrators there is a real conflict of evidence no question of law (within the meaning of that expression in this section) arises as to the sufficiency of the evidence to justify any finding, and no such question arises even if the evidence (at all events if it be wholly or partially oral) is all on one side, if on that side is the onus of proof; but the question whether there is or is not any evidence upon which there might properly be a finding in favour of the person on whom is the onus of proof may be a question of law.

Arbitrators having on oral and documentary evidence made certain findings of fact and stated them in the form of a special case, one of the parties took out a summons under this section asking that they be ordered to state a further case on the "question of law" whether there was any evidence proper to go to the arbitrators in respect of their findings of fact and whether on the evidence the findings were not such as no reasonable man could come to. *Held*, that the case being one of a conflict of evidence and not one of "no evidence" no question of law arose and that no further case should be directed.—*Driver* v. *War Service Homes Commissioner*, 1924 V.L.R., 515.

The expression "any question of law arising in the course of the reference" is not restricted to questions of law which incidentally arise for the first time in the course of the proceedings before the arbitrators, but includes matters which have arisen before the reference and which have occasioned the reference being either in the contemplation of the parties at the outset of the dispute or necessarily involved in the dispute though not actually contemplated, and the Court has jurisdiction to order arbitrators before award to state a special case on that basis.

In exercising its discretion under this section the Court will order a special case if satisfied there is a real point of law and that the arbitrators are not specially qualified to decide it.

Form of questions to be asked in special case settled.

In re an arbitration between *Hobsons Bay Shire* and *Carr*, 1924 V.L.R., 56, affirmed with a variation, 34 C.L.R., 234.

(b) The costs of a special case stated under this section are in the discretion of the arbitrator. —In the matter of the arbitration between *Gronich* and the *State Rivers and Water Supply Commission*, 1913 V.L.R., 455.

The arbitrator during the course of the arbitration stated that he would, by stating a case or otherwise, allow the appellants an opportunity of obtaining the opinion of the Supreme Court upon the question of the construction of the contract, and the appellants were thereby induced to refrain from applying to the Court under this section for an order directing the arbitrator to state a case for the opinion of the Court. The arbitrator made his award, and at the same time issued his reasons for his award, whereby the appellants were enabled on a motion to set aside the award to raise the substantial points of law upon which it relied.

Held, that the arbitrator was not guilty of misconduct.—*Melbourne Harbour Trust Commissioners* v. *Hancock*, 39 C.L.R., 570.

SCHEDULES.

FIRST SCHEDULE.

Section 2.

Number of Act.	Title of Act.	Extent of Repeal.
2614	*Arbitration Act* 1915	The whole.

SECOND SCHEDULE.

Section 4.

PROVISIONS TO BE IMPLIED IN SUBMISSIONS.

(*a*) If no other mode of reference is provided, the reference shall be to a single arbitrator.

(*b*) If the reference is to two arbitrators, the two arbitrators may appoint an umpire at any time within the period during which they have power to make an award.

(*c*) The arbitrators shall make their award in writing within three months after entering on the reference, or after having been called on to act by notice in writing from any party to the submission, or on or before any later date to which the arbitrators, by any writing signed by them, may from time to time enlarge the time for making the award.

(*d*) If the arbitrators have allowed their time or extended time to expire without making an award or have delivered to any party to the submission or to the umpire a notice in writing stating that they cannot agree, the umpire may forthwith enter upon the reference in lieu of the arbitrators.

(*e*) The umpire shall make his award in writing within one month after the original or extended time appointed for making the award of the arbitrators has expired, or on or before any later day to which the umpire by any writing signed by him may from time to time enlarge the time for making his award.

(*f*) The parties to the reference, and all persons claiming through them respectively, shall subject to any legal objection submit to be examined by the arbitrators or umpire, on oath or affirmation, in relation to the matters in dispute and shall, subject as aforesaid, produce before the arbitrators or umpire all books, deeds, papers, accounts, writings, and documents within their possession or power respectively which may be required or called for, and do all other things which during the proceedings on the reference the arbitrators or umpire may require.

(*g*) The witnesses on the reference shall, if the arbitrators or umpire think fit, be examined on oath or affirmation.

(*h*) The award to be made by the arbitrators or umpire shall be final and binding on the parties and the persons claiming under them respectively.

(*i*) The costs of the reference and award shall be in the discretion of the arbitrators or umpire, who may direct to and by whom and in what manner those costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof, and may award costs to be paid as between solicitor and client, such costs (including the charges of the umpire, if any, and of the arbitrators) may on the application of any party interested be taxed by the Taxing Master of the Supreme Court.