LAW REFORM COMMISSION OF BRITISH COLUMBIA

REPORT ON ARBITRATION

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The Law Reform Commission of British Columbia was established by the Law Reform Commission Act in 1969 and began functioning in 1970.

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TO THE HONOURABLE ALLAN WILLIAMS, Q.C.,
ATTORNEY GENERAL OF THE PROVINCE OF BRITISH COLUMBIA:

The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON ARBITRATION

This Report examines the law relating to the arbitration of civil disputes. The Report focuses on the *Arbitration Act*, R.S.B.C. 1979, c. 18, and the law relating to arbitration generally. Two areas in which arbitration is widely used are excluded from this study: expropriation proceedings and labour disputes. This is because the Commission, in an earlier Report, recommended changes in the law of expropriation, and, with respect to labour disputes, substantial changes were enacted in 1973 in the *Labour Code* of British Columbia.

The recommendations in this Report are aimed at modernizing the *Arbitration Act*, which has remained substantially unaltered since 1893 when it was first enacted, and curing many anomalies in the law of arbitration. Of particular note are the recommendations concerning the judicial review of awards.

CHAPTER I INTRODUCTION

A. Scope of the Report

This Report examines the law governing arbitration. Its focus is on the *Arbitration Act* and other laws of general application rather than specific enactments which provide that particular disputes in relation to specific matters must be resolved through arbitration. In particular, two important areas in which arbitration is widely used are excluded from this study: expropriation proceedings and labour disputes. In an earlier report this Commission recommended sweeping changes in the law relating to expropriation, including specific proposals for changes in the use of arbitration in that context. Arbitrations of labour

disputes are governed by the *Labour Code* of British Columbia and substantial changes to the law relating to such arbitrations were made when the Code was enacted in 1973. These changes appear to have worked satisfactorily, and we believe that any recommendations for further changes would be premature.

Several statutes, however, provide that particular disputes be resolved by arbitration, and the provisions of the *Arbitration Act*, in whole or in part, apply. Section 2 of the *Arbitration Act* provides:

> This Act applies to an arbitration under an 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 recognized by that Act.

In addition, section 39 of the *Interpretation Act* provides:

Where an enactment or an order made under an enactment provides that a matter, dispute or question be decided by arbitration, or under the *Arbitration Act*, the provision shall be deemed to be a submission within the meaning of the *Arbitration Act*.

The language of each such enactment must therefore be examined to ascertain the extent to which the *Arbitration Act* applies. The recommendations in this Report would, if implemented, affect these "statutory" arbitrations insofar as they are governed by the *Arbitration Act*. We have not examined these enactments in detail because they deal with specific disputes often in highly specialized areas. We therefore believe it would be inappropriate for us to deal with them in this Report. We would however urge those who are responsible for administering these statutes to examine these provisions in the light of our recommendations for reform of the law of arbitration generally.

Arbitration is becoming increasingly important in the commercial world, particularly in the field of international trade. It is also promoted as an alternative to the courts for the resolution of consumer disputes. A survey of recent decisions in British Columbia, indicates that arbitration clauses are now included in leases, partnership agreements, construction contracts, shareholders' agreements and a wide variety of other contracts. It is therefore important that the governing law should reflect the needs and expectations of those who have chosen to resolve their disputes by arbitration. This has been the principal aim of the Commission in formulating its recommendations for reform.

B. Arbitration Defined

Arbitration is defined in Halsbury as:

> ... the reference of a dispute or difference between not less than two parties for determination, after hearing both sides in a judicial manner, by a person or persons other than a court of competent jurisdiction.

The persons to whom the dispute is referred are called arbitrators. If it is provided that in the event of disagreement between the arbitrators the dispute is to be referred to another person, that person is known as the umpire. The decision of the arbitrators or the umpire is called the award.

Arbitration should be distinguished from mediation or conciliation, the purpose of which is to persuade the parties to reach agreement in settlement of their dispute. A distinction must also be made between an arbitration proper and a mere valuation. In a valuation, the person appointed is required to arrive at a decision as a result of his own observations and knowledge, rather than through receiving evidence and argument submitted by the disputants as in the case of arbitration. A valuation, or appraisal, is not a quasijudicial proceeding, as is an arbitration. A valuer or appraiser in carrying out his task is not bound to comply with the fundamental procedural and substantive principles of investigation adopted by the courts.

Whether a person is acting as an arbitrator or valuer can be of critical importance. It has been held that an arbitrator, because he acts in a judicial capacity, is immune from actions for negligence in the performance of his duties. If he is acting as a valuer he enjoys no such immunity.

C. Why Arbitrate?

The reputed advantages of arbitration, in contrast to litigation, are its speed, efficiency, expert decisionmaking and economy. In practice, however, these advantages are not always realized. In addition, arbitration has several disadvantages.

1. Advantages of Arbitration

One of the main advantages of arbitration, at least in the minds of many businessmen, is that as a method of resolving disputes it is less likely to breed animosity. If a continued friendly business relationship is important to the parties, they may prefer it. As Jerome Frank has pointed out:

> There is a category of disputes for which the courts seem poorly designed: when two businessmen dispute about a breach of contract, often neither of them wants vindication, or to assuage a feeling of injustice. What they may want is a speedy sensible readjustment of their relations, so that they can resume or maintain their usual mutual business transactions. Because of the difficulty of precise ascertainment by a court of the actual past factors out of which their disputes arose, it may well be that the best mode of settling is not a court decision in a law suit but arbitration in which the disputants agree to abide by the decision of the arbitrators.

Another reputed advantage is that the parties can agree on the arbitrator. This means that a person noted for his expertise in a particular area can be appointed, who is familiar with the realities of the situation and more likely to achieve a resolution of the dispute that is acceptable to the parties. If the question in dispute relates only to fact, such an expert may be more efficient than a judge in weighing the evidence and reaching a decision.

A speedier hearing is also theoretically possible. If the parties are intent on maintaining amicable relations, dilatory tactics may be avoided.

Another advantage of arbitration is that hearings can be held in private. This may be of importance to businessmen who do not wish to open the way in which they conduct business to the scrutiny of their competitors, or the general public. Moreover, arbitration unlike litigation, is not tied to a fixed location; hearings can be held at almost any time and place that may be agreed on by the parties.

Finally, an arbitration award is thought to have greater finality. It can only be impugned by the courts in specific circumstances.

2. Disadvantages of Arbitration

(a) Private Disadvantages

It has been argued that arbitration is not necessarily cheaper than litigation or less timeconsuming. For example, in a lengthy proceeding the arbitrator may find it difficult to sit continuously because of other commitments. In every arbitration, space must be rented, or at least provided by one party, and the arbitrator must be paid. These factors may detract significantly from the speed and economy of arbitration.

As pointed out, arbitration is said to be advantageous because the arbitrator can be chosen by the parties for his particular expertise. While this is helpful when facts are in issue, it has been suggested that

where difficult questions of law are involved a judge may render a decision faster and more competently than an ad hoc arbitrator. Moreover, because an award is reviewable, if there is an error of law on its face, arbitrations involving difficult questions of law may provoke litigation. In this regard Sidney Smith J.A., in the British Columbia Court of Appeal, observed:

> One cannot but wonder about the efficacy of arbitration as a means of settling disputes of this kind. The present case occupied a great deal of time before the Board and before the two Courts. Costs are bound to be heavy. It would appear the the *Arbitration Act*, R.S.B.C. 1948, c. 16 instead of affording a quick, easy and cheap method of settlement provides one longer, more difficult and more expensive in the elucidation of matters such as these.

The Law Reform Commission of Western Australia has suggested that where a dispute involves something more than a mere valuation, most persons would prefer it be resolved by the courts. They argue that no more time is involved in going to court than to arbitration; that a judge always has the power to penalize a dilatory party; and that litigation is less costly because the parties are not obliged to remunerate the judge. The same Commission also places more confidence in judges than arbitrators.

The disadvantages of arbitration raise particular concerns in relation to contracts of adhesion. A "contract of adhesion" is one imposed by one party (the dominant party) on another party (the adherent party) through a standard form prepared and used by the dominant party in the course of his business. It might be used where the dominant party has a monopoly over the services or goods which the other party requires, or because an industry as a whole utilizes similar contracts.

As such contracts are not in practice freely negotiated, the adherent party does not have a free choice to settle disputes by arbitration. When an arbitration clause is used in a contract of adhesion, it is in the interest of the dominant party that any dispute be settled by arbitration. This interest may not coincide with that of the adherent party.

It has been suggested that the disadvantages of arbitration increase dramatically where there is a contract of adhesion. Professor Hasson argues that an arbitrator who hears a number of cases involving the same party on one side, for example an insurance company, but different opposing parties on the other, is bound to develop an unconscious bias in favour of the party whom he perceives to be under attack, i.e. the insurance company. This problem might be accentuated if the arbitrator wished to be retained on a continuing basis.

A contract of adhesion may also provide that both parties are to bear their own costs of the arbitration, even if the adherent party is successful. This may deter the adherent party from going to arbitration to vindicate his rights.

Professor Hasson has also argued that the parties are more likely to plead a technical defence before an arbitrator than they would before a public tribunal. This is less likely, however, where the parties intend to deal with each other in the future and they are unwilling to antagonize each other.

(b) Public Disadvantages

The Law Reform Commission of New South Wales has pointed out that, aside from the "private" drawbacks to arbitration, there are also certain "public" drawbacks.

First, litigation produces reported cases, but the decisions of arbitrators (other than in labour matters) are not reported. This could inhibit growth of the common law in particular fields of business and retard the process whereby standard terms in contracts acquire a settled interpretation.

Second, although businessmen might view the privacy of arbitration as an advantage, such privacy might be harmful to the community. The Law Reform Commission of New South Wales stated:

> ... 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.

This Report explores ways to reduce the disadvantages of arbitration and to enhance the reputed advantages of arbitration.

CHAPTER II LEGISLATION RELATING TO ARBITRATION

A. History

Recourse to arbitration has been common in England since the Middle Ages. In early Roman and English law, the natural way of settling disputes was selfhelp and recourse to the courts depended on the consent of the parties. At this early period the courts were tribunals of arbitration, and so, as Maine said, "the magistrate carefully simulated the demeanour of a private arbitrator casually called in." Holdsworth points out that the practice of arbitration comes, so to speak, naturally, to primitive bodies of law; and "after courts have been established by the state and recourse to them has become the natural method of settling disputes, the practice continues because the parties to a dispute wish to settle them with less formality and expense than is involved in a recourse to the courts."

The medieval courts in England did not look favourably on arbitration, regarding it as a practice which tended to diminish their jurisdiction. Consequently, when the courts were asked to enforce arbitral awards, they took the opportunity to impose conditions governing their validity and their enforcement. In the result, the law relating to arbitration became technical and complex. In 1698 the first *Arbitration Act* of general application was enacted in an attempt to facilitate the enforcement of arbitral awards.

It was not until the nineteenth century, however, that legislation was enacted which dealt with the more complex and irrational technicalities of the common law. The current *Arbitration Act* of British Columbia is closely modelled on this nineteenth century legislation.

The first legislative intervention in British Columbia occurred in 1869 when the *Civil Procedure Ordinance* was enacted by which the procedures relating to arbitration in the *Common Law Procedure Act, 1854* of England were made applicable in British Columbia. It was argued in one early case that the enactment of this Ordinance rendered, by implication, the *Arbitration Act* of 1698 inapplicable in the Province. This issue was never settled, and in 1893 the Act of 1698 was specifically repealed by the first *Arbitration Act* to be enacted in British Columbia.

The *Arbitration Act* of 1893 substantially the same in form as the present *Arbitration Act* was modelled on the English *Arbitration Act* of 1889. In England, however, there have been a number of statutory changes to the law of arbitration and that law is now, in general, governed by the *Arbitration Act*, *1950* and the *Arbitration Act*,*1979*. The 1950 Act purports to be a consolidation of four earlier Acts, commencing with the *Arbitration Act* of 1889. Further changes were enacted in the 1979 Act. Thus, while there have been a number of reforms in England, no substantial changes have been made to the *Arbitration Act* of British Columbia since 1893. Nor has any significant change been made to the arbitration legislation of the other common law provinces of Canada, all of which is modelled on the *English Act* of 1889.

In recent years several Australian States have examined the law of arbitration. Each of these jurisdictions has, or had, an *Arbitration Act* based on the English *Arbitration Act*, *1889* and, consequently, their various studies have been very helpful. In particular, we found most helpful the report published by

the Law Reform Commission of New South Wales. We gratefully acknowledge our indebtedness to the authors of that report.

B. Uniform Arbitration Legislation

In 1930, the Canadian Chamber of Commerce suggested to the Conference of Commissioners on Uniformity of Legislation that they consider a draft Uniform Act on Arbitration. In the report of the proceedings of the Conference of Commissioners it was said:

> Mr. Falconbridge reported to the Conference that the National Committee on Arbitration of the Canadian Chamber of Commerce had suggested that the Conference might consider a draft *Arbitration Act* which the committee submitted. In view of the importance of the subject of commercial arbitration to the business community and commercial interests, it was then resolved that the Conference consider the draft arbitration act of the Canadian Chamber of Commerce. After discussion it was resolved that the *Uniform Arbitration Act* should be prepared and the British Columbia Commissioners were requested to prepare a draft act and to report at the Conference at the next meeting. The British Columbia Commissioners were directed to consult, in respect of their draft, with the proper officials of the Canadian Chamber of Commerce; and it was further resolved that the commissioners for each province should consult with the officers of the local board or boards of trade with respect to a uniform *Arbitration Act*.

The report of the Committee on the draft *Arbitration Act* was presented to the 1932 Conference of Commissioners. The Committee found that all the provinces except Quebec and Prince Edward Island had statutes based on the *English Act* of 1889 and that those Acts were substantially uniform. Prince Edward Island still had the arbitration provisions found in the English statutes prior to 1889. The report of the Committee stated:

> There does not appear to be any reason why commercial arbitration may not be developed under the acts now in force in Canada to the same extent as it is under the *Imperial Act* ... Examination of the draft provincial *Arbitration Act* advocated in the report [of the Canadian Chamber of Commerce] fails to disclose any new or additional provision essential to the practice of commercial arbitration ... This draft appears to be based on a Draft *State Arbitration Act* ... in the opinion of the Committee] some of the provisions of the draft are unsuited to conditions in Canada, and many of its substantive sections are not so complete or effective in their provisions as the corresponding sections of the acts we already have.

Because of the "marked degree of uniformity existing in Canada," the Committee recommended that no action be taken by the Conference. The Conference adopted this recommendation.

Since 1932, the matter has never been considered by the Commissioners on Uniformity of Legislation, nor has any other effort been made to secure the adoption of uniform legislation.

The observations of the Committee of the Uniformity Commissioners, concerning the "marked degree of uniformity existing in Canada," although made almost 50 years ago, retain their force today. Law reform raises a difficult issue as to how much weight should be given to the benefits flowing from achieving or maintaining uniformity of arbitration laws.

These benefits are much the same as those that exist with respect to other areas of the law. Uniformity discourages "forum shopping," the practice of choosing to adjudicate disputes in one jurisdiction rather than another because of a more favourable legal regime. Uniformity allows a person carrying on business in more than one jurisdiction to adopt a single provision concerning arbitration for inclusion in their contracts rather than one for each jurisdiction a convenience for large businesses. Uniformity of legislation permits a court or arbitrator in one jurisdiction to examine decisions made in other jurisdictions as an aid to the construction of the Act. It is said that uniformity of legislation is particularly important in commercial law matters.

Nonetheless, if uniformity is to be regarded as an imperative, in the face of which all other considerations must be discounted, then the *Arbitration Act* must remain forever static and unchanged, a posi-

tion that does not accord with common sense. An unjust, unworkable or obsolete law should not be retained simply because it is also the law of a number of other jurisdictions.

Throughout this study we have borne in mind the desirability of uniform arbitration legislation and weighed against it the various possibilities for reform that we have considered. Concerning the recommendations made in this Report which represent a departure from uniformity, we believe that the benefits flowing from the recommendations outweigh the benefit of maintaining uniformity with the other common law provinces of Canada.

CHAPTER III THE ARBITRATION AGREEMENT

A. Form

The *Arbitration Act* defines a "submission" as "a written agreement to submit present or future differences to arbitration, whether an arbitrator is named or not." While *Russell* states that there is some conflict of authority as to whether the signatures of the parties are also necessary, it has been held in British Columbia that although a submission under the Act must be in writing, the parties need not have signed it. It would appear, however, that if the submission concerns a subjectmatter within the *Statute of Frauds*, it must also be signed by the party against whom it is to be enforced.

The scope of the *Arbitration Act* is not completely defined by the meaning given to "submission." First, it should be noted that an oral agreement to arbitrate is not a nullity simply because it does not meet the requirements of the definition. It remains a fully enforceable arbitration agreement at common law. Furthermore the term "submission" is used selectively in the Act. Some provisions apply to "submissions" only, while others apply to arbitrations generally. Thus the Act sets out two bodies of law: one applies to all arbitrations and the other applies only to those that fall within the definition of "submission."

Among the provisions that apply only to "submissions" are those which:

(a) specify that certain provisions are deemed to be included in the submission unless it provides otherwise,
(b) make a submission irrevocable except by leave of the court,
(c) provide for a stay of legal proceedings,
(d) permit the summary enforcement of an award, and
(e) permit an award in the form of a stated case.

s. 3 submission to operate as if made an order of the court.
ss. 7,8 appointment of arbitrators.
s. 9 award by majority.
s. 10(a) arbitrator may take oaths.
s. 10(c) correction of slip or omission in award.
s. 11 subpoenas.

Other provisions appear to apply to all arbitrations, such as those which give the courts a limited jurisdiction in relation to arbitration proceedings. These include the power to:

(a) remit or set aside an award,
(b) order a case to be stated during the reference, and
(c) remove an arbitrator for misconduct or delay.

The application of these provisions does not depend on the existence of a written agreement.

s. 12 enlargement of time for award.
s. 20 order attendance of prisoner.

The requirement that a "submission" be in writing does not appear to have been the cause of any great difficulty, presumably because the lack of writing usually does not affect the enforceability of an

agreement to arbitrate. Nonetheless, the distinction is capable of creating anomalies that are difficult to justify. For example, the agreement must be in writing if an arbitrator wishes to state an award in the form of a special case under section 10(b) of the Act; whereas to state a case during the reference under section 21, the agreement need not be in writing. Oral agreements appear to be revocable by the parties while written agreements are revocable only by leave of the court.

We have concluded that there is no reason for the *Arbitration Act* to be confined, in any of its provisions, to arbitration agreements that are in writing. While the lack of writing may give rise to problems of uncertainty and difficulties as to proof, such problems do not, in our view, have any bearing on the statutory control of, and aid to, arbitrations generally.

It has also been recommended by law reform agencies in two Australian jurisdictions that the writing requirement be repealed. One of these, the Law Reform Commission of New South Wales, also noted certain advantages of written arbitration agreements, and suggested that:

> Where the existence or terms of the agreement cannot easily be proved, as where the agreement is not in writing or the agreement, although 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.

We examine in a later chapter the circumstances in which a court should give leave to revoke the authority of an arbitrator or refuse a stay of litigation. We wish to point out here, however, that we believe it is unnecessary to provide ecifically that such factors should count in favour of giving leave to revoke or refusing a stay of litigation. Where there is uncertainty as to the terms of the agreement then, as with any contract, it is open to the court to find that there is no binding agreement in law.

The Commission recommends that:

1. *The* Arbitration Act *should apply to all agreements, whether or not in writing, to submit present or future differences to arbitration, whether or not an arbitrator is named in the agreement.*

B. Death of a Party

Where a party to an agreement to arbitrate dies pending the reference of a dispute to arbitration, and the dispute concerns a claim or cause of action which survives his death, whether his personal representatives are bound by the submission depends on its terms. If the submission provides either in express terms or by necessary implication that it binds the personal representatives of the parties, they are bound. If not, the personal representatives are not bound. This is based on the common law rule that the death of the principal revokes the authority of an agent, an arbitrator being regarded as an agent of the parties.

In some other provinces, and in England, arbitration legislation provides that the death of a party neither discharges or revokes a submission. The English legislation further provides that the survival of the submission does not affect the operation of any rule of law that extinguishes a right of action on the death of a person.

We have concluded that an arbitration agreement should not be discharged nor should the authority of an arbitrator revoked by the death of a party, and that provisions similar to those contained in the English *Arbitration Act 1950* should be enacted. If such provisions are to be enacted, however, we believe that the parties should be free to contract out of them.

The Commission recommends that:

2. *Unless the parties otherwise agree:*

(a) An arbitration agreement should not be discharged by the death of any party and in such an event it should be enforceable by or against the personal representatives of the deceased.

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

(c) Nothing in (a) and (b) should 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.

CHAPTER IV THE SUBMISSION AS AN ORDER OF THE COURT

Section 3 of the *Arbitration Act* provides:

> A submission, unless a contrary intention appears, is irrevocable except by leave of the Court and has the same effect in all respects as if it had been made an order of the court.

To understand the effect of this section it is necessary to examine its historical background. The New South Wales Law Reform Commission noted that the section is merely a piece of "legislative shorthand" aimed at giving a submission the same effect as if it had been made an order of the court under the previous law. In
British Pacific Properties Ltd. v. *Minister of Highways*, Collins J. examined the history of this provision. He said:

> A perusal of the first chapter of Stewart Kyd's Treatise on the Law of Awards, 2nd ed., published 1799, indicates that for a great many years, prior to 9 Wm. III, by agreement of parties to disputes, the differences between them were submitted to arbitration without reference by or to the court. In most cases a party to the dispute could revoke the submission to arbitration at any time before the arbitration award was published. A party to the dispute could commence an action to have the court determine the dispute at any time before an arbitration award was made. If the action be commenced after a submission, but before an award, the commencement of the action was treated as a revocation of the submission to arbitration. After the award was made a court of equity could entertain a bill to set the award aside on the ground that it had been improperly obtained. However, courts of common law had no authority to set aside an award. *Russell*, 7th ed., pp. 6523.
>
> During the reign of King Charles II, a practice became established whereby, by consent of parties, judicial orders were obtained from time to time to refer matters of account to arbitrators. This practice was found beneficial. As a result of this experience, there was enacted a statute, 9 & 10 Wm. III, ch. l5, providing that the parties to a dispute might *agree that a submission by them to arbitration should be made a rule of court*; and a procedure was stipulated whereby, upon application to the court, an order could be obtained directing
>
> > "that the parties shall submit to, and finally be concluded by, the arbitration or umpirage which shall be made concerning them."
>
> A party who did not abide by the order was liable to attachment. The practice was for the order to be obtained before the award was made. In *Re Rouse and Meier* (1871) LR 6 CP 2l2, 40 LJCP 145, at 147, Willes J. at 217, says:
>
> > "The result was that the *Court in which the submission was so made a rule, acquired authority over the award*."
>
> and, according to Lord Brougham C. in Nichols v. Roe (1834) 3 My & K 431, 40 ER 164
>
> > "exclusive authority over the award made under the reference."
>
> Also, as stated in *Russell*, 7th ed., p. 653:
>
> > "The Statute of Willliam III provided, in effect, that in all cases where the submission contained an agreement for making it a rule of any of the superior courts of record, the award if procured by corruption or

undue means, should be set aside on *complaint of the court of which the submission was agreed to be made a rule*."

By sec. 39 of 3 & 4 Wm. IV, ch 42, amending the Statute of 9 & 10 Wm. III, it was provided, inter alia, that the power and authority of an arbitrator or umpire appointed

> "by or in pursuance of *any submission to reference containing an agreement that such submission shall be made a rule of any of His Majesty's Courts of Record*, shall not be revocable by any party to such reference without the leave of the Court."

By sec. 17 of the *Common Law Procedure Act*, being 17 & 18 Vict., ch. 125, it was enacted that

> "every agreement or submission to arbitration by consent, whether by Deed or Instrument in writing not under seal, *may be made a rule of any one of the Superior Courts of Law or Equity*,"

on the application of any party thereto, unless the agreement contain words showing an intention that the submission should not be made a rule of court.

A perusal of the reasons for judgment of Quain J. in Randall, *Saunders and Co.* v. *Thompson* (1876) 1 QBD 748, 45 LJQB 713, and also the judgments of the appellate court, indicate that at least one of the effects of making a submission to arbitration a "rule of court" is to give it the status of a reference by an order of the court, and that two of the consequences of that status are that the submission thereby becomes irrevocable and under certain circumstances the court may appoint an arbitrator or an umpire.

By proclamation of Governor James Douglas, dated November 19, 1858, the law of England relating to arbitration became part of the law of British Columbia. This included 9 & 19 Wm. III, ch. 15, 3 & 4 Wm. IV, ch. 42, and 17 & 18 Vict., ch. 125. That law remained the law governing arbitration in this province until the enactment of S.B.C. 1893 ch. 1, which was modelled on the English *Arbitration Act* of 1889, which was, according to *Russell*, 14th ed., p. 46, an Act of consolidation and amendment.

As Collins J. pointed out, one consequence of making a submission an order of the court was to make available committal (imprisonment) as a sanction against revoking the authority of the arbitrator and as a sanction for compelling performance of the award, as nonperformance of the award would be contempt of court. As we point out later, apart from enforcement of the submission by committal, making the submission an order of the court enabled the court to tax the costs of the arbitration.

We believe the provision that a submission have effect as if made an order of the court is outdated and unnecessary. Section 15 of the *Arbitration Act* would allow enforcement by committal in cases where that remedy would be available to enforce an order. We also recommend later that any new *Arbitration Act* deal
specifically with the taxation of costs.

The provision was repealed in England in 1950 and in Australia it has been recommended in several jurisdictions that the provision be repealed.

The Commission recommends that:

3. The phrase in section 3 "and has the same effect in all respects as if it had been made an order of the court" should be repealed.

CHAPTER V ARBITRATORS AND UMPIRES

A. Appointment of Arbitrators

1. Appointment by the Parties

In general the parties may appoint anyone to arbitrate their dispute. Thus a single arbitrator may be appointed, or two arbitrators and an umpire, or two or more arbitrators without any umpire, or a number of persons such as the committee of a trade association or even a foreign court.

The submission itself may name the arbitrator or arbitrators, or may direct how they are to be selected.
Alternatively, it may provide only for a reference to arbitration without naming the arbitrators or directing how they are to be selected. In such a case, if the submission is in writing and, unless a contrary intention appears, the reference is to a single arbitrator.

2. Appointment by the Court

The court has no inherent power to appoint an arbitrator or umpire or to compel any party to the submission to do so. The *Arbitration Act*, however, confers a limited jurisdiction to appoint either arbitrators or umpires. Section 7 provides:

> 7. Where a submission provides that the reference be to a single arbitrator
>
> (a) if an appointed arbitrator refuses to act, is incapable of acting or dies, and the submission does not indicate to the contrary, a new arbitrator may be appointed;
>
> (b) if all the parties do not, after differences have arisen, concur in the appointment of an arbitrator or of a new arbitrator, a party may serve the other party with a written notice to concur in the appointment of an arbitrator or of a new arbitrator;
>
> (c) if the appointment is not made within 7 clear days after the notice is served, the court shall, on application by the party who gave the notice, appoint an arbitrator who has the same powers to act in the reference and to make an award as if he had been appointed by consent of all parties.

Section 8 provides:

> 8. Where a submission provides that the reference shall be to 2 arbitrators, one appointed by each party, or to 3 arbitrators, one appointed by each party and the third by the 2 arbitrators or another person or in any other manner, or to 2 arbitrators and an umpire, appointed by the 2 arbitrators or another person or in any other manner, then unless the submission expresses a contrary intention,
>
> (a) if either of the arbitrators appointed by the parties refuses to act, is incapable of acting or dies, the party appointing him may appoint a new arbitrator in his place;
>
> (b) if a third arbitrator or an umpire refuses to act, is incapable of acting or dies, a new third arbitrator or umpire may be appointed in the same manner as his predecessor;
>
> (c) if either party fails to appoint an arbitrator either originally or after an arbitrator appointed by him refuses to act or dies, any party having appointed his arbitrator may serve the other party with a written notice to appoint an arbitrator or new arbitrator;
>
> (d) if the 2 arbitrators fail to appoint a third arbitrator or an umpire either originally or after a third arbitrator or an umpire appointed by them refuses to act or dies, in substitution for the third arbitrator or umpire, any party may serve the arbitrators with a written notice to appoint or concur in the appointment of a third arbitrator or new third arbitrator, umpire or new umpire;
>
> (e) if any appointment is not made pursuant to the notice mentioned in the last 2 preceding paragraphs within 7 clear days after the notice is served, the court shall, on application by the party who gave the notice, appoint an arbitrator, third arbitrator, or umpire, as the case may be, who has the same power to act in the reference and make an award as if he had been duly appointed by the parties or by the arbitrators respectively and by consent of all parties;
>
> (f) the court, on hearing an application under the last preceding paragraph and on terms thought proper, may permit the party in default under paragraph (c) to appoint an arbitrator to act for him.

These provisions differ in one significant regard from the provisions of the English *Arbitration Act*, *1889* upon which they were based. Under the *English Act*, where the reference is to two arbitrators, one to be appointed by each party, and one party so appoints but the other does not, the first party could appoint his choice as sole arbitrator, although the court did have the power to set aside the appointment. A similar provision is contained in the English *Arbitration Act*, *1950*. Under the *British Columbia Act*, if a party fails to appoint in such circumstances, the other party must seek a court order appointing a second arbitrator.

While these provisions appear to be quite comprehensive, they do not cover all contingencies. It is possible for an arbitration to fail because the legislation, or the agreement, does not provide for an unexpected event. This was highlighted in the recent English case, *National Enterprises Ltd*. v. *Racal Communications Ltd*., where it was provided that the arbitrator was to be appointed by a third party. The third party declined to do so and an application was made to the court for the appointment of an arbitrator. The court held that it had no jurisdiction to appoint in such circumstances as the relevant provisions applied only where the arbitration clause provided for appointment by the parties and, after differences had arisen, they failed to concur in appointing one. We suggest that the British Columbia provisions could be interpreted similarly. In England, the Commercial Court Committee, in its recent *Report on Arbitration*, noted that this was "a gap which should be filled," and the *Arbitration Act 1979* amended the 1950 Act so as to provide expressly that application may be made to the Court for the appointment of an arbitrator in such circumstances.

The present British Columbia legislation concerning the appointment of arbitrators does no more than deal with specific cases. As a result the provisions dealing with the appointment of arbitrators by the court are unnecessarily cumbersome and long. A better approach, and one that commends itself to us, is that adopted in *The Arbitrations Act* of Ontario, which provides in section 8:

> (1) In any of the following cases,
>
> (a) where a submission provides that the reference is to a single arbitrator and the persons whose concurrence is necessary do not, after differences have arisen, concur in the appointment of an arbitrator; or
>
> (b) where an arbitrator, an umpire or a third arbitrator is to be appointed by a person, and such person does not make the appointment; or
>
> (c) unless the submission otherwise provides, where an arbitrator, an umpire or a third arbitrator refuses to act or is incapable of acting or dies and the vacancy is not supplied by the person having the right to fill the vacancy,
>
> a party may serve the other party or the arbitrators, or the person who has the right to make the appointment, as the case may be, with a written notice to concur in the appointment of a single arbitrator or to appoint an arbitrator, umpire or third arbitrator.
>
> (2) If the appointment is not made within seven clear days after the service of the notice, 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.

The Commission recommends that:

4. *Sections 7 and 8 of the* Arbitration Act *should be replaced by legislation similar to section 8 of The Arbitrations Act of Ontario.*

B. Removal of an Arbitrator

While at common law the court has no jurisdiction to remove an arbitrator or umpire, section 14(1) of the *Arbitration Act* provides that where an arbitrator or umpire has misconducted himself, the court may remove him.

It would appear that applications for removal of an arbitrator are rare, presumably, as is suggested in Halsbury, because the "misconduct" of the arbitrator does not in most cases appear until the award has been made. Furthermore, in Ontario, it has been held that bias, or the likelihood of bias, is not a ground for removal under a similar section of *The Arbitrations Act*. Such a limitation is not, however, as serious as might be imagined. Apart from section 14(1), it is always open to the court to disqualify an arbitrator if there is a probability or reasonable suspicion of a biased appraisal or judgment, unintended though it may be.

In England, the court has, in addition to the power to remove an arbitrator who has misconducted himself, the power to set aside certain appointments made under references to two arbitrators. A similar power was vested in the courts in British Columbia under the *Arbitration Act, 1893*. The provision was repealed, however, in 1909. This power was vested in the courts before they had the power to remove an arbitrator for misconduct, and a similar provision in New South Wales has been described as "practically a dead letter." We agree, and believe the Legislature was correct in repealing the provision in British Columbia in 1909.

Under the English *Arbitration Act*, *1950* the court also has the power to remove an arbitrator or umpire who has delayed in "entering on and proceeding with the reference and in making an award." Furthermore, if an arbitrator is removed by reason of such delay he is not entitled to remuneration for his services.

We have concluded that while the general power to remove an arbitrator is rarely invoked, it is a power that should be retained. We suggest, however, the words "committed an arbitral error" be used in substitution for the words "misconducted himself," to allay any feeling of grievance suffered by lay arbitrators guilty of only technical error. The term "arbitral error" should then be defined in a new *Arbitration Act* as including the various types of conduct or errors that currently constitute "misconduct."

It is also our view that a provision empowering the court to remove an arbitrator for delay should be adopted. Delay by an arbitrator can often lead to greater expense and defeat one of the main purposes of using arbitration instead of resorting to the courts, i.e. to resolve a dispute speedily. We would go further, however, than the comparable provision in the English *Arbitration Act*. Where an arbitrator is to be removed on this ground, the court should have a discretion to order that he lose his remuneration and that he also be responsible for the costs thrown away. We believe that if the court had these powers, arbitrators would be encouraged to conduct their proceedings in an expeditious manner. While to some, the sanction in costs might appear to be harsh, we believe that it is necessary if an innocent party is not to be penalized by the conduct of a dilatory arbitrator. For example, if the court removes an arbitrator for delay in making his award, it would be unfair to burden the parties with the costs of the previous proceedings in addition to the costs of the hearing before
a replacement arbitrator.

The Law Reform Commission of New South Wales took the view that the court should not have the power to remove for delay. In their view the general power to remove for misconduct would cover such a situation, and was all that was needed. They also stated their belief that the English provision, so far as it
concerns the arbitrator's remuneration, appears to be both Draconian and partial: Draconian because he may not have been in culpable default and partial because it does not deal with other cases of removal for misconduct. It is our view, however, that delay can be distinguished from other forms of misconduct because
it does not amount to a mere technical error on the arbitrator's part. We would also recommend that the court should also have the power to deprive an arbitrator of his remuneration where he is removed for

misconduct amounting to corruption or fraud. While we believe that an arbitrator should not be penalized for mere technical errors it is our view that in the majority of cases where an arbitrator is guilty of delay he is "culpable," and in any event if he is not at fault the court will always have a discretion not to remove him and a discretion with respect to costs.

Finally, with one exception, if an arbitrator is removed for misconduct or delay we believe that it should be specified that the court may appoint another person to act as arbitrator in his stead. The exception is those cases where a named individual was chosen as arbitrator in the submission. A party to the submission,
in such a case, may have agreed to submit any dispute to arbitration because he had confidence in the particular individual named.

The Commission recommends:

5. *The court should have the power to remove an arbitrator or umpire who makes an arbitral error or who does not proceed with reasonable dispatch in conducting the arbitration and making an award, and the court should have a discretion, where it removes an arbitrator or umpire for conduct amounting to corruption or fraud or for failing to use reasonable dispatch, to order that he is not entitled to receive any remuneration for his services and that he be liable for the costs that the parties have incurred to the date of his removal.*

6. *(a) Where an arbitrator or umpire is removed by the court under recommendation 5, the parties should be permitted to appoint a replacement as if a vacancy had been created.*

   (b) Where the parties do not concur in the appointment of a replacement under recommendation (a), the court should have the power to appoint a person to act as arbitrator or umpire in place of the person removed unless the person so removed was designated by name in the arbitration agreement.

C. Fees and Expenses

Where a submission is in writing and unless a contrary intention appears, the arbitrator may fix the amount of his remuneration and include it in the award. The amount so fixed must not, however, exceed the maximum prescribed by regulation under the *Arbitration Act*. The parties may agree upon the remuneration of the arbitrator in advance, but any exclusion of the prescribed amount must be in writing. In 1979, a regulation was passed in which the fees and expenses of arbitrators were prescribed as follows:

> For the purposes of paragraph (i) in the Schedule to the *Arbitration Act*,
>
> (a) the prescribed fees equal the fair value for services performed, and
> (b) the prescribed expenses are the necessary and reasonable expenses incurred by an arbitrator, umpire, clerk,
>
> secretary, or reporter.

If the amount of the arbitrator's fees are fixed by the award they cannot be taxed by the court but if the amount is in excess of what he is entitled to or, if his ement is not governed by the submission or statute or the amount is unreasonable and excessive, the court may find him guilty of misconduct, and on that ground set aside or remit the award. In Ontario *The Arbitrations Act* provides for a penalty against an arbitrator who attempts to exact excessive fees.

There has been little argument in British Columbia on the question of arbitrator's fees. Before 1979, the relatively low tariff forced arbitrators to seek the agreement of the parties to waive it, and at the same time to settle the amount to be paid before the arbitration commenced. The legislation of some

other provinces also contain such limits which apply in the absence of contrary agreement. The English *Arbitration Act*, however, sets no limit.

An arbitrator or umpire has a lien on the submission and the award for the amount of his charges, but this lien does not extend to documents delivered to the arbitrator during the reference. In *Russell* the following observation is made with respect to the practice in England:

> As the retention of the award is practically the chief security on which he can rely for the satisfaction of his claim, the practice commonly prevails not to deliver the award up to the party seeking to take it up until the charges have been paid. Where the party who takes up the award is not by the terms of its provisions to be the party ultimately liable to pay them, he may recover from his opponent all the costs of the award that its directions impose upon the latter. The difficulty arises when neither party takes up the award. The arbitrator must then rely upon the promise, express or implied, to pay him for his services.

Where there is an express agreement between the parties that they will pay an arbitrator or umpire, they are jointly and severally liable to him and he can maintain an action to recover reasonable remuneration. It is also noted in Halsbury that:

> It was formerly held that there was no implied promise by the parties to a submission that they would pay the arbitrator or umpire for his services, but this appears to be no longer the law where the reference is to lay arbitrators; and if a lay arbitrator may bring an action on an implied promise by the parties that they would pay him reasonable remuneration for his services, there would seem to be no sound reason why a legal arbitrator should not also be entitled to do so.

In Ontario, *The Arbitrations Act* specifically provides that where an award has been made, the arbitrator may sue for his fees after they have been taxed; in the absence of an express agreement to the contrary, action may be brought against all the parties to the reference, jointly or severally.

The Law Reform Commisson of New South Wales noted difficulties that arise in trying to control arbitrators' fees. They recommended that the court be given the power to order delivery of an award on payment into court of a sum to cover the amount demanded by the arbitrator for his fees and expenses, and to
tax the amount demanded. Similar provisions exist in England. It was also recommended that an award should not be binding so far as it concerned the amount of the fees and expenses of an arbitrator. It would be open to the parties, however, to contract out of such provisions unless they were parties to a contract of adhesion.

In the Working Paper that preceded this Report, we stated that "the present provisions relating to arbitrators' fees are not totally satisfactory." This comment was made in relation to the situation where fixed amounts were prescribed. With regard to these fixed amounts we said:

> While they do have the advantage that they preclude any argument as to the arbitrator's remuneration, there are a number of disadvantages associated with them. First, in times of rapid inflation, a prescribed fee structure must be constantly reviewed if the amounts are to be adequate for the services to which they relate. It can be cogently argued that the continual review and prescription of fees in essentially private matters, even though they apply in default of an agreement by the parties, is not a proper function of Government. It is likely, however, that a prescribed tariff of fees is almost always going to be below the amount the parties would agree on if they turn their minds to the matter. In the result, the tariff may visit an unjustifiable hardship on the arbitrator when, for one reason or another, the question of fees has been overlooked.

We therefore proposed that there should be no tariff, and that it be an implied term of every submission that the arbitrator is entitled to be paid a reasonable amount for his services. Following the publication of the Working Paper, the regulation set out above was passed whereby it is now prescribed that an arbitrator is entitled to "fair value for services performed" and his "necessary" and "reasonable" expenses. We adhere to the position taken in the Working Paper, and are pleased that the manner in which arbitrators' fees are currently prescribed now accords with that position. It is therefore unnecessary for us to make a formal recommendation in this regard.

We also adhere to a proposal made in the Working Paper that a provision entitling an arbitrator to a reasonable amount for his services should be supplemented by a power in the court to tax an arbitrator's fee. This power to tax should be at the instance of the arbitrator or any party to the arbitration, notwithstanding
any agreement prohibiting taxation. We recommend that the taxing procedure should be based upon the procedure established under the Barristers and Solicitors Act for the taxing of solicitors' bills for fees and expenses. The relevant sections of the Barristers and Solicitors Act are reproduced in Appendix F. Thus any taxing officer of the Supreme Court would have the power to tax arbitrators' fees and expenses, and the certificate of the taxing officer fixing the fees as taxed would be enforceable as a judgment.

Finally, we believe that the prescription for "reasonable" fees supplemented by a procedure for taxing of arbitrators' fees will eliminate the need to retain the arbitrator's lien for unpaid fees, and that therefore the lien should be abolished.

The Commission recommends that:

7. *The arbitrator's lien in respect of his fees and expenses should be abolished.*

8. *Notwithstanding any agreement prohibiting taxation, there should be a general power to tax an arbitrator's bill in respect of his fees and expenses at the instance of the arbitrator or any party to the arbitration.*

9. *The procedure for taxing an arbitrator's bill under recommendation 8 should be similar to that established under section 92 of the* Barristers and Solicitors Act *for the taxation of solicitors' bills, and when the bill of an arbitrator is taxed, the certificate of the taxing officer should be enforceable as a judgment of the Supreme Court.*

CHAPTER VI CONDUCT OF THE ARBITRATION

A. General

While the Act imposes no particular procedure to be followed by arbitrators in determining a dispute referred, they must act in accordance with natural justice, they must not exceed the jurisdiction conferred by the submission and they must decide the dispute in accordance with the applicable law.

The duty of an arbitrator to apply the law appears to be peculiar to England and those jurisdictions, including British Columbia, which enacted legislation based on the *Arbitration Act*, *1889*. In other jurisdictions, notably the United States, an arbitrator, in the absence of agreement to the contrary, need not determine matters by reference only to law, but may also act in accordance with equity and good conscience (*ex aequo et bono*). In *Russell*, it is stated that the duty to apply the law is sometimes treated as an implied term in the arbitration agreement, but it is also implicit in the statutory provisions that enable a court to order a case to be stated upon a point of law and to set aside an award for error of law. As Pearson L.J. observed in *Tersons Ltd*. v. *Stevenage Development Corpn*.:

> The procedure by special case is a valuable safeguard, because without it there might grow up a system of arbitrators' law independent of, and divergent from, the law administered by the courts; and also, if different arbitrators took different views as to the meaning of a clause in a standard contract, there would be no means of obtaining an authoritative decision.

This duty to apply the law also flows from the English and Canadian courts' characterization of arbitration proceedings as "judicial" in contrast to proceedings such as valuations. It should be noted that in British Columbia an apparent exception to the duty to apply the law exists with respect to arbitrations under the *Labour Code*. Section 92(3) provides:

> (3) An arbitration board, to further the intent and purpose expressed in subsection (2), shall have regard to the real substance of the matters in dispute and the respective merit of the positions of the parties to it under the terms of the collective agreement, and shall apply principles consistent with the industrial relations policy of the Act, and is not bound by a strict legal interpretation of the issue in dispute.

A distinction is drawn, however, between general rules of law and rules of practice of the courts. It has been held, for example, that a fastidious observance of the regularity of forms is not called for, and that while arbitrators should observe, so far as is practicable, the rules which prevail at the trial of an action in court, they may deviate from those rules as long as they do not disregard the substance of justice. However, it has also been held in British Columbia that where the proceedings were "slipshod and irregular," this might lead to injustice, and an award should therefore be set aside.

Should parties to an arbitration be able to "leave the issues to be determined in accordance with the sense of justice and equity that they may believe reposes in the breasts and minds of their selfchosen judges," or should arbitrators continue to be bound to apply the law? We do not mean to suggest that as arbitrators are bound to apply the law, this presupposes that justice and equity will not be served. Rather, in certain cases it
might not be appropriate to adhere strictly to the law if an otherwise reasonable solution is available.

The Law Reform Commission of New South Wales examined this question and recommended that it be the duty of an arbitrator to decide questions of law by reference to the law, unless the parties have agreed otherwise by "exempt contract." In their Working Paper it was proposed that this right to contract out should exist in relation to any contract that was not a "contract of adhesion." Opinion was divided on this question among those who responded to the Working Paper, as the Commission noted:

> 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 quasilaw 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. 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.

They remained of the view, however, that parties to an arbitration should be free, in relation to certain contracts, to stipulate that arbitrators are not bound to apply the law. They were not overly concerned about the possibility that there would be less room for questions of law to come before the court on stated cases with the result that the development of the law by judicial decision might be hampered. They noted that:

> The function of the Court is to determine disputes. As a byproduct 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.

They also noted that, because they had recommended that clauses which provide that an arbitrator's award is a condition precedent to a cause of action (the socalled *Scott* v. *Avery* clauses) should be void, it would remain open to a party who had agreed to let the arbitrator decide otherwise than by reference to law, to seek relief from the agreement if there is a serious risk of injustice. He might obtain leave to revoke the authority of an arbitrator or commence an action and resist any application to stay litigation.

The Law Reform Commission of the Australian Capital Territory also considered this question and concluded that an arbitrator should be bound to apply the law unless the parties have agreed otherwise in an agreement to arbitrate an existing difference.

The requirement that arbitrators should apply the law leads to a degree of certainty that would not necessarily exist if they were not so bound. For example, before commencing an arbitration a party can be advised as to his "legal" position. On the basis of this advice he can decide whether or not to proceed with the arbitration. The requirement also means that, in theory, there is a systematic development of the law that might not otherwise take place. It is for this and other reasons that we later recommend a procedure to provide appeals from awards on points of law.

We recognize, however, that in relation to certain disputes it may be thought desirable that arbitrators should not be bound strictly to apply the law. This was recognized by the Legislature of British Columbia when the *Labour Code* was enacted.(3) An arbitration board, to further the intent and purpose expressed in subsection (2), shall have regard to the real substance of the matters in dispute and the respective merit of the positions of the parties to it under the terms of the collective agreement, and shall apply principles consistent with the industrial relations policy of this Act, and is not bound by a strict legal interpretation of the issue in dispute. We therefore recommend later that the parties to an arbitration agreement should be free to exclude by agreement judicial review of the award for errors of law, provided the exclusion agreement is made after the commencement of the arbitration. Where the parties have excluded judicial supervision of the award for errors of law, then we can see no reason why they should not also be free to agree that the arbitrator is not bound to apply the law.

The Commission recommends that:

10. Arbitrators should continue to be required to adjudicate disputes according to the law, rather than by reference only to equity and good conscience, unless the parties agree otherwise in a valid exclusion agreement made pursuant to recommendation 44.

B. Powers During the Reference

1. General

In the conduct of the proceedings, the arbitrator must conform with any directions which may be contained in the submission itself. The *Arbitration Act* provides that unless the submission expresses a contrary intention, the parties to the reference and all persons claiming through them must, subject to any legal objection:

1. submit to be examined by the arbitrators on oath or affirmation;
2. produce all books and other papers which may be required or called for;
3. do all other things which during the proceedings on the reference the arbitrators may require.

Furthermore, the witnesses on the reference must, if the arbitrators think fit, be examined on oath or affirmation.

The parties may have agreed on a specific method of proceeding, which the arbitrator is bound to follow. It is therefore open to the parties to make their proceedings formal and it is equally open to them to make them simple and straightforward in an attempt to make them less expensive and timeconsuming. Needless to say, once an arbitration ceases to be informal, it has probably defeated one of its main objects i.e., to provide comparatively simple and inexpensive machinery for settling disputes between the parties.

In many cases, however, arbitration clauses in commercial contracts do not specify in detail the procedure that is to be followed and, as a consequence, any procedure adopted by the arbitrator must comply with the *Arbitration Act*. In our view, the present *Arbitration Act* does not encourage the use of simple, informal procedures. For example, the *Arbitration Act* provides that witnesses may be examined and documents produced, but does not authorize the use of affidavit evidence by the arbitrator. It is our

view that in many cases expense could be saved if the arbitrator indicated prior to ordering the hearing that all or particular matters may be determined by affidavit. We therefore recommend that arbitrators be given specific authority to receive evidence on affidavit. Our recommendation in this regard is incorporated in recommendation 12, which deals generally with the admissibility of evidence before an arbitrator.

An arbitrator has no power to call a witness himself without consent of the parties. As Moulton L.J. said in *Re Enoch and Zaretzky*, Bock & Co. It is certainly not the law that a judge or any person in a judicial position, such as an arbitrator, has any power himself to call witness to fact against the will of either of the parties. There may in some cases be a person whom it would be desirable to have before the court; but neither party wishes to take the responsibility of vouching his personal credibility or admitting that he is fit to be called as a witness. In such a case the judge may relieve the parties by letting him go into the box as a witness of neither party; and of course if the answers are immaterial, he may refuse to allow crossexamination.

In British Columbia, the *Labour Code* now permits arbitrators to call witness on their own motion. It is our view that this is a power that might usefully be given to all arbitrators.

The Commission recommends that:

11. An arbitrator should be permitted to call a witness on his own motion but any party to the reference should have the opportunity to crossexamine the witness and offer evidence in rebuttal.

2. Evidence Before an Arbitrator

In *Russell*, it is stated that:

Arbitrators are bound by the same rules of evidence as the courts of law, unless the parties have agreed otherwise.

If, however, an arbitrator should make a mistake as to the admissibility of certain evidence, that in itself is not "misconduct," and the award will not be set aside unless the error appears on the face of the award. The award would be set aside, however, if he admitted and acted upon evidence which is obviously
inadmissible, and which "goes to the very root of the question before him."

While an arbitrator's rejection of evidence as being inadmissible under the law of evidence is not generally open to review, a rejection of evidence on the ground that it is not relevant to the issues may lead to the award being set aside.

Sometimes cases which on their face appear to raise a question relating to the law of evidence are really concerned with a denial of natural justice. For example, it has been held that an award should be set aside where an arbitrator received evidence or information from one of the parties in the absence of the other, even if the arbitrator testifies that such evidence did not influence his decision.

In the United States it would appear that it is a well established principle of arbitration law and practice that court rules regarding the admission or rejection of evidence do not prevail in arbitration. As Domke points out:

> Arbitrators have discretionary power to admit and hear any evidence that the parties may wish to present through witnesses or documents. Rulings of arbitrators on the admissibility of evidence are not subject to review by courts since such action would 'result only in waste of time, the interruption of the arbitration proceeding, and encourage delaying tactics.' Hearsay evidence cannot be precluded per se in arbitration. It was said in *Petroleum Separating Co*. v. *InterAmerican Refining Corp*.: 'the arbitrators appear to have accepted hearsay evidence from both parties, as

> they were entitled to do. If parties wish to rely on such technical objections they should not include arbitration clauses in their contracts.'

The question arises whether the rule that arbitrators are bound by the laws of evidence should be retained, or whether the American position should be adopted. In New South Wales it was recommended that, unless otherwise agreed, matters admissible under the law of evidence should be admissible in an arbitration and, furthermore, an arbitrator should be allowed to admit relevant matters not admissible under the laws of evidence, and should be allowed to reject unnecessary or vexatious matters. That Commission said:

> An advantage sometimes seen in arbitration, as compared with litigation, is that the difference may be determined by a person who is not a lawyer but is experienced in the subjectmatter of the difference to be determined. It is unreal to expect such an arbitrator to apply the laws of evidence as if he were a judge. It is oppressive as well as unreal to put on a conscientious arbitrator a duty which, to the knowledge of the parties, he is not equipped to perform.

We share these views and recommend that arbitrators should be free to accept and receive any evidence they think is relevant. Arbitrators in labour matters already have such a power and its existence has not led to any great difficulties. The only qualification we would make is that an arbitrator should not be free to exclude evidence that is admissible in a court of law.

The Commission recommends that:

12. Unless the parties agree otherwise, an arbitrator should have the power to admit evidence and information on oath, affidavit or otherwise as in his discretion he considers proper, whether or not the evidence is admissible in a court of law, but he should not be permitted to refuse to admit evidence that is admissible in a court of law.

C. Majority Action

Section 9 of the *Arbitration Act* provides that where a submission is in writing and provides that the reference shall be to three arbitrators, unless the submission expresses a contrary intention, the award may be made by a majority of the arbitrators. This provision was first enacted in 1909 in response, it would seem, to the British Columbia Court of Appeal in *McLeod* v. *Hope and Farmer*. There it was held on a reference to three arbitrators the award must be unanimous. There is a provision similar to section 9 in the English *Arbitration Act*, *1950*, although it is not expressed to be subject to contrary agreement.

We believe that the provision allowing an award by majority should be retained. We have concluded, however, that it should not be restricted to references to three arbitrators but should apply whenever there are three or more arbitrators unless the parties agree otherwise. Moreover, the provision should not be confined to the award as distinct from other steps in the arbitration.

Allowing three or more arbitrators to act by majority would not, however, resolve all the situations in which an impasse might arise. One might arise where, through the death of an arbitrator or by agreement, there is an even number of arbitrators. One might also arise where there is a multiplicity of parties or issues and the arbitrators are unable to reach a majority decision.

Ideally, this kind of possibility will occur to those who frame arbitration agreements and a term to deal with it will be included. In practice, however, most agreements will be silent on the matter and we therefore believe that the *Arbitration Act* should contain some mechanism to resolve an impasse.

The mechanism that we favour is simply to provide that the decision of the chairman of the panel of arbitrators should prevail if a majority decision cannot be reached. This is the approach taken in section 103 of the *Labour Code*. We realize that this approach may be far from satisfactory in some cases, but it would only apply in default of a contrary agreement by the parties. The mere fact that the possibil-

ity of an impasse is "flagged" by the Act may lead the parties to develop a provision more suited to their own needs.

The Commission recommends that:

13. Where there are three or more arbitrators then, unless the parties agree otherwise,

(a) the arbitrators may act by majority, and
(b) if there is no majority, the decision of the chairman of the arbitration panel should be the decision of the panel.

D. Costs

Two kinds of costs may be incurred in connection with an arbitration. The term "costs of the reference" means all the expenses incurred by the parties in the course of one whole enquiry before the arbitrator, and the "costs of the award" are the fees and expenses of the arbitrator. These terms are used in the following provision that is deemed to be part of every written submission unless the parties have agreed otherwise:

> 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 of them shall be paid, and may tax or settle the amount of those costs and may award costs to be paid as between solicitor and client ...

The "costs of the arbitration" or simply "costs" is often used as a collective term to cover costs of both the reference and the award.

Generally speaking, the parties may by their agreement to arbitrate (whether or not it is in writing) make such agreement with regard to the costs of the arbitration as they think fit. If the agreement to arbitrate is not in writing and is silent on the question of costs, thenbecause under the *Arbitration Act* the arbitrator does not have any power to adjudicate upon them, each party must bear his own expenses of the reference and half of the costs of the award.

Where an arbitrator has a discretion as to costs it must be exercised. If he fails to exercise his discretion, the award is liable to be remitted or set aside on the ground that he has failed to deal with all the matters referred to him. The arbitrator's discretion with regard to costs must also be exercised judicially
and consequently, he must have positive reasons if he deviates from the court practice of awarding costs to follow the event.

Where the agreement to arbitrate is in writing and an arbitrator has made an award of costs, those costs may be taxed by the court as such submissions are given the same effect as if made an order of the court. It appears, however, that unless the parties consent, the court has no power to make an order for costs of the arbitration proceedings. Thus, it has been held that where an award is set aside, the court could not order the unsuccessful party to pay the costs of the applicant in connection with the arbitration proceedings. The court has authority, where it makes an order under section 22 of the *Arbitration Act*, to impose such terms as to costs as it thinks just. If, however, the court fails to impose terms as to costs when, for example, it orders a special case to be stated, the matter is left in the discretion of the arbitrators and the court has no power subsequently to award costs.

In England, the *Arbitration Act*, *1950* gives arbitrators a discretion with regard to costs similar to that given to arbitrators under the *Arbitration Act* of British Columbia. The *English Act*, however, has other provisions relating to costs. One stipulates that, in an agreement to refer future differences to arbitration, a provision that each party shall pay his own costs should be void. This provision was enacted in

an attempt to invalidate such clauses which formerly were common in insurance policies. The *English Act* also provides that where an arbitrator fails to deal with costs any party may apply to him within 14 days for an order as to costs, after the publication of the award. The High Court is also given specific power, unless the award directs otherwise, to tax any costs that are directed to be paid by an award.

The Law Reform Commission of New South Wales made several recommendations concerning costs. First, the costs of a reference and award should remain in the discretion of the arbitrator, and that the costs awarded to be paid should be taxable in the court, unless fixed by the arbitrator. Second, a stipulation in an arbitration agreement of future differences that each party is to bear its own costs should be void, but only where the stipulation is in a contract of adhesion. Finally, where an arbitration proves abortive, for example where a sole arbitrator is removed and not replaced, the court should be able to deal with the costs, unless otherwise agreed.

On the whole, we are not dissatisfied with the general position in British Columbia concerning the costs of arbitration proceedings. In particular, we believe the parties should remain free to reach their own agreement as to costs without exception. In England and Australia, there may be cogent reasons for limiting the contractual freedom of the parties in this context, but we have no evidence that unfair terms as to costs contained in contracts of adhesion are an issue in British Columbia.

We also believe that, subject to an agreement to the contrary, the costs of both the reference and the award should remain in the discretion of the arbitrator and that he should continue to have the power to tax or settle the amount of those costs. That is not presently the case where the agreement to arbitrate is oral, but our proposal that all provisions of the *Arbitration Act* apply equally to oral agreements would eliminate this obstruction.

The one aspect of costs which additional legislation may be called for is where an arbitrator fails to exercise his discretion to award costs. This failure may be deliberate or an oversight. It would be useful to permit an application to the arbitrator, even after the award has been delivered, to consider the matter of costs. If, after such an application, no award of costs has been made, the arbitrator's failure should be taken as deliberate and each party should, as between themselves, bear his own costs. All the parties will, of course, continue to be liable jointly and severally for the fees and expenses of the arbitrator.

The Commission recommends that:

14. Unless the parties otherwise agree:

(a) The costs of the reference and award should be in the discretion of the arbitrator, who should be able to direct to and by whom those costs are to be paid, and be able to tax or settle the amount of those costs, and
(b) if the arbitrator fails to make an award as to costs, either party, within 30 days of the award, should be able to apply to the arbitrator for an order as to costs and for the amount to be fixed, but where no such application is made, or the arbitrator refuses or neglects to make an order as to costs, each party should as between themselves bear his own costs of the reference and his prorated share of the cost of the award.

CHAPTER VII ARBITRATION AND LITIGATION

A. Stay of Proceedings

Where there is a valid submission to arbitration and a party commences legal proceedings in respect of the matter to be referred, section 6 of the *Arbitration Act* permits the court, subject to certain conditions, to stay the proceedings. It provides:

If a party to a submission or a person claiming through him, commences legal proceedings against another party to the submission or a person claiming through him in respect of any matter agreed to be referred, a party to the legal proceedings may after appearance and before delivery of any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings. The court, 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.

This provision differs in one important respect from section 4 of the English *Arbitration Act 1889* upon which it is based. Section 4 of the *English Act* permitted proceedings in any court to be stayed by "that court." Section 6 of the *British Columbia Act* differs, the application for a stay must be made to "the court," which is defined in the *Arbitration Act* as the Supreme Court. It has been held that only the Supreme Court can stay proceedings under this section. The right of the Supreme Court to stay proceedings, however, extends to proceedings commenced in the County Court. In England there is now an additional power to stay litigation where a question agreed to be referred to arbitration arises in proceedings for interpleader.

It has been held in England that, because a defendant in an action who delivers a counterclaim has thereby commenced legal proceedings, if the counterclaim is in respect of some matter which is comprised in a written submission to arbitration, the plaintiff can apply for a stay of the counterclaim. In a recent Alberta
case, however, it was held that a plaintiff could not apply for a stay in such circumstances.

Certain conditions must be fulfilled if a stay is to be granted. First, the matter in question in the legal proceeding which it is sought to stay must be within the scope of the submission. The submission must also be contained in a written agreement and must be valid and subsisting.

The application has to be made by a party to the submission or a person claiming through or under him. Thus it has been held that where the action was against the party who commenced the arbitration proceedings and his solicitors, they, not being parties to the original agreement to arbitrate, could not obtain a stay.

Section 6 also provides that the applicant must not have delivered any pleadings or taken any other steps in the proceedings after appearance. Any application whatsoever to the court, even application for time, is a step taken in the proceedings. Furthermore, a party may be held to have taken a step in the proceedings notwithstanding his ignorance at the time of the existence of the arbitration clause. It has been held that delivery of a defence, application to the court for leave to interrogate, or for a stay pending the giving of security for costs, or for an extension of time for delivery of a defence, are "steps" in the proceedings. It has been held recently in British Columbia that a demand for particulars of the statement of claim constitutes a step in the proceedings as such a demand, by virtue of the Supreme Court Rules, must be made before the court can order a party to deliver further particulars. On the other hand, neither a notice requiring a statement of claim, a request by letter for an extension of time for pleading, nor taking objection to jurisdiction, amount to taking a step in the proceedings.

The applicant must also satisfy the court that he is, and at the commencement of the proceedings, was ready and willing to do everything necessary for the proper conduct of the arbitration. Finally, the court must be satisfied that there is "no sufficient reason why the matter should not be referred to arbitration in accordance with the submission."

If all of the above conditions are satisfied, then it is for the party who wishes the matter to be litigated in court to satisfy the court that it ought not to be referred and, unless he can show that, an order to stay will be made.

An order to stay will be refused if there is good ground for apprehending that the arbitrator will not act fairly in the matter, or that, for some reason, it is improper that he should arbitrate the dispute.

Halsbury points out that before the 1889 Act in England, it was laid down in a number of cases that a stay should not be refused only because the issue between the parties was merely a question of law. Now, however, when a question of law arises in the course of a reference, the arbitrator can be compelled to state
a special case for the opinion of the court. If the only question in dispute is a question of law, the court would probably refuse a stay, since it would be idle to remit to the arbitrator a question which the arbitrator in his turn would have to submit to the court. The Supreme Court of Canada has held that if the sole matter to be dealt with by the arbitrators is a question of law, a stay of action may properly be refused on that ground.

The position is more complicated, however, where there are important questions of fact to be determined. In such cases if no important questions of law are to be determined, then the court will invariably grant a stay. It was stated by the Supreme Court of Canada, in *StokesStephens Oil Co.* v *McNaught*, that where there are important questions of fact to be determined, that there are also important questions of law involved will not justify the refusal of a stay if the claims in the action are otherwise proper for submission to arbitrators. This statement was questioned recently in an Ontario case. The court pointed out that the issues to be determined in the Stokes case were largely factual, and suggested that the case was inapplicable where there are sufficient matters of mixed fact and law involved.

A stay may also be refused where the arbitration agreement only covers some of the matters which are the subject of the legal proceedings to avoid multiple proceedings when it would be more convenient for all the related claims to be disposed of in the same action.

The power of the court to refuse a stay of litigation seems inconsistent with a basic precept of arbitration that the parties have chosen arbitration in preference to litigation and they should be bound by that decision. On the other hand, there is a competing view that disputes involving questions of law, and possibly those involving an evaluation of disputed evidence, should be determined by tribunals which are legally trained, preferably the courts.

Recognizing this conflict of principle we have considered whether the power of the court in this regard should be widened, restricted or should remain unaltered.

A majority of the Law Reform Commission of Western Australia recommended that the court be given more extensive powers to refuse a stay of litigation. In support of this recommendation it was argued that at the time of entering into a contract the parties may not have a clear conception of the nature of the disputes likely to arise under it. In particular it was considered that matters such as conflicts of evidence or questions of law or the interpretation of a document are best determined by a court.

The majority was also persuaded by an argument that most people would prefer their disputes to be settled by a court rather than by arbitration. It was noted that:

> ... an arbitration clause is often included in a contract, not because the parties have brought their minds to the question whether arbitration is the best method of determining any dispute that might arise, but because they have merely followed a precedent. Agreements to arbitrate are often included in some "standard form" contracts, to which a customer or client has no real choice but to subscribe.

It was also suggested that court proceedings take no longer than arbitration proceedings, that the expense is less because, for example, the parties do not pay for the services of the judge, and that the community has more confidence in a judge than in a arbitrator.

Finally, it was pointed out that by the time a judge has heard enough to enable him to decide whether to grant a stay, it would be simpler and quicker to allow him to complete the hearing rather than for the proceedings to start afresh before an arbitrator.

A majority of the Law Reform Commission of Western Australia, therefore, recommended that the present practice be reversed by enacting a provision under which the court would not be able to stay an action,

> unless it is satisfied that by reason of expense and delay, the nature of the questions in issue, or any other circumstances, justice would be better served by the dispute being determined by arbitration.

They also recommended this principle should apply to the converse case where arbitration proceedings are commenced against a party. In such cases, the court would be expressly empowered to stay those proceedings, so that the party who commenced them would be obliged to take court proceedings.

While we believe that in certain cases it might be appropriate for a court to refuse a stay of litigation, we believe that the approach suggested by the majority of the Law Reform Commission of Western Australia goes too far. If there is an arbitration agreement, and court proceedings have been commenced in breach of that agreement, the onus should remain on the person bringing those proceedings to show cause why those proceedings should continue.

This was the minority view of the Law Reform Commission of Western Australia, and also the view of the Law Reform Commission of New South Wales. The latter recommended that the court's power in this regard should not be widened. They recommended, however, that the legislation should specify some matters relevant to the decision to stay or not to stay litigation. For example, it should weigh against a stay that it is opposed by an adherent party to a contract of adhesion, 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, as should the partiality of an arbitrator.

The Law Reform Commission of New South Wales also recommended simplification of the conditions for the statutory power. They suggested that the procedural restrictions (that the application must be made before the delivery of any pleadings or taking any other steps in the litigation) should be abolished. As stated in the Report:

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. 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.

They also recommended abolition of the requirement that the applicant must have been "ready and willing" to arbitrate:

> 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?

As we have said, we believe that the court should continue to have the power to refuse a stay of litigation and that the person commencing litigation in breach of an arbitration agreement should continue to bear the onus of convincing the court that a stay should not be granted. It is our view that there should be an express statutory statement to this effect.

We agree with the Law Reform Commission of New South Wales that the legislation should specify those matters relevant to the decision to stay or not to stay. We also agree that the conditions as to taking no steps in the litigation, and being ready and willing to arbitrate are, too rigid, but believe that they are factors which should be taken into consideration by the court. We would, therefore, list them amongst the matters relevant to the exercise of the court's discretion.

The matters which we consider to be relevant are set out in our recommendations below, and are, in the main, self-explanatory. We should like to point out that the Law Reform Commission of New South Wales recommended that if the arbitration agreement is a contract of adhesion then it should be open to the court to treat that as sufficient for withholding a stay. It is our view that where an arbitration agreement is not freely
negotiated this should not in itself be sufficient reason to refuse a stay, but should be a factor to be taken into account by the court in exercising its discretion.

The Commission recommends that:

15. *If a party to an arbitration agreement, or a person claiming through him, commences legal proceedings against another party to the arbitration agreement, or a person claiming through him in respect of any matter agreed to be referred, any party to such legal proceedings or to the arbitration agreement should be permitted to apply to the court to stay the proceedings.*

16. *Once the party applying for a stay pursuant to recommendation 15 has shown that the matter is one that was agreed to be referred, the burden of showing cause why effect should not be given to the arbitration agreement should be upon the party opposing the application to stay.*

17. *In determining whether cause has been shown in recommendation 16, the court may consider:*

    (a) whether or not the agreement to arbitrate was freely made;
    (b) whether the questions in issue raise issues of factual or legal complexity and whether it is appropriate that these issues be settled by arbitration in the light of the qualifications of the arbitrator;
    (c) the comparative expense and delay involved in the proceedings as opposed to arbitration proceedings;
    (d) if there are several parties to the arbitration agreement, whether those parties, other than the applicant, would prefer the proceedings to be continued;
    (e) whether there are other parties to the proceedings who are not parties to the arbitration agreement;
    (f) the stage the proceedings have reached;
    (g) whether the applicant has delivered any pleadings or has taken any other step in the litigation;
    (h) whether the applicant was, at the time the proceedings were commenced and at the date of the hearing remains ready and willing to do all things necessary to the proper conduct of the arbitration;
    (i) whether the arbitrator may not be capable of impartiality;
    (j) whether fraud is alleged by any party to the proceedings;
    (k) any other matter the court considers significant.

B. Revocation of the Authority of an Arbitrator

At common law, it was not open to one of the parties to revoke the agreement to refer a dispute to arbitration. It was possible, however, for one of the parties to revoke the authority of a particular arbitra-

tor on the basis that the authority given to the arbitrator is analogous to the mandate given by a principal to his agent.

The right to revoke the authority of an arbitrator where the submission falls within the definition of a submission in the *Arbitration Act*, is now limited by section 3 of that Act, which provides in part:

> A submission, unless a contrary intention appears, is irrevocable except by leave of the Court ...

The wording of this provision is slightly ambiguous, as was the wording in section 1 of the English *Arbitration Act*, *1889*, upon which it was based. This was noted by Bowen L.J. in *Re Smith & Service and Nelson & Sons*, where he explained the section as follows:

> We have to construe the language of s. 1, and I may remark that the word "submission" and the words "revocation of submission" are words which have been used with some inexactitude, both in the cases and in the textbooks. There may be an agreement to refer generally without naming the arbitrators; such an agreement was always irrevocable, and an action would always lie for its breach, although the Court could not compel either of the parties to proceed under it. There may be an agreement to clothe a particular arbitrator with authority, and if one of the parties revoked that particular arbitrator's authority, and refused to submit to him, he could not be compelled to proceed. In such a case, though not with exactitude, one might probably talk of revocation of the submission and of the submission as revocable, although it was in truth a revocation of the authority of that arbitrator. The difficulty here arises because in this Act submission is defined as a written agreement to submit to arbitration whether an arbitrator is named or not. Exacter language was used by the legislature in framing 3 & 4 Wm. 4, c. 42, s. 39, which accordingly provides that the power and authority of an appointed arbitrator when the submission has been made a rule of Court shall not be revocable. That shews what is the true thing that is revoked; the party does not revoke the agreement to refer, but revokes the authority which he has given to the arbitrator.

The power to grant leave to revoke the authority of an arbitrator is exercised by the court in a sparing and cautious manner. Unless the applicant can establish that there will be a failure of justice if the reference is allowed to proceed, he will not be allowed to revoke.

In a recent English case, *City Centre Properties (I.T.C. Pensions) Ltd.* v. *Tersons Ltd.*, Harman J., speaking for the Court of Appeal, stated that leave to revoke should only be given in very exceptional circumstances, such as misconduct on the part of the arbitrator. He further stated that the power to give leave to revoke is not the converse of the power to refuse a stay of proceedings, and should not therefore be exercisable in similar circumstances. However, in the Alberta case, *Mobil Oil Canada Ltd.* v. *Pan West Engineering & Construction Ltd.*, the court took a different view. It was said that the general principles laid down in the cases where an applicant has applied for a stay of court proceedings apply by analogy to an application for leave to revoke a submission.

We believe that the policy of section 3 is correct and that the authority of an arbitrator should continue to be irrevocable except by the leave of the court. We also believe that the court in the *Mobil Oil* case adopted the correct approach with regard to the general principles to be applied in exercising its discretion in this regard. The power of the court to allow the revocation of the authority of an arbitrator complements its power
to stay litigation. Neither should be considered in isolation from the other.

In England the provision whereby an arbitration agreement is irrevocable except by leave of the court was carried forward in the *Arbitration Act*, *1950*. Apart from this general power to give leave to revoke an arbitrator's authority there are also specific statutory powers to revoke his authority, or remove him, if he fails to use all reasonable dispatch, if he has misconducted himself or the proceedings, or if he is guilty of bias or the dispute involves the question of whether a party has been guilty of fraud.

In England, the 1950 Act widened the court's statutory power to revoke the authority of an arbitrator and interfere where the parties to a dispute, with full knowledge of the facts, select an arbitrator who is not an impartial person. This latter rule caused hardship when applied to particular contracts, especially in the construction trade. It was, and still is, common for an arbitration clause in a building con-

tract to specify that the architect will act as arbitrator even though he may be the agent or employee of one of the parties.

The *Arbitration Act*, *1950* provides:

> 24. (1) Where an agreement between any parties provides that disputes which may arise in the future between them shall be referred to an arbitrator named or designated in the agreement, and after a dispute has arisen any party applies, on the ground that the arbitrator so named or designated is not or may not be impartial, for leave to revoke the authority of the arbitrator or for an injunction to restrain any other party or the arbitrator from proceeding with the arbitration, ll not be a ground for refusing the application that the said party at the time when he made the agreement knew, or ought to have known, that the arbitrator, by reason of his relation towards any other party to the agreement or of his connection with the subject referred, might not be capable of impartiality.

Thus, leave to revoke the authority of the arbitrator will not be refused because the applicant, when he entered into the agreement, knew, or ought to have known, that the arbitrator might not be an impartial person. We believe that such a provision would be a useful feature of British Columbia arbitration law.

The statutory power in the *English Act* to revoke the authority of an arbitrator where the dispute involves allegations of fraudulent conduct, is closely linked to the cases which have held that questions of fraud may be sufficient to induce a court to refuse a stay of litigation brought in breach of an arbitration agreement. In *Russell* it is stated that these special rules in fraud cases exist because it is desirable that such charges should
be investigated in open court, presumably because the person so charged will then be able to clear his name in public, and that it is not "proper that a party against whom such charges are made should be without a right of appeal on questions of fact."

The Law Reform Commission of New South Wales was not persuaded by such reasoning.

> ... 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, 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, or by setting aside an award.

In the result, they recommended that there should not be a special provision for leave to revoke where questions of fraud arise.

As the Law Reform Commission of New South Wales pointed out, the various problems that might arise where questions of fraud are involved are subject to the eventual control of the court. Such control would be exercised, however, after the arbitration had taken place, and it is our view that if such control is thought
desirable at all, then the court should be entitled to intervene at a much earlier stage. Furthermore since we have already concluded that the court, in exercising its discretion to give leave to revoke, should have regard to the same principles used in cases where a stay of litigation is sought then, as questions of fraud are relevant in such cases, they should also be relevant when leave to revoke is sought if the analogy between the two forms of application is to be complete. In view of our proposals in this regard, however, we do not believe that a specific statutory provision, such as the English provision, is called for.

The Commission recommends that:

18. The authority of an arbitrator should continue to be irrevocable except by leave of the court.

19. The court in exercising its discretion in giving leave to revoke should as far as possible apply the same general principles that it applies in exercising its discretion to refuse a stay of litigation.

20. A provision comparable to section 24(1) of the English Arbitration Act 1950*, should be enacted in British Columbia.*

C. Arbitration Award as a Condition Precedent to Action

An arbitration agreement which purports to oust the jurisdiction of the court is illegal and void as being contrary to public policy. It is well established, however, that an agreement which provides that no right of action shall accrue in respect of any differences which may arise between the parties until those differences have been adjudicated upon by an arbitrator does not oust the jurisdiction of the court. Thus a stipulation in a submission that the obtaining of an award shall be a condition precedent to a cause of action in respect of any of the matters to be referred, is valid. Such a stipulation is commonly known as a *Scott* v. *Avery* clause and, generally speaking, the existence of such a clause is a ground on which the court will stay litigation brought in respect of a matter agreed to be referred. Furthermore, such a clause constitutes a defence to any proceedings brought before publication of the award. A stipulation making arbitration a condition precedent to the right to sue may, however, be waived by conduct.

The nature of *Scott* v. *Avery* clauses was considered recently and their validity reaffirmed by the Supreme Court of Canada in *Deuterium* v. *Burns and Roe*. In that case the trial judge had refused to grant a stay of proceedings, notwithstanding the existence of a *Scott* v. *Avery* clause, because complicated issues might arise before the arbitrators and this was "sufficient reason" for refusing to order a stay of proceedings under section 5 of the Nova Scotia *Arbitration Act*. That section is in substantially the same form as section 6 of the British Columbia *Arbitration Act*. The decision of the trial judge was reversed by the Nova Scotia Court of Appeal and further appeal was taken to the Supreme Court of Canada. In both the Nova Scotia Court of Appeal and the Supreme Court of Canada it was held that the existence of a *Scott* v. *Avery* clause prevented a court from exercising its usual discretion to refuse to grant a stay, because the clause was a condition of the contract to which the court must give effect. As Mr.Justice Ritchie said:In the face of arbitration statutes which, like that in Nova Scotia and others elsewhere in Canada, are designed to place private arbitration on a regulated footing, I am not prepared at this date to revert to a common law policy of jealous reaction to the attempted supersession of the original jurisdiction of the ordinary Courts.

> The fact that complicated issues might arise before the arbitrators was, as Mr. Justice Gillis has indicated, a circumstance which might have constituted a sufficient cause for denying a stay of proceedings if there had not been a *Scott* and *Avery* clause in the original agreement, but I am satisfied that Article VIII is, as Lord Wright said in *Heyman* v. *Darwins Limited, supra*: "A condition of the contract to which the Court must give effect."

He did go on to say, however, that:

> There may be cases where it would be palpably futile and ineffective to submit the matter to arbitration and in such event it might be desirable to refuse a stay of proceedings under s. 5 notwithstanding the existence of a *Scott* and *Avery* clause, but in my opinion this is not such a case and indeed I am satisfied that where, as here, a contract has been concluded between two substantial corporations, acting at arm's length and no doubt with advice, it would constitute an encroachment on freedom of contract if it were held that the courts were at liberty to interfere with a condition precedent freely accepted by both parties for the purpose of limiting the conditions under which an action could be brought under the contract.

We assume that Mr. Justice Ritchie was alluding to those cases which have held that where arbitration proceedings have proved abortive it is the duty of the court, notwithstanding the existence of a *Scott* v. *Avery* clause, to come to the assistance of the parties by removing any impasse.

In *Deuterium* v. *Burns and Roe*, the Supreme Court of Canada noted that under the English *Arbitration Act*, *1950* the court now has a discretion, in certain instances, to override a *Scott* v. *Avery* clause. Section 25(4) provides that where a court orders that an arbitration agreement shall cease to have effect in

relation to a dispute, it may also order that any *Scott* v. *Avery* clause in force between the parties (whether contained in an arbitration agreement or otherwise) shall likewise cease to have effect. As *Russell* points out this section in effect gives the court a discretion, in suitable cases, to treat the *Scott* v. *Avery* clause as a mere arbitration clause.

In England, the court has such statutory powers in three cases: where the authority of an arbitrator or umpire is revoked by leave of the court; where the whole arbitral tribunal is removed by the court i.e., for misconduct or delay; and where the dispute involves charges of fraud.

In Australia it has been recommended in several jurisdictions that *Scott* v. *Avery* clauses be made void, or that they be read only as an agreement to arbitrate, that is, an agreement to submit disputes to arbitration. In some of these jurisdictions this recommendation is now embodied in legislation. The Law Reform Commission of New South Wales, in recommending that such clauses be made void, described what it termed the "evils of the clause" as follows:

> 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 but unmeritorious defence may, by insisting on arbitration, avoid the damaging publicity which would attend such tactics if they were employed in court'. However inartificial or onesided 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, with the risk of inconsistent decisions, both adverse to A.

We agree that undesirable consequences may flow from giving *Scott* v. *Avery* clauses full effect according to their terms. We are, however, uneasy about the effect of making such clauses totally void. The *Scott* v. *Avery* clause may be the only provision in an agreement that contains any reference to arbitration and, if made void, the result could be that it contains no provision for adjudication by arbitration. Such a result would be totally inconsistent with the expectation of the parties.

On balance, therefore, we prefer the approach adopted in certain other Australian jurisdictions, simply to treat a *Scott* v. *Avery* clause as a submission to arbitration. This would retain arbitration as the primary means of resolving disputes under the contract but still permit a party to revoke or to commence litigation which would not be stayed if that course were open under the general law of arbitration.

The Commission recommends that:

21. A clause in a contract that makes adjudication by arbitration a condition precedent to a cause of action or a defence (a Scott *v.* Avery *clause) should not be given effect according to its terms but should be construed as if it were an agreement to submit differences under the contract to arbitration.*

D. Time Limits

A stipulation in a submission that, if a claim for arbitration is not put forward within a limited time, the claim shall be deemed to be waived is neither illegal nor void. Such a stipulation is commonly referred to as an "Atlantic Shipping clause." Such a clause can, however, result in hardship where the time limit is so short that a claim may be barred before the claimant knows that he has a claim. This risk was recognized in England where it is now provided that the court has power to extend the time fixed, even though it has expired, if "undue hardship" is caused and the justice of the cases requires it. It has been held by the English Court of Appeal that "undue hardship" merely means "greater hardship than the circumstances warrant," or "hardship greater than that which, in justice [the claimant] should be called upon to bear." It would appear, however, that the mere fact that a claim is barred cannot be held to be

"undue hardship." In all the recent Australian Law Reform Reports it has been recommended that the English provision should be adopted.

We also believe that a similar provision should be enacted in British Columbia for, even though Atlantic Shipping clauses do not appear to be matters of high concern in this Province, the possibility of hardship exists, and a mechanism for ameliorating this possibility is therefore desirable.

The Commission recommends:

22. *Where the terms of an agreement to refer future disputes to arbitration provide that any claims to which the agreement applies shall be barred unless notice to appoint an arbitrator is given or an arbitrator is appointed or some other step to commence arbitration proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the court, if it is of the opinion that in the circumstances of the case undue hardship would otherwise be caused and, notwithstanding that the time so fixed has expired, should be able, on such terms, if any, as the justice of the case may require, to extend the time for such period as it thinks proper.*

CHAPTER VIII FORM AND ENFORCEMENT OF THE AWARD

A. Effect of Awards

Where a submission is in writing, and unless a contrary intention appears, the *Arbitration Act* provides that it is deemed to include a term that the award is final and binding on the parties and the persons claiming through them. A similar provision was contained in the British Columbia *Arbitration Act of 1893* and is again based upon a comparable provision in the English *Arbitration Act*, *1889*, and merely reflects the position at common law where, even if the parties did not expressly agree to be bound by the award, it was implied that the award was final and binding upon them. Thus it appears that an award based on an oral submission was, and is, binding upon the parties.

The rule as to finality is not, of course, absolute. The court has the power, in certain circumstances, to set aside an award or remit it to the arbitrator for reconsideration. It does mean, however, that once a final award is made the arbitrator becomes *functus officio* and he may not reopen or recall it; he can only alter it (except to correct a clerical mistake or error) if it is remitted to him by the court. Likewise, the court has no power to alter or amend a final award, it can only set it aside or remit it to the arbitrator.

As between the parties to a submission, the award gives rise to an estoppel *inter partes* with regard to the matters decided, analogous to that created by a judgment in an action in *personam*. Thus, if the award was in respect of a breach of contract, it may bar further proceedings even though fresh damage has flowed from the breach.

The publication of the award therefore extinguishes any right of action in respect of the former matters of difference. It gives rise, however, to a new cause of action based on the implied agreement between the parties to perform the award.

While the provision implied by the Act only expresses that which would otherwise be implied in any event, it should be retained. The object of arbitration, to provide for a final adjudication of a dispute, should be supported by an appropriate statutory provision.

The Commission recommends that:

23. Every arbitration agreement should be deemed to include a provision that, subject to the provisions of the Arbitration Act*, the award is final and binding on the parties and those claiming under or through them, unless the parties agree otherwise.*

B. Time for Making the Award

Where the submission does not prescribe the time within which the award is to be made, sections 4(c), (d) and (e) of the *Arbitration Act* provide that, unless a contrary intention appears:

> (c) the arbitrators shall make their award in writing within 3 months after entering on the reference, or after having been called on to act by notice in writing from a party to the submission or on or before any later day to which the arbitrators in writing extend 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 advised a party or the umpire in writing that they cannot agree, the umpire may promptly enter on the reference in place of the arbitrators;
>
> (e) the umpire shall make his award within one month after the original or extended time expired, or on or by any later day to which the umpire in writing extends the time for making his award;

The parties may also consent to the extension of the time for making the award. Early English authorities, and some early Canadian authorities, held that such consent amounts in law to a new submission and, consequently, it should be in writing if the provisions of the *Arbitration Act* are to be apply. In 1879 the
Supreme Court of Canada held, however, that where the parties had consented in writing to an extension of time, that consent did not operate as a new submission. The parties may also be estopped from objecting to an award on the ground that it was made out of time, even though they had not consented to the time for making the award being extended.

In every case, the court can extend the time for making an award, whether the time has expired or not, and even after an award has been made. Thus an award which was at the time that it was made bad on the ground that the authority of the arbitrator had expired can be made valid and enforceable.

Where an award is remitted by the court to the arbitrator or umpire for reconsideration, the award is to be made within three months from the date of the order, unless the order otherwise directs.

In England the relevant provisions were changed substantially in 1934, and are now contained in section 13 of the *Arbitration Act*, *1950*. Unless the arbitration agreement expresses a contrary intention, an award may be made at any time. However, an arbitrator may be removed by the court if he "fails to use all reasonable dispatch in entering on and proceeding with the reference and making an award." The provision permitting the court to extend the time fixed for making the award has been retained, as has the provision whereby on remission of an award, the arbitrator, unless the court orders otherwise, must make his award within three months.

The English provisions were enacted in accordance with recommendations made by the Mackinnon Committee. As the Law Reform Commission of New South Wales points out:

> 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.

That Commission agreed with the Mackinnon Committee and recommended that new legislation should not fix any time for making an award but that, except in cases of contracts of adhesion, the parties should be free to agree upon a time for the making of the award. They also recommended that the court

should have power to extend time, but not where the parties have agreed otherwise in a contract that is not a contract of adhesion. It was also recommended that delay should not be a stipulated ground for removal of an arbitrator.

In four other Australian states recommendations have been made that the English provisions be adopted. In the Australian Capital Territory it has been recommended that the New South Wales provisions be adopted, save that contracting out would be allowed only after the difference has arisen.

Like the Mackinnon Committee, we can see no practical value in a statutory provision whereby a time for making an award is fixed but the arbitrator could enlarge it, and as we have proposed elsewhere that the court should have the power to remove an arbitrator who is guilty of delay, we believe that there is no need to fix specifically the time within which an award should be made.

We believe that it should be open to the parties to fix the time within which an award should be made, but that the court or the arbitrator should have the power to extend that time whether or not the parties have agreed otherwise.

The Commission recommends that:

24. There should be no specific time in which an award must be made unless the parties have agreed otherwise.

25. Where the parties have agreed as to the time in which an award must be made the arbitrator or the court should have the power to extend such time notwithstanding any agreement to the contrary and whether or not the time has expired.

26. The right of an arbitrator to extend the time for making an award should not affect the power of the court to remove an arbitrator for delay under recommendation 5.

C. Writing and Signature

The *Arbitration Act* provides that unless a contrary intention appears in the submission arbitrators shall make their award in writing, but does not provide expressly that the award of an umpire must be in writing. *Russell* states that although an award is required to be in writing, it need not be signed. In an early British Columbia case, however, Irving, J.A. said, in the Court of Appeal, "signature by the arbitrators without doubt, is necessary, otherwise it [the award] would not be in writing." In a recent Alberta case Prowse J.A., speaking for the Alberta Court of Appeal, disagreed with that statement and held that where an award is required to be in writing it need not be signed.

In England the statutory requirement that an award must be made in writing was repealed in 1934. Thus, unless the submission otherwise requires, a parol award made on a written submission is valid.

The Law Reform Commission of New South Wales has recommended that, unless the parties agree otherwise, an award need not be in writing or signed as a condition of its validity. They state that England seems to have managed well enough for over forty years without the requirement. As they also recommend that there should not be any statutory requirement that reasons be given for an award, they see no need for an award to be in writing. They go on to point out:

> 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.

Although the Law Reform Commission of New South Wales has recommended that there be no statutory requirement that an award be in writing, they recognize that 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. Therefore they recommend that where an award is not in writing, an arbitrator should be required on request by a party to give a statement of terms of the award, but not so as to affect the validity of the award.

We agree with the views expressed by the Law Reform Commission of New South Wales, although we concede, as they do, that in practice an award usually ought to be, and is, in writing and signed.

The Commission recommends that:

27. Unless the parties agree otherwise, an award should not be required to be in writing or signed by the arbitrator.

28. If an award is not in writing the arbitrator should, if requested by a party, give a statement of the terms of the award, in writing and signed by him, within 15 days of the request.

D. Interim Awards

The English *Arbitration Act 1950* contains the following provision:

> 14. 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 may, if he thinks fit, make an m award, and any reference in this Part of this Act to an award includes a reference to an interim award.

As Diplock L.J. pointed out in *Fidelitas Shipping Co.* v. *V/O Exportchleb*:

> The power of the arbitrator to make an interim award was first conferred by the *Arbitration Act*, *1934*. Before that date the only kind of award that he could make was a final award which determined all the issues raised between the parties (original emphasis).

Russell states that it is usual for interim awards merely to determine certain of the issues arising upon a claim, such as liability while leaving quantum until later. The New South Wales Commission noted in their Report on Commercial Arbitration that there are at least three kinds of interim award:

> One kind is a direction analogous to an interlocutor injunction or other order in litigation, relating to the enjoyment or management, pending final award, of the subject matter of the difference. 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. 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 or a step towards the determination of some head of difference.

They concluded that a power to make interim awards would be useful and, accordingly, recommended that such a power be given to arbitrators unless otherwise agreed by the parties. They noted, however, that in Victoria, it had been recommended that arbitrators should not have the power to make interim awards. The Victorian view was that convenient though such a procedure may sometimes be, piecemeal determinations were rarely satisfactory, and if the parties wanted an arbitrator to have this power it was better to do so by agreement.

It is apparent that in these jurisdictions, namely England, New South Wales and Victoria, it is assumed that arbitrators cannot make an interim award in the absence of specific authority or the agreement of the parties. Whether however, this is the law in British Columbia is debatable. In a recent decision of the Court of Appeal, *Re Jung James Gim and Sam Kam Yee*, the Court set aside a Supreme Court order quashing an arbitration award because no award had been made on the main issues referred. The Court of Appeal declared the award to be appropriate as an interim award. Thus, the arbitrator was still seized of the unresolved issues. Carrothers J.A., speaking for the court, said:

> To my mind it was inherent in the arbitration proceedings and implicit in the wording of the impugned award that the arbitration was a twostep procedure. There were two basic issues to be resolved: the dissolution issue had to be resolved first to establish the basis for resolution of the accounting issue. In the impugned award the arbitrator made his determination of the dissolution issue and said that the appellant was 'entitled to' resolution of the accounting issue, but the material to that point submitted on the accounting issue was not satisfactory and the arbitrator indicated what would be satisfactory. *It was agreed by counsel that at law the arbitrator could make an interim award* on the dissolution issue and then have the parties adduce further evidence and make further argument leading to a final award on all issues. But the arbitrator did not expressly say this was his intent. Perhaps he hoped the parties could resolve the accounting issue amongst themselves, once the dissolution issue was resolved for them.
>
> However, the judge hearing the motion to quash and set aside the award viewed it as a final award. He held that the dissolution issue and the accounting issue were not severable, that the accounting issue was central to the arbitration, and that, in failing to deal with the accounting issue, 'the arbitrator totally failed to exercise his jurisdiction' and the award was bad in toto. He said that the arbitrator could have made an interim award, with proper direction for completion of the proceedings, but the arbitrator instead 'purported to make a final award' and is functus.
>
> In consequence, the issue on this appeal is whether the impugned award is interim or final. *The right to make an interim award is not questioned.*
>
> I am inclined to the view that the wording of the award itself is consistent only with it being an interim award. In deferring the accounting issue there is no refusal or neglect to deal finally with the accounting issue, but rather a clear indication of an ongoing phase of the arbitration proceedings and what will be required in that regard. When the accounting issue is determined on the basis of the ruling on the dissolution issue that final award will confirm and make final the award on the dissolution issue. (Emphasis added)

The concluding paragraph of the judgment of Carrothers J.A. reads as follows:

I would allow the appeal, set aside the order below and restore the award of the arbitrator, who is still seized of the reference to him of the unresolved accounting issue, should the parties need his assistance.

This decision could therefore be taken as authority for the proposition that, in British Columbia, arbitrators have the power to make an interim award. This notwithstanding, we believe it desirable that, for the sake of certainty, arbitrators should be given the power by statute to make interim awards.

The Commission recommends that:

29. Unless the parties agree otherwise, every arbitration agreement should be deemed to contain a provision that the arbitrator may make an interim award.

E. Specific Performance

The English *Arbitration Act 1950* provides:

> Specific Performance
>
> 15. 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.

The Law Reform Commission of New South Wales noted that this provision was enacted as a consequence 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 s. 52 of the *Sale of Goods Act, 1893*, against payment of their price," and that there was no reason why they should not also be given power to order specific performance of a contract by the delivery of any property other than land or money in any case in which the
court might do so. In their working paper the Law Reform Commission of New South Wales had proposed that the English provision should not be adopted in New South Wales. As is pointed out in the Report:

> 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 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.

In the Report they stated that most commentators on the Working Paper thought the English provision should be adopted. It was also noted that:

> In South Australia and Queensland the reports recommend adoption of the English provision. In Western Australia the report recommends adoption of a like provision, but contracts relating to land are not excluded. In Victoria the Chief Justice's Law Reform Committee formed a view similar to that put in our working paper, and for similar reasons. The Australian Capital Territory Report (1974) does not deal with the matter.

It was the Commission's conclusion that:

> 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.

They therefore recommended that the English provision should not be adopted.

While we share some of the concerns expressed by the Law Reform Commission of New South Wales, we believe that a limited power in arbitrators to order specific performance might in particular instances prove useful. The instances we have in mind are those relating to contracts for the sale of goods, particularly perishable goods. We would therefore recommend that arbitration be given the power by statute to order specific performance of contracts concerning the sale of goods.

The Commission recommends that:

30. Unless the parties agree otherwise, every arbitration agreement should be deemed to include a provision that the arbitrator has the same power as the court to order specific performance of any contract for the sale of goods.

F. Correction of the Award

1. Correction by the Arbitrators

An arbitrator or umpire who has made his award is *functus officio*, and at common law could not alter it in any way whatsoever. Thus, he could not correct an obvious clerical mistake, or a misapprehen-

sion of the effect of the evidence or a mistake as to the extent of his jurisdiction. Under the *Arbitration Act*, however, unless a contrary intention appears in the submission, the arbitrator or umpire has the power to correct any clerical mistake or error in an award arising from any accidental slip or omission. The only other time that he may alter his award is if it is remitted to him by the court.

The position is the same in England except that an arbitrator, on application to him within fourteen days after publication of the award, may amend the award so as to repair an omission to deal with costs.

2. Correction by the Court

The court has no power to alter or amend an award; it can only set it aside or remit it to the arbitrator. The Law Reform Commission of New South Wales suggested that there appears to be no ground in principle why an award, like other private instruments, should not be rectified by a court of equity. They
were unable, however, to find any reported instance of rectification of an award in England, Canada or Australia. As is pointed out in the New South Wales Report, in a sense the court does exercise a limited power to rectify an award where it sets aside part of an award, or allows enforcement of part only of an award. This separate treatment of part of an award is only done when the parts are severable.

3. Reform

In the United States, several arbitration statutes, notably the *Uniform Arbitration Act*, provide statutory grounds for modification or correction of an award. Arbitrators have the power to modify or correct an award where there is an evident miscalculation of figures or mistake in the description of any person, thing or property referred to in the award.

Such powers of correction are wider than those enjoyed by arbitrators in British Columbia. Wide powers of correction would in our view be very useful, and could make unnecessary many applications to the court for the remission or setting aside of awards. It is our view, however, that the power given to an arbitrator to correct an award in the United States is perhaps still too restrictive. We believe that an arbitrator should have the power, properly limited in time, to amend or vary an award in such manner as seems just and reasonable. In Manitoba, The *Arbitration Act* permits arbitrators to reopen and amend an award in such circumstances, provided a party to the submission makes an application requesting such an amendment within 15 days of being notified of the making of the award. It does not appear that this power has been abused or has led to any great difficulties. We believe the Manitoba approach should be adopted in British Columbia, and that it should not be open to the parties to contract out of this provision. We should emphasize that the arbitrator's power to correct should be permissive so that he would continue to be able to decline to consider any application for correction of an award.

The Commission recommends that:

31. Notwithstanding any agreement to the contrary,

(a) Any party to a reference should be permitted, within 15 days of being notified that an award has been made and of its terms, to apply in writing to the arbitrator or umpire to reopen the award, and to amend or vary it in respect of anything that was raised on the reference.
(b) On receipt of an application made pursuant to recommendation (a), the arbitrator or umpire should notify the parties

(i) whether or not the arbitrator or umpire is willing to consider the application, and

(ii) if the arbitrator or umpire is willing to consider the application the place where, and a time and date when, the matters raised in the application shall be heard, and the date so fixed should be no more than 30 days after the receipt of the application.

(c) After hearing the application the arbitrator or umpire should be permitted to reopen the award and amend or vary it in such manner as is just and reasonable, and the award so amended or varied should be deemed to be the award of the arbitrator or umpire in the matter.

G. Interest on the Award

An arbitrator may award interest, by virtue of his implied authority to follow the ordinary rules of law. A statutory arbitrator, however, can only award such interest if the statute concerned so provides and, if an arbitrator exceeds his power by awarding interest where there is no jurisdiction to do so, the award will be set aside.

The court might also allow interest in an action on the award. The court has no power, however, to award interest when giving leave to enforce an award in the manner of a judgment. This was reaffirmed in *Re Vancouver and BrandramHenderson Ltd*. where it was argued that since section 15 of the *Arbitration Act* allows an award to be enforced in the same manner as a judgment and since section 3 of the Act provides that a submission has the same effect as if it had been made an order of the court, an award must therefore carry interest under the *Canada Interest Act*. In reply to this argument Collins J. said:

> Counsel for the applicant argued that sec. 15 of the *Arbitration Act* of this province coupled with sec. 15 of the *Interest Act*, RSC, 1952, ch. 156, by their combined effect bestowed upon an award the quality of carrying interest either from the time of delivery or from the time of demand for payment of the amount of the award. It should be here noted that the balance of the principal amount of the award was paid by the City of Vancouver to the applicant in June of 1960 and was accepted by the applicant without prejudice to any right that it might have to claim interest. Sec.15 of the *Interest Act* reads as follows:
>
> > 15. Any sum of money or any costs, charges or expenses made payable by or under any judgment, decree, rule or order of any court whatsoever in any civil proceeding shall for the purposes of this Act be deemed to be a judgment debt.'
>
> In my view sec. 15 of our *Arbitration Act* does not extend beyond affording a procedure for the enforcement of an award. It does not clothe the award with the interestbearing qualities of a judgment conferred by sec. 15 of the *Interest Act*. The word in the *Interest Act* which has given me concern is the word 'rule.' However, it is my view that sec. 3 of our *Arbitration Act* makes only the submission of the dispute to arbitration a rule of court and thus gives the court jurisdiction over the proceedings and to some extent over the award. Sec. 3 applies and takes effect prior to the making of the award. In my view sec. 3 does not make the award itself a rule of court and therefore the word 'rule' contained in sec. 15 of the *Interest Act* does not apply to the award. As it does not apply to the award that section does not confer upon the award the quality of bearing interest.

The situation is different in England where, by virtue of section 20 of the *Arbitration Act*, *1950*, any sum that is directed to be paid by the award carries interest at the same rate as a judgment debt from the date of the award, unless the award otherwise directs. This section only gives an arbitrator a discretion to decide whether the award will carry interest. It does not give him, for example, a discretion to direct that his award should carry interest at whatever rate he chooses to fix.

In New South Wales it has been recommended that an arbitrator should have the power to direct that money payable under his award shall or shall not carry interest from the date of the award or a later date and at any rate as he may direct. Subject to this recommendation it is also recommended that money payable under an award should carry interest as does money payable under a judgment. It is suggested, however, that the parties should be able to agree otherwise.

We have concluded that an arbitrator should not have a discretion as to whether to award interest, and that all awards should automatically carry interest in the same manner as a judgment debt, which would include both post and prejudgment interest. Such a proposal is in accord with our later proposal that an arbitration award should be able to be entered as a judgment.

The Commission recommends that:

32. The Arbitration Act *should provide that a sum directed to be paid by an award should carry both prejudgment and postjudgment interest.*

H. Enforcement of an Award

1. Domestic Awards

There are two principal methods available to a person who wishes to enforce an award. He may bring an action on the award, or he may seek the leave of the court, under the *Arbitration Act*, to enforce the award in the same manner as a judgment. In addition, it is probable that a third method is available, namely, making an application for committal of the party in default.

(a) Enforcement by Action

Every submission contains a mutual promise, either express or implied, to perform the award and, consequently, nonperformance of an award is a breach of the arbitration agreement in respect of which an action may be brought. Where the submission is oral, an action is the only available method of enforcing the award. It has also been held that this is the method that ought to be pursued, rather than the summary method under the *Arbitration Act*, where objections are raised that cast doubt on the validity of the award.

(b) Enforcement in the Same Manner as a Judgment

This is the most common and important method of enforcing an award. Section 15 of the *Arbitration Act* provides:

An award or submission may, by leave of the court, be enforced in the same manner as a judgment or order to the same effect.

The section does not apply where the submission is not in writing, although it might be open to someone to argue otherwise in view of what appears to be a typographical error in the wording of the section. The section provides "An award or submission ..." whereas the *English Act* which it follows provides "An award on a submission...." A submission is defined as a "written agreement to submit to ... arbitration" consequently, under the English wording the award must be pursuant to a written agreement. The British Columbia section could be read, however, as encompassing any award, whether made on a written or parol submission. To our knowledge this has never been argued in a British Columbia court and, furthermore, the courts in British Columbia appear to read the section as if it is the same as the English section. In one case,
for example, the section is cited and the word "sic" is placed in parenthesis after "or" In another case the court stated the English section is "identical with ours." We have little doubt that a court would be prepared to substitute "on a" for "or" if ever faced with this problem.

It should be noted that section 15 empowers a party to get leave only to enforce an award in the same manner as a judgment; it does not clothe an award with the same qualities as a judgment. Thus, a court when giving leave under this section cannot order that the award bear interest and, furthermore, the award cannot be enforced as a judgment but only in the same manner as a judgment. While, to some, this difference in wording might appear to be mere semantic quibbling that does not affect the final outcome

of the enforcement proceedings, it has led to certain difficulties. In *Re Riverside Hills Estates Ltd.*, for example, Wootton J. upheld the refusal of the Registrar of the Vancouver Land Registry to register an award because of the form of certificate of the District Registrar of the Court presented in support of the application. That certificate read in part that the applicant had "obtained leave to enforce an arbitration award," when in fact he had obtained leave to enforce the award "in the same manner as a judgment." The Registrar had refused to register as the award was not a judgment, and Wootton J. held that he was correct and said:

> In my opinion this is not a mere play upon words, but is a matter of substance. Had the correct words been used it is difficult to see how the learned registrar could refuse to register as the application would have then come within the spirit and intention of said sec. 15 of the *Arbitration Act* and the order of this court made thereunder.

The unfortunate applicant was therefore forced to go back to the court for the "proper" material.

We have already pointed out that a court will not always grant leave to enforce the award summarily, since a party in such a case can pursue his remedy by action. In answer to an application for leave to enforce an award, the respondent may argue that the award is a nullity, or is wholly or partly ultra vires, or is bad on its face. If, however, the respondent's objection to the award is that the arbitrator misconducted himself, or that the award was improperly procured, his proper course is to move to set the award aside and, if necessary, to get the application to enforce the award adjourned in the meantime.

Finally, it should be noted that because of their nature, some awards will not be enforced as a judgment under section 15, leaving the successful party to bring an action on the award. For example, an award that assesses compensation but which does not determine liability cannot be enforced summarily under the section.

(c) Committal for Nonperformance

As a submission in writing, unless a contrary intention appears, has the same effect as if it had been made an order of court; a refusal to comply with an award made on such a submission is a contempt of court, and in certain cases may be punished by committal. This means of enforcement, however, does not appear to have ever been used in British Columbia, and seems to have fallen into disuse in other jurisdictions. It appears that this remedy is no longer used because seeking leave to enforce an award as if it were a judgment is more direct and simpler; if the application succeeds then the order is enforceable by committal.

In England, as we have pointed out earlier, arbitration agreements are no longer deemed rules of court, and enforcement by committal is therefore no longer available. In recommendation 3 we recommend that a submission should no longer have effect as if made an order or rule of the court. On implementation of this recommendation the possibility of enforcement by committal would no longer exist.

(d) Reform

We have concluded that the summary method of enforcing an award under section 15 of the *Arbitration Act* should be retained but modified slightly. In England and Manitoba, where leave has been given to enforce an award in the manner of a judgment, judgment may be entered in the terms of the award. In our view such a provision would be quite useful, and would prevent the occurrence of the difficulties highlighted in the *Riverside Hills Estates Ltd.* case.

While the Law Reform Commission of New South Wales did not recommend the adoption of a provision for entry of judgment on the award, it was suggested that the court be given power to make orders necessary or convenient for carrying the award into effect. It was their view that there was a rigidity in the present provision which "might sometimes be a nuisance." It was pointed out in their working paper that:

> The framing of an effective judgment or order calls for skill and it is likely that occasionally the precise terms of an award will not be adequate for the Court's processes of execution and other enforcement.

We agree, and would suggest that the courts in British Columbia be given a similar power.

We have also concluded that there should be no change in the law relating to the enforcement of awards by bringing an action on the award. This is a useful remedy when it is not possible to proceed summarily, and we are not aware that it has raised any difficulties.

The Commission recommends that:

33. *An award on an arbitration agreement should be enforceable by leave of the court in the same manner as a judgment or order to the same effect and, where leave is so given, judgment may be entered in the terms of the award.*

34. *The court, on an application for leave to enforce an award in the same manner as a judgment or order, should have the power to make such orders as are necessary for carrying the award into effect.*

35. *The right to bring an action on the award should be retained.*

2. Foreign Awards

The use of arbitration to settle disputes in international trade is on the increase and, in consequence,
situations can arise where someone may wish to enforce, in British Columbia, an award made under a system of law other than that of British Columbia. Such an award may be described as a "foreign award."

In the past not much use has been made in Canada of the various methods available for the of enforcement of foreign awards. One writer does not find this surprising as he believes that most businessmen comply with adverse awards. The same writer also points out that as against the occasional defaulter private sanctions are usually more effective than formal proceedings for enforcement.

There are several methods of enforcing foreign arbitration awards, all of which require the assistance of the court.

(a) Action on the Award at Common Law

Most writers agree that at common law a foreign award is enforceable by action in the same way as an award made in British Columbia. There are, however, few reported cases that deal with this mode of enforcement, and those that do suggest that it is of limited utility.

We are aware of only one reported Canadian case concerning the enforcement of a foreign award at common law, namely *Stolp & Co. v. Browne & Co*. In that case, the Ontario Supreme Court held that if an award has been made enforceable by a foreign judgment, it may be enforced in Ontario as a judgment. The Court relied on Piggot's view that an award of an arbitrator abroad does not come within the definition of a foreign judgment until it is made an order of court. It is then merged in that order which is in effect the judgment of the court in that matter. This reasoning also formed the basis of the decision in the English case of *Merrifield Ziegler & Co.* v. *Liverpool Cotton Association,* where the court refused to enforce a foreign award as an enforcement order was required to render it enforceable by the local law.

Many writers argue, however, that this view is untenable today. As Professor Castel has pointed out, the editors of Dicey state that a foreign award will be enforced whether or not the law governing the

arbitration proceedings requires a judgment or order of a court to make the award enforceable. The reason
given for this view is that the enforcement of foreign awards is a matter of procedure governed by the *lex fori*, and the same local procedure should therefore apply to all awards whether they are local or foreign.

In England, it has been held that where an award is complete and could be enforced in the country where it was made, and is therefore enforceable at common law, the plaintiff must prove in the action to enforce the award:

1. that there was an arbitration agreement;
2. that the arbitration was conducted in accordance with that agreement; and
3. that the award was made pursuant to the provisions of the agreement and is valid according to the *lex fori* of the place where the arbitration was carried out and where the award was made.

As is pointed out in *Russell*, however, since there is a presumption of fact, in English proceedings, that any foreign law concerned is the same as English law, it is sufficient in the first instance for a plaintiff in such an action to proceed as if the award were an English award.

(b) Under the Arbitration Act

As we have pointed out elsewhere, section 15 of the *Arbitration Act* provides that an award may, by leave of the court, be enforced in the same manner as a judgment or order to the same effect. That section is in substantially the same terms as section 26 of the English *Arbitration Act*. In *Russell* it is suggested that there would seem to be no reason why an award upon an arbitration conducted abroad, or founded on a submission governed by a foreign law, should not be enforceable under section 26 of the *English Act* in the same manner as an award having no foreign element.

Although this point has not been settled in British Columbia, a recent English decision supports this view. In *Dalmia Cement Ltd.* v. *National Bank of Pakistan*, it was held that the discretionary jurisdiction under section 26 is applicable to all awards, whether English or foreign. It is interesting to note that the court pointed out that this was the same view taken by the editors of *Russell* and Dicey.

(c) Registration under the Court Order Enforcement Act

The *Court Order Enforcement Act* provides for the enforcement of judgments of the courts of reciprocating states.Alberta, Saskatchewan, Ontario, New Brunswick, Manitoba, North West Territories, Yukon, B. C. Reg. 442/53; Newfoundland, B.C. Reg. 170/60; Federal Republic of Germany, B. C. Reg. 196/64; Austria, B. C. Reg. 35/68; Victoria, B.C. Reg. 43/70; Queensland, B.C. Reg 201/71; Nova Scotia, B.C. Reg 136/73; Prince Edward Island, B.C. Reg. 92/75. "Judgment" is defined as a judgment or order where money is made payable, and as including an award in an arbitration proceeding, if the award under the law in force in the state where it was made, has become enforceable in the same manner as a judgment given by the court in that state. The Act provides that such judgments can be registered in the Supreme Court in the same manner as a judgment. Upon such registration the "judgment" is of the "same force and effect" as if it had been a judgment given originally by the registering court.

(d) International Conventions

Several international coventions deal with the validity and enforcement of foreign arbitration awards, although no Canadian jurisdiction has given effect to or acceded to any of these. Prior to joining Canada, however, Newfoundland did give effect to a Protocol on Arbitration Clauses which provides for the validity of arbitration agreements and to a convention on the Execution of Arbitration Awards. The conventions were signed by the United Kingdom in Geneva respectively on September 24, 1923 and on September 26, 1927, and they now form the basis of the enforcement provisions contained in Part II of the English *Arbitration Act*.

As Castel points out, the 1923 Protocol binds contracting states to recognize international arbitral agreements in commercial matters and to remove disputes covered by such agreements from the jurisdiction of the courts. The Convention of 1927 follows as a necessary corrollary. The contracting states undertake to provide the acilities for the enforcement of foreign awards as are provided for the enforcement of awards made within their own jurisdiction.

The principal reason for nonaccession by Canada is that the provinces have jurisdiction over arbitration. Since the decision of the Privy Council in the case of *A.G. Canada* v. *A.G. Ontario*, it is doubtful how far, if at all, the Dominion has power to pass legislation to implement an international agreement relating to a matter lying within the jurisdiction of the provinces.

In 1958, a convention on the Recognition and Enforcement of Foreign Arbitral Awards was signed in New York. It was intended to improve the existing system of international recognition and enforcement of foreign awards. More than forty states have now ratified or acceded to this Convention, including the United Kingdom. Canada has not.

(e) Reform

We do not believe that any change should be made in the law relating to the right at common law to bring an action on the award, whether it is a domestic or foreign award. We believe that the future development of the law relating to the enforcement of foreign awards should lie in harmonizing that law with the law as it is developing in the international community. The most appropriate method of achieving this would be to persuade the Federal Government, with the concurrence of the Provinces, to participate fully and ratify or accede to existing or future International Conventions on this subject. The 1958 New York Convention is gaining increasing acceptance throughout the world as providing a rational scheme for the enforcement of foreign arbitral awards, and we would therefore recommend that the Government of British Columbia request the Government of Canada to give serious consideration to accession to this Convention. We are of course aware that there are constitutional hurdles in this area, but we do not believe them to be insurmountable.

After publication of our Working Paper we made enquiries of the Federal Government as to whether serious consideration had been given to acceding to the Convention, and if so, why Canada had not acceded to the Convention. Replying to our enquiry, the Department of Justice stated:

> You are quite correct that Canada has not ratified this Convention. One of the reasons has been a lack of interest by Canadian business. Our files indicate that when the question of a conference on the preparation of a Convention on the Enforcement of Foreign Arbitral Awards was raised in 1954 and again in 1958, the Federal Government communicated with the Canadian Exporters Association, the Canadian Manufacturers Association and the Canadian Chamber of Commerce. These three organizations would have the most direct interest in the matter. After consulting their members, they indicated that they were not interested in the adoption by Canada of such a convention. Since that time there has not been any significant interest on the part of the business and commercial communities which would indicate a need for Canadian accession to the Convention.
>
> Another reason why Canada has not ratified the New York Convention is the matter of jurisdiction. While I am not aware that this Department has ever taken a formal position, we have been concerned that the subject matter of the Convention may be primarily one falling within provincial jurisdiction. In that case, in order for this Convention to be implemented effectively in Canada, without restricting its application to matters within the legislative jurisdiction of Parliament, it would probably be necessary not only to have federal legislation, but also to have all the provinces and the territories adopt uniform implementing legislation and rules of practice and procedure. I am not aware that any provincial government has ever urged accession by Canada to the New York Convention or evidenced any interest in the Convention.

In a recent article Professor Castel has also called for the Canadian government to give serious consideration to accession to the 1958 Convention. He noted that now, unlike in the past, there is general support for Canada's adherence from the business community, and the Arbitrator's Institute of Canada.

The Commission recommends that:

36. The Government of British Columbia should request the Government of Canada to accede to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and upon accession by Canada to that Convention, the Government of British Columbia should enact legislation to give effect to the Convention.

CHAPTER IX JUDICIAL SUPERVISION OF AWARDS

As we have pointed out earlier, the rule as to finality of awards is not absolute. Various mechanisms exist by which the courts are permitted to exercise control over awards made by arbitrators. These range from the giving of an opinion on a point of law on statement of a special case to setting aside the award or remitting it to the arbitrator for reconsideration.

A. Special Case for the Opinion of the Court

While an arbitrator must decide on all matters referred to him, both of law and of fact, the *Arbitration Act* does aid arbitrators who find themselves confronted by a difficult point of law by providing two methods by which arbitrators can state a case for the opinion of the Court. These procedures are believed to be unparalled in most, if not all, other systems of law outside certain parts of the Commonwealth. They are available neither in the United States of America nor under continental systems of law.

Section 21 of the *Arbitration Act* provides a method whereby a special case can be stated at any time before the making of the award, as follows:

> An arbitrator may at any stage of the reference, and shall if directed by the court, state a special case for the opinion of the court on any question of law arising in the course of the reference.

Such cases are often referred to as "consultative" cases. The provision applies notwithstanding an agreement to the contrary. In a case stated under this section the arbitrator retains the arbitration and when the court has ruled on the point of law on which it was consulted the arbitration is remitted to him for final decision. As the jurisdiction of the court in the matter is purely consultative, any opinion given by the court is not a judgment or order for the purposes of giving a right of appeal. Furthermore, the opinion of the court is not binding on the arbitrator or the parties, hence they are not precluded from taking exception to any ultimate award founded on that opinion.

The arbitrator may state a special case for the opinion of the court either at the request of a party to the reference or, it would seem, of his own motion without any such request. The case stated must, however, be based on a statement of fact, either admitted or judicially ascertained; a court will not advise the parties as to what their rights would be under a hypothetical case.

If the arbitrator is requested by a party to state a special case for the opinion of the court and he refuses to do so, application can be made to the court for an order directing him to state in the form of a special case the question or questions of law on which the opinion of the court is desired. The granting of such an application is in the discretion of the court, but the discretion ought not to be exercised unless the arbitrator has refused to state a case, and the question of law upon which the opinion of the court is desired is material to the issues between the parties, and is one which in all the circumstances of the case should be determined by the court.

An order directing an arbitrator to state a special case cannot be made after the award has been made. Thus, if an arbitrator refuses to state a special case he should be required to defer making his

award until application has been made to the court for an appropriate order. If the arbitrator, notwithstanding such a request, proceeds to make his award, he is, assuming the application for a special case ought to have been granted, guilty of "misconduct," and the court can set aside the award or, if it thinks fit, remit it to him with a direction to state a special case.

The court has no jurisdiction to deal with costs of the argument of a special case stated pending the reference. Such costs form part of the "costs of the reference and award" within the meaning of section 4(i) of the *Arbitration Act*, and are, where the provisions of that section apply, in the discretion of the arbitrator or umpire.

Under section 10(b) of the *Arbitration Act*, the arbitrators or umpire acting under a submission may, unless the submission expresses a contrary intention, "state an award, as to the whole or part thereof, in the form of a special case for the opinion of the court." In such a case the award states the question of law on which the court is requested to rule; it then sets out the alternative answers which can be given to that question and states the decision of the arbitrator in any contingency. Thus, the arbitrator will state that if the question
of law has to be answered this way, as in his view it should be answered, he awards the applicant $l,000 but, in the alternative, if, contrary to his view, the question of law has to be answered the other way, he dismisses the application. This form of the special case has the advantage that the court whose opinion is sought can give a final decision and need not remit the case to the arbitration tribunal.

It should be noted that in a recent decision of the English Court of Appeal it was held that on the hearing of a special case the court was not bound by the precise way in which the questions were formulated, but in the interests of justice could adopt a broad realistic approach to the legal problems arising from the findings of fact.

The exercise of this power is in the discretion of the arbitrator, and the court cannot order him to state the award in the form of a special case. An award in the form of a special case also differs from a consultative case in that the court can direct how the costs of the argument are to be borne, and the decision of the court may be appealed.

The English *Arbitration Act*, *1950* changed the law concerning the statement of special cases by arbitrators in a number of ways. That Act provided for a third situation in which a decision of the court may be obtained, that of an interim award which may be stated in the form of a special case. As to final awards in the form of a special case, the court was given the power to direct the making of such an award, and the power to contract out of this provision was excluded. There was also a right of appeal to the Court of Appeal from a decision of the High Court in a consultative case. These provisions were repealed by the English *Arbitration Act*, *1979*. That Act has abolished the case stated procedure, setting up instead a limited right of appeal on points of law. The Act also gives the court jurisdiction to determine preliminary points of law arising in the course of a reference to arbitration. These new provisions are discussed in greater detail later in this Report.

B. Review of Awards: Setting Aside by Court

1. General

At common law the courts have an inherent jurisdiction to set aside an award where there is an error of law appearing on the face or where the arbitrators have exceeded their jurisdiction by trying a question that was altogether outside the reference. In addition, the *Arbitration Act* provides:

> The Court may set the award aside where an arbitration or award has been improperly procured or an arbitrator or umpire has misconducted himself.

The exercise of the power to set aside an award is in the discretion of the court, and it should be noted that in exercising this discretion the courts are inclined to uphold, rather than to set aside, awards,

and are loathe to extend their power. Furthermore, as the question whether an award should be set aside is one for the discretion of the court, an appellate court will not interfere unless that discretion has been obviously misused.

As a result of a recent amendment to the *Arbitration Act*, unless the leave of the court is obtained, no application to set aside an award under the Act shall be made more than two months after the parties have been notified of the award.

2. Grounds for Setting Aside

The *Arbitration Act* provides two grounds upon which the court may exercise its discretion to set aside an award. First, where an award has been improperly procured, and second, where an arbitrator has misconducted himself. The courts have not always clearly differentiated between these two grounds. The liberal interpretation that has been given to the concept of "misconduct" is such that the improper procuration of an award will also involve misconduct that would also justify setting aside the award. We have found it convenient, however, to deal with each ground separately.

(a) Improperly Procuring an Award

The examples most often given as to what amounts to an arbitration or award being improperly procured include cases where the arbitrator is deceived, or where material evidence is fraudulently concealed. As Lord Hardwicke stated in *Metcalf* v. *Ives*:

> For though it is true, that arbitrators are judges of the parties' own making, and therefore there is no colour to set aside an award because they have mistaken the law or judged wrong upon a doubtful point, yet the fact is to be laid fully before them; and, if there has been any industry or art used by either of the parties to conceal, it is sufficient to make void the award.

Another instance of improperly procuring an arbitration or award occurs when one of the parties bribes or otherwise corrupts the arbitrator. In such circumstances, however, the court is more likely to take the view that there was such misconduct on the part of the arbitrator as to warrant the setting aside of the award. The ground upon which a party seeks to impugn an award will therefore often depend upon whether he wishes to challenge the conduct of the arbitrator or that of the other party to the arbitration.

(b) Misconduct

It is difficult to give an exhaustive definition of what amounts to misconduct on the part of an arbitrator or umpire. The expression covers a wide range of conduct including on the one hand acts involving moral turpitude such as bribery and corruption and on the other hand a mere mistake as in the scope of authority conferred by the submission. Thus, the term can cover cases where there is no suggestion of moral culpability. One writer has pointed out:

> Some authorities construe the term to cover such cases as where there is ambiguity or uncertainty in the award, or where an arbitrator makes a mistake as to the scope of the authority conferred upon him by the terms of the reference, or where an error of law appears on the face of the award.

The same writer has also pointed out, however, that in *Russell* all of these cases are not subsumed under the misconduct provision. In *Russell* "misconduct" is construed somewhat more restrictively, but it is said that:

> The court has further an inherent power to set aside an award which is bad on its face: either as involving an apparent error in fact or law, or as not complying with the requirements of finality and certainty. The inherent power to set aside also extends to an award which exceeds the arbitrator's jurisdiction, and possibly to cases where fresh evidence has become available.

While we do not intend to include in this Report an exhaustive survey of the extensive case law, we believe that some examination of the general principles that the courts have acted upon, and the sort of conduct that has been held to constitute misconduct, is called for. It is important to remember that the courts will not set aside an award merely because they would have reached a different conclusion or because they would have awarded a different amount.

Awards have been set aside where bias on the part of the arbitrator has been shown, for it is of the essence of arbitration that the parties should be satisfied that they came before an independent tribunal. As to this, Rand J. has said:

> From its inception arbitration has been held to be of the nature of judicial determination and to entail incidents appropriate to that fact. The arbitrators are to exercise their function not as the advocates of the parties nominating them, and a *fortiori* of one party when they are agreed upon by all, but with as free, independent and impartial minds as the circumstances permit. In particular they must be untrammelled by such influences as to a fair minded person would raise a reasonable doubt of that impersonal attitude which each party is entitled to ... [The] authorities illustrate the nature and degree of business and personal relationships which raise such doubt of impartiality as enables a party to an arbitration to challenge the tribunal set up. It is the probability or the reasoned suspicion of biased appraisal and judgment, unintended though it may be, that defeats the adjudication at its threshold. Each party, acting reasonably, is entitled to a sustained confidence in the independence of mind of those who are to sit in judgment on him and his affairs.

The court will not interfere, however, on account of mere suspicion of bias, only where an arbitrator had some pecuniary or proprietory interest in the proceedings or it is shown that a real likelihood of bias exists. In recent years, the courts have adopted an objective test for the determination of bias. Such a
test was adopted by Munroe J. in *Board of School Trustees, District 15 (Penticton)* v. *Proudfoot*, where he said that the test was whether:

> ... in the mind of a fair minded person there would be reasonable doubt of that impersonal attitude and impartiality to which each party is entitled.

An award will also be set aside on the ground of misconduct where the arbitrator has exceeded his jurisdiction. In this regard, it has been held that where there is no evidence to support an award the arbitrator has exceeded his jurisdiction. It has also been held that an award was made in excess of jurisdiction where it purported to dispose of the rights of persons who were not parties to the submission. Furthermore, it has been held that it is immaterial whether the arbitrator acted by mistake or design.

It is also misconduct on the part of the arbitrators to fail to dispose of all matters referred to them, as in such a case the award will lack finality. In one case, for example, an award was set aside where the arbitrators had intentionally and deliberately agreed not to disclose the matters they were asked to decide. Similarly an award may be set aside if it is uncertain, although in such a case, remission might be the more appropriate remedy.

An award has also been set aside for misconduct where an arbitrator made excessive charges as part of his award. Similarly the court has intervened where an award is either grossly exorbitant or inadequate. In such cases, however, the courts are very cautious as they will not exercise their discretion to merely correct an erroneous judgment.

Although arbitrators are not bound in the conduct of their proceedings to observe the rigid formalities that are associated with the judicial process, they have a duty to ensure that justice is done. It has therefore been held that extreme irregularity in the proceedings might lead to injustice and the resulting award should be set aside. For example, awards have been set aside where the arbitrator heard one of the parties and, without giving notice to the other, published his award on the same day, and also where the arbitrators took the evidence of a witness in the absence of the parties and their counsel. With regard to the factors to be taken into account by the court where procedural irregularities are alleged, Lord Halsbury L.C. said in *Andrews* v. *Mitchel*l:

> We must not insist upon a too minute observance of the regularity of forms among persons who naturally by their education or by their opportunities cannot be supposed to be very familiar with legal procedure, and may accordingly make slips in what is mere matter of form without any interference with the substance of their decisions. I should be anxious myself, as I have no doubt all your Lordships would, to give effect to their decisions; on the other hand, there are some principles of justice which it is impossible to disregard, and, giving every credit to the desire on the part of this arbitration court to do justice, I think it is manifest that they proceeded far too hastily in this case, and, apart from imputing to them any prejudice or any desire to do wrong, I think that the mode in which the whole thing arose and was disposed of was so slipshod and irregular that it might lead to injustice.

This statement has been cited and approved in British Columbia.

(c) Error of Law on the Face of the Award

We pointed out earlier that the power of the court to set aside an award under section 14(2) of the *Arbitration Act* has been construed as being sufficiently broad to encompass those cases where an arbitrator makes an error of law which appears on the face of the award. Indeed, in a recent case, the British Columbia Court of Appeal proceeded on the basis that section 14(2) gives the court jurisdiction to set aside an award for error of law on the face of the award. The jurisdiction to set aside an award on this ground has been described in several cases, however, as an inherent jurisdiction existing at common law quite independently of anything in the *Arbitration Act*.

A frequently cited definition of error of law on the face of the award is that of Lord Dunedin in the Privy Council case of *Champsey Bhara & Co.* v. *Jivraj Balloo Spinning and Weaving Co.*, where he said:

> An error of law on the face of the award means, in their Lordships' view, that you can find in the award or in a document actually incorporated thereto, as for instance a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous.

Thus, it has been held that where an arbitrator gave his reasons in a memorandum accompanying the award, error of law may be shown by reference to those reasons. Furthermore, where an arbitration award refers to certain documents or parts of them, such documents might be construed as being incorporated in the
award so as to enable the court to examine them. On the other hand, it has been held that the transcript of the proceedings, or the pleadings which are not referred to in the award, do not form part of the award and cannot be examined by the court for error of law.

An award will not be set aside if the error of law relates to a question of law that was specifically referred to arbitration. It is therefore sometimes necessary for the courts to distinguish between cases in which a question of law is specifically referred, and cases in which a question of law merely arises in the course of a reference. As Lord *Russell* of Killowen said in *F. R. Absalom Ltd.* v. *Great Western (London) Garden Village Society Ltd.*:

> My Lords, it is, I think, essential to keep the case where disputes are referred to an arbitrator in the decision of which a question of law becomes material distinct from the case in which a specific question of law has been referred to him for decision. I am not sure that the Court of Appeal has done so. The authorities make a clear distinction between these two cases, and, as they appear to me, they decide that in the former case the Court can interfere if and when any error of law appears on the face of the award, but that in the latter case no such interference is possible upon the ground that it so appears that the decision upon the question of law is an erroneous one.

It has therefore been held that where the question referred to the arbitrators is strictly and purely one of construction of an agreement, it is the submission of a specific question of law, and the decision of the arbitrator cannot be set aside for an error of law.

The distinction would seem to rest on the notion that the choice of an arbitrator will reflect the nature of the dispute. Thus where the issue is purely a question of law the arbitrator will be chosen for his

legal skills. Similarly, where the issue is primarily one of valuation, the arbitrator may be chosen for his familiarity with the commodity or mercantile practice in the area. It is arguable that where an arbitrator is selected for his legal
skills, his decision on a question of law should be less vulnerable to attack than that of an arbitrator chosen for other qualities but who is called upon to decide a collateral issue of law that may arise.

In England, the *Arbitration Act*, *1979*, has abolished the power of the court to set aside (or remit) any award on the ground of error of fact or law on its face, and introduced a new limited right of appeal on a point of law only. These provisions are discussed in greater detail later.

(d) Waiver of Objection

It is always open to the parties to waive any objection as to the misconduct of an arbitrator, but such waiver must be made with full knowledge of the circumstances.

C. Review of Awards: Remission for the Reconsideration of the Arbitrator

1. General

While at common law there is no inherent power in the courts to remit an award for the reconsideration of the arbitrators, such power is given to the courts by section 13 of the *Arbitration Act*, which provides:

> 13. (1) On an arbitration, the court may remit the matter referred or some of it for reconsideration by the arbitrators or umpire.
>
> (2) The arbitrators or umpire shall, unless the order otherwise directs, make their new award within three months of the order.

Unless the leave of the court is obtained, an application to remit an award cannot be made more than two months after the parties have been notified of the award.

Section 13 is in substantially the same form as section 8 of the *Common Law Procedure Act, 1854*, which was repealed in British Columbia in 18938 The only substantial difference between the two sections is that section 8 spoke of remission for the "reconsideration and redetermination" of the arbitrators but, as is
pointed out in *Russell*, the change does not appear to have affected the duties of an arbitrator to whom a matter is remitted, "for the matter remitted to him for reconsideration must be determined by him and therefore redetermined."

Since section 13 confers upon the court the broad power to remit "the matter referred, or some of it," it would appear that if only one of a series of matters referred is remitted, the remainder of the award will be valid, although its effect will be suspended.

2. Grounds for Remission

Section 13 confers upon a court a complete discretion with regard to remission, and the exercise of this discretion will not be interfered with by an appellate court in the absence of obvious abuse. Although this power is discretionary, it is well established that there are certain grounds upon which the court may properly exercise its power to remit matters for the reconsideration of an arbitrator. These grounds were categorized

by Chitty L.J. in *Montgomery, Jones & Co.* v. *Liebenthal & Co*. in terms which were accepted by the other members of the court, and which have been approved in Canadian courts. These grounds, which essentially complement those that will justify the setting aside of an award, are:

1. where there is an error on the face of the award;
2. where there has been misconduct on the part of the arbitrator;
3. where there has been an admitted mistake, and the arbitrator himself asks that the matter be remitted; and
4. where additional evidence has been discovered after the making of the award.

The courts have treated these grounds as guidelines only and have refused to treat them as exhaustive. Thus, while a court will hesitate before exercising its discretion to remit a case which does not fall within any one of the recognized categories, I do not think that I am limited by authority to the four grounds for remitting awards approved in *Montgomery Jones & Co.* v. *Liebenthal & Co.* although I should naturally hesitate before exercising my discretion to remit in a case which does not come within any one of the four categories there approved. the courts have also stated that they have an unfettered discretion to remit if they decide that it is warranted in the interests of justice.

(a) Error on the Face of the Award

We have examined earlier the circumstances in which a court will set aside an award for error of law on the face of the award. In such circumstances it is open equally to the court to remit the award rather than to set it aside and, indeed, if the error can easily be corrected the courts are more likely to remit than to set aside.

Thus an award was remitted on this ground in Re International *Woodworkers of America* v. *Passmore Lumber Co*. where evidence, which the chairman of a board of arbitrators had ruled to be admissible for a limited purpose only, was considered by the arbitrators in its wider and inadmissible aspects. It was held that the evidence had affected the entirety of the decision, thereby giving rise to an error of law apparent on the face of the award.

Remission on this ground has also been granted where an award is ambiguous or uncertain, or is inconsistent with the terms of the reference, or where it does not finally dispose of all matters referred.

(b) Misconduct

As we have pointed out earlier the term "misconduct" in the law relating to arbitration is used as a term of art with an extremely broad connotation. Misconduct is a ground on which an award may be set aside, and where there has been misconduct amounting to moral turpitude on the part of an arbitrator it would appear that the award will be set aside rather than remitted. On the other hand, as one writer has pointed out, where the misconduct complained of involves no personal connotation against the arbitrator and the court has no reason to believe that if the matter is remitted the arbitrator will not conscientiously discharge his duties, the court may decide to remit the award rather than set it aside.

(c) Admitted Mistake

This ground differs from the others in that the arbitrator himself must ask that the matter be remitted. Furthermore, if the award is made by more than one arbitrator, all must concur in admitting the mistake and requesting remission.

The kind of mistake which will warrant remission is where the arbitrator intending to award in one way by mistake awards in another i.e., the award does not express his true intentions. He may have decided, for example, to give one sum but by mistake awards another, or he may intend to make an award on all matters
referred to him but by mistake does not do so.

The court will not intervene, however, if the arbitrator has made a mistake as to the effect of the award. As is pointed out in *Russell*:

> ... the mistake which the court will consider for the purpose of remitting an award must be a mistake which has happened in expressing in the award the decision which the arbitrator had previously come to and desires to express in his award.

Brett L.J. suggested in one case that parties to arbitration proceedings must recognize that an arbitrator may make a mistake in attempting "to do rough justice," and that such mistakes have to be accepted as inevitable.

The courts have also refused to remit an award on this ground if the mistake relied upon is one which involves an impeachment by him of a matter upon which he has made an adjudication. Thus, in *Robins* v. *Andrews*, the court refused to remit an award which two of the three arbitrators alleged was made because they had been persuaded by one of the parties' solicitor that they were legally bound to find in his client's favour because of the greater volume of evidence that had been adduced on behalf of his client. In delivering the judgment of the court, Stuart J.A. said:

> It seems clear ... that it is impossible for the Court to interfere where, as in the present case, the arbitrators come forward and seek to impeach their own decision. Particularly ought this to be so, it seems to me, where they seek to impeach their own decision upon the main question of fact involved in the arbitration. The admission of their own weakness is, of course, rather surprising. They plead that they were overridden by the supposed influence or authority of a solicitor who was present on behalf of Andrews. There is contradictory evidence before us as to the understanding between the parties upon the question of the presence of solicitors. I do not think we can attempt to decide who is right upon this matter.

He added:

> If the two arbitrators did act so unjustly to Robins as they said they did it would probably relieve their consciences if between them they paid what they, against their conscience at the time, said he would have to pay.

(d) New Evidence

While the discovery of new evidence is well accepted as a ground for remission, the courts have laid down certain conditions that must be fulfilled before an award will be remitted on this ground. Thus, the evidence must be such that the tribunal of fact could properly give it some weight and it must be evidence which the party desiring to adduce it could not, by the exercise of reasonable diligence, have procured at the hearing.

In *Re Pacific Western Airlines Ltd. and Pacific Western Airlines Pilots' Association*, Sullivan J. suggested that two further conditions should also be met before the court would remit the award, citing part of the judgment of Denning L.J. in *Ladd* v. *Marshall*, a case concerned with the power of the English Court of Appeal to receive further evidence.

In *Ladd* v. *Marshall* Denning L.J. said:

> ... In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.

While it has been argued that this formulation, with respect to the character of new evidence warranting remission is more restrictive than that adopted by the courts in earlier cases, it does accord with the view that the courts should be at least as wary in opening up awards as they are with judgments.

(e) Evidence on Reconsideration by an Arbitrator

Where an award is remitted for the reconsideration of the arbitrator or umpire, his original powers are revived, and it is his duty to hear such further evidence as the parties may wish to present, unless the remission is merely for the purpose of correcting some formal defect or making some alteration in the award which would not involve the hearing of further evidence.

CHAPTER X JUDICIAL SUPERVISION OF AWARDS: REFORM

A. General

The role the courts should play in supervising awards is a difficult issue. It seems obvious that some judicial supervision and powers of review are necessary, if only to deal with circumstances involving culpable misconduct by the arbitrator such as taking a bribe or where an award was fraudulently procured. It would be repugnant if an innocent party were without recourse to the courts in such cases. Assuming this to be the minimal level of judicial supervision, the issue becomes how much further the powers of the courts to review awards should extend. Should they extend to misconduct that does not involve culpable behaviour by the arbitrator such as a procedural irregularity? In what circumstances should a special case be stated for the opinion of the court? How far should awards be amenable to review for errors of law?

While both the availability of the special case procedure and the review powers under the existing law are not totally clearcut, it seems evident that they are relatively wide. This has not escaped criticism.

B. Criticism of the Present Position

1. The Special Case Procedure

Professor Schmitthoff has noted that the special case procedure has been much criticized by international users of English arbitration because in practice it is impossible for an arbitration tribunal to have final jurisdiction if a question of law arises. He has said that this may lead to delay, abuse and may also add to the costs. He acknowledges, however, that in the past the special case procedure has been very valuable. It enabled the courts to exercise a supervisory jurisdiction over arbitrations. It also maintains the uniformity of commercial law, for without it, in the words of Atkin L.J., "in time codes of law would come to be administered in various trades differing substantially from the English mercantile law."

Professor Schmitthoff believes it desirable that the courts should exercise some supervisory jurisdiction over arbitrations, and that the special case procedure should not be abolished. Nevertheless he takes the view that the procedure should be limited to those cases in which it "really appears appropriate." He goes on to say:

> Here four possibilities exist. First, it would be possible for English law to follow Scots law, as laid down in the 1972 Act, and to allow parties to contract out of the special case procedure; this possibility should be rejected because in that case parties would always opt for the abrogation of the special case procedure and that useful means of supervising arbitrations by the judicial process would thus, in practice, be completely abolished. Secondly, it has been suggested by Lord Wilberforce that in special case proceedings the ruling of the commercial judge should be final, unless he gives leave to appeal. Thirdly, the courts themselves may adopt a restriction of the special case procedure, as was suggested by Kerr J. in The Lysland but rejected by the Court of Appeal; the learned judge suggested there that the arbitrators should have discretion to state a special case if questions of law arose and that they were bound to do so in two sets of circumstances, viz. if the dispute was one of unusual legal complexity or if it involved an important legal principle of general interest. Fourthly, the legislator could provide that the case should be stated straightaway for the decision of the Court of Appeal and should no longer go first to the Commercial Court.

A committee of the Commercial Court in England recently issued a report in which the special case procedure was also criticized. It was pointed out that the procedure increases the cost of arbitration and causes delay. It was also pointed out that:

> 21. A much more serious objection is that the procedure is capable of being used by undeserving parties for the sole purpose of postponing the day when they have to meet their commitments. This is a relatively new phenomenon, bred no doubt of the current inflationary world economic situation in which cash flow has assumed a new importance and unstable rates of exchange may greatly vary the value of an award to the successful party and its burden on the unsuccessful party, according to the time when it becomes enforceable.
>
> 22. It is no part of the purpose of this report to provide a detailed guide on how to achieve these delays. Suffice it to say that a successful application for an award to be stated in the form of a special case involves the arbitrator in additional work, which must inevitably create some delay. Thereafter a date for a hearing by the Court must be obtained and full argument has to take place. This involves further delay. An unsuccessful applicant can appeal to the High Court or even to the Court of Appeal against the refusal of the arbitrator to state his award in this form. This too will create considerable delay.
>
> 23. It may be thought that the Court should be in a position to recognise and to prevent or at least discourage unmeritorious applications. Unfortunately, this is not the case. At the stage at which a decision has to be made whether or not an arbitrator shall be ordered to state his award in the form of a special case, the arbitrator has not yet made any findings of fact upon the basis of which a decision can be made. Faced with hypothetical findings of fact, it is very difficult for a Court to be certain that no serious questions of law can arise for decision. All doubts must be resolved in favour of the applicant for an award in the form of a special case and, as a result, such applications are rarely refused.

The Committee therefore recommended that judicial review based upon the special case procedure should be replaced by one based on reasoned awards. This recommendation was implemented by the *Arbitration Act*, *1979*. This legislation is discussed in greater detail later in this chapter.

2. Review of Award for Error of Law on its Face

Although arbitrations are intended to provide a less expensive and less cumbersome method of resolving disputes than litigation in the courts, the setting aside of an award can sometimes make arbitration a more costly and a less satisfactory procedure than litigation. It can also make a mockery of the two principal objectives of arbitration, namely early finality and a determination outside the courts. As one writer has pointed out:

> ... a [building] contractor may be involved in arbitration proceedings which are as formal, and last as long, as an ordinary trial. He may be successful in obtaining a satisfactory award, which the owner then applies to have set aside on the ground of error on the face of the award. The decision on this application may then be appealed to the provincial Court of Appeal and further to the Supreme Court of Canada (subject to the recent requirement for leave to appeal). If the contractor is unsuccessful in the latter Court, he will find himself after several years and the costs of four hearings no nearer a decision on the merits of his case than when he started....If he had not gone to arbitration, he would in less time, and with the costs of one less hearing, at least have had a final decision on the merits of his case.

It is a matter of concern that some of the objectives of arbitration can be thwarted in this way.

One of the grounds for setting aside an award, namely error of law on the face of the award, has been criticized for over a century. Lord Denning, in *Arenson* v. *Arenson*, after stating that the courts have always refused to upset an award on the ground that the arbitrator made a mistake, went on to say:

The only exception is when the award contains an error of law on the face of it, and this has often been regretted. The position was well stated by Williams J. in *Hodgkinson* v. *Fernie* (1857) 3 C.B.N.S. 189, 202:

> The law has for many years been settled, and remains so at this day, that, where a cause or matters in difference are referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final judge of all questions both of law and of fact. Many cases have fully established that position, where awards have been attempted to be set aside, ... The court has invariably met those applications by saying: 'You have constituted your own tribunal; you are bound by

> its decision.' The only exception to that rule, are, cases where the award is the result of corruption or fraud, and one other, which though it is to be regretted, is now, I think, firmly established, viz. where the question of law necessarily arises on the face of the award, or upon some paper accompanying and forming part of the award. Though the propriety of this latter may well be doubted, I think it may be considered as established.

The Law Reform Commission of New South Wales suggest that review for error of law on the face of the award can be criticized on three grounds:

> 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 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.

The Commission recommended that an award should no longer be liable to be set aside for error of law appearing on its face. It was suggested, however, that some means must be left for the correction of "gross errors" and that the appropriate means should be remission and, if necessary, by direction to make a new award in the form of a stated case.

In the Commercial Court Committee Report on Arbitration, it was pointed out that the existing obstacle to a judicial review based upon reasoned awards is the power and the duty of the court to set aside awards for error on their face. It was the Committee's conclusion that this obstacle could easily be removed and that a system of judicial review based upon reasoned awards would have considerable attractions. The Committee's recommendation that the courts be deprived of the power to set aside an award for error on its face was implemented by the *Arbitration Act 1979*. This Act is discussed later.

3. Conclusions

The criticism of the judicial supervision and review of arbitration awards seems to divide into three main areas.

1. Judicial supervision and review may rob the arbitration process of its early finality.
2. As a matter of principle, parties who have constituted their own tribunal should be bound by its decision, for better or worse.
3. The availability of judicial review is fortuitous in the sense that it depends not on the nature or extent of the alleged injustice but on the technical questions of what constitutes the face of the award, and whether the arbitrator has chosen to set out his reasons therein.

The first two criticisms are essentially policy issues that can only be answered in terms of competing policy considerations. While we do not question the validity of these criticisms, we believe that some form of judicial supervision over arbitration awards is salutary. Justice, in our view, should not be subordinated to considerations of speed and convenience. Simply because parties have chosen one forum in preference to another for the resolution of a dispute between them should not carry with it the implication that the parties have waived their rights to have that dispute resolved in accordance with the law and widely accepted legal norms of conduct.

Earlier in this Report we recommended that arbitrators should continue to be bound to apply the law rather than deciding cases *ex aequo et bono*. How is such a policy to be realized if there is no mechanism for review by those institutions which society has entrusted with declaring the law the courts? Only an arbitration regime in which the policy is clear that arbitrators should be free to disregard the law in favour of other considerations, is compatible with an absence of judicial review on questions of law.

The third criticism, however, is not directed at judicial review as bad policy so much as it concerns what are perceived as defects in the machinery that the law provides for judicial review. It is, therefore, worthy of independent consideration. In a subtle way the first sentence of this paragraph may illustrate the basis of these defects. The use of the words "judicial review" illustrates the extent to which the role of the courts in this
context has been influenced by administrative law concepts. For example, we speak of the "face of the award" in the same way that we speak of the "face of the record" in certiorari proceedings. Moreover, the setting aside of an award is often referred to as "quashing" it.

While the administrative law model for judicial supervision of arbitration awards may be explicable in historical terms, its suitability for application to contemporary arbitration proceedings is open to question. It may be that much of the dissatisfaction with the current position would be dissipated if the supervisory role of the courts was to be cast in a new model. One possible model is the English *Arbitration Act 1979*.

C. The English Arbitration Act 1979

The principal features of the Act can be summarized as follows. The Act leaves unchanged the control of the courts over the "misconduct" of arbitrators or arbitrations. However, it abolishes the special case procedure and deprives the court of the power to set an award aside because of errors of fact or law on the
face of the award.

The Act creates a new right of appeal on points of law; the right is restricted to cases in which the High Court gives leave to appeal or all parties so agree. Leave to appeal is only to be given if the High Court is satisfied that the question of law in issue could substantially affect the rights of the parties under the award. There is a further right of appeal from the High Court to the Court of Appeal provided leave to appeal has been given by the High Court or the Court of Appeal, and the High Court has certified that the question of law either is one of general public importance or is one which for some other special reason should be considered by the Court of Appeal. A procedure is established whereby reasoned awards can be required.

The Act also permits references to the Court on any question of law arising in an arbitration, but only if the arbitrator or all the parties consent. The court, however, cannot entertain such a reference unless it is satisfied that the determination of the application might produce substantial savings in costs to the parties and the question of law is one in respect of which leave to appeal might be given.

An important feature of the Act is that it provides that the jurisdiction of the High Court may be excluded altogether. The Act provides that in the case of domestic arbitrations, that is, arbitrations not involving foreign nationals or companies, the right of appeal to the High Court can only be excluded after the
arbitration has begun. The aim is to protect the consumer or small trader "from being bullied by a stronger party into agreeing in advance to forego the benefits of the new right of appeal to the High Court should a dispute arise." Separate provision is made for disputes arising out of maritime and insurance contracts and contracts relating to commodities. As with domestic arbitrations the right of appeal to the High Court can only be excluded after the arbitration has begun. The Commercial Court Committee considered that the retention of a right of recourse to the courts from such arbitrations is very important for the proper development of English commercial law and its maintenance as the first choice of law in international commerce. Some measure of flexibility is introduced, however, in that the Secretary of State may by order provide that this provision shall cease to have effect.

Apart from domestic arbitrations and the special category disputes, parties to an arbitration agreement are, under the Act, free at any time to exclude the right of appeal to the High Court.

The Law Reform Commission of Hong Kong has also recommended that legislation, similar in most respects to the *Arbitration Act*, *1979*, be enacted in Hong Kong.

D. Recommendations for Reform

We are of the view that some features of the English *Arbitration Act 1979* might usefully be adopted in British Columbia. It represents a serious attempt to balance the competing interests of early finality of awards and the need for some degree of judicial supervision of the arbitral process. We believe it to be a sensible compromise. We would therefore recommend that the special case procedure be abolished as should review of arbitration awards on the ground of error of law on the face of the award. A limited right of appeal on points of law should be introduced together with a limited right to seek a preliminary opinion from the court during the course of a reference. There should also be some mechanism for obtaining reasoned awards from arbitrators. Finally, we believe that in certain circumstances parties should be able to exclude judicial review of an award on points of law. The substance of our recommendations are examined and discussed in greater detail below.

Unfortunately, one of the Commissioners does not agree with certain of the recommendations in this chapter. His views and recommendations are set out in his dissent which is reproduced at the end of this chapter.

1. Limiting Judicial Review

Abolition of the special case procedure can be effected by repealing sections 10(b) and 21 of the current *Arbitration Act*. Specific statutory provisions will be necessary, however, if the jurisdiction of the court to set aside an award for error on its face is to be taken away and replaced by a limited right to bring an appeal on questions of law.

This would leave intact the court's power to set aside or remit an award for "misconduct" except for errors on the face of the award insofar as such errors can at present be subsumed under the term "misconduct". Similarly the court would continue to have the power to set aside an award that was "improperly procured." In an earlier chapter, where we dealt with the court's power to remove an arbitrator for "misconduct," we recommended that the term "arbitral error" should be used in substitution for the term "misconduct," so as to allay any feeling of grievance suffered by lay arbitrators guilty of only technical error. We suggested that the term "arbitral error" should be defined as including the types of conduct or errors that currently constitute "misconduct." We would therefore recommend that the court should have jurisdiction to set aside or remit an award where an arbitrator has committed an "arbitral error" and that "arbitral error" be defined as an error constituting misconduct and as including conduct amounting to corruption or fraud, bias on the part of an arbitrator, an arbitrator exceeding his powers, and a breach of natural justice. "Arbitral error" would not include the making of an error of law.

In addition, we believe it desirable that the court have a power similar to that given in the *Judicial Review Procedure Act*, namely to refuse to set aside an award where the sole ground established is a defect in form or a technical irregularity and no substantial wrong or no miscarriage of justice has occurred.

The Commission recommends that:

37 *(a) Sections 10(b) and 21 of the* Arbitration Act *should be repealed.*
(b) The Arbitration Act *should provide specifically that subject to the right of appeal in the Act the court does not have jurisdiction to set aside or remit an award on the ground of errors of fact or law on the face of the award.*

(c) The Arbitration Act *should provide that the court may set aside an award where an arbitrator has committed or whose conduct amounts to an "arbitral error" to be defined as an error made by an arbitrator that constitutes misconduct and as including*

(i) corrupt or fraudulent conduct,
(ii) bias,
(iii) exceeding his powers,
(iv) failure to observe the rules of natural justice.

(d) On an application to set aside an award for an arbitral error, where the sole ground of relief established is a defect in form or a technical irregularity, the court, if it finds that no substantial wrong or miscarriage of justice has occurred, should have the power to refuse to set aside the award.

2. Right of Appeal

Introducing a new right of appeal on points of law from arbitration awards raises a number of issues: What should be the grounds of appeal? Which court should hear the appeal? Should an appeal be possible only with leave, and if so, in what circumstances should leave be given? We shall deal with each of these issues seriatim.

(a) Grounds for Appeal

We have recommended that the court should no longer have jurisdiction to set aside or remit an award for error on the face of the award. We would leave unchanged, however, the court's power to set aside or remit awards for "misconduct," which we recommend be called "arbitral error." As we have noted, errors on the face of the award would not be reviewable under this power. Errors of law would be reviewable under a new right of appeal that would permit appeals to be brought on any question of law arising out of an award. Whether the error appears on the face of the award would be irrelevant. Where such an appeal is brought, the court should have the power to confirm, vary or set aside the award or to remit the award to the arbitrator.

The Commission recommends:

38. (a) An appeal should lie on any question of law arising out of an award.
(b) In an appeal brought under (a) the court should have the power to

(i) confirm, vary or set aside the award, or
(ii) remit the award to the arbitrator.

(b) The Appellate Court

An issue that has given us great difficulty is the court to which an appeal from an arbitration award should be brought. Should it be the Supreme Court or the Court of Appeal? Persuasive arguments have been considered in support of either court.

It is pertinent to note that in British Columbia a direct appeal to the Court of Appeal is now available in labour arbitrations. Section 109 of the *Labour Code* provides:

> (1) On the application of a party affected by a decision or award of an arbitration board, the Court of Appeal may review the decision or award where the basis of the decision or award is a matter or issue of the general law not included in section 108(1).
>
> (2) The rules governing appeals to the Court of Appeal from a decision of the Supreme Court apply to proceedings under subsection (1).

Section 109 was enacted in 1975. Although the experience with appeals direct to the Court of Appeal is therefore limited, we are not aware that it has created any difficulties.

Furthermore, in the Report on Expropriation this Commission recommended that the Court of Appeal should hear appeals from awards made in expropriation proceedings.

One of the more persuasive arguments in favour of appeals direct to the Court of Appeal is that by eliminating a step in the appeal process there will be an apparent saving both in time and expense. It would assimilate arbitration awards to the decisions of trial courts, which, some would argue, is how they are viewed,
albeit erroneously, by the majority of those who resort to arbitration today. To the vast majority of people arbitration is an alternative to litigation in a trial court, and it would not be unreasonable to suggest that for the purposes of appeal they would also wish to avoid the trial court by going directly to the Court of Appeal.

It is possible that if the appeal was limited to the Court of Appeal, this would tend to reinforce the finality of arbitration awards. It could be argued that a trial judge might be more willing to reverse a decision whereas the Court of Appeal is more reluctant to substitute its own judgment on a matter before it.

Despite the foregoing, however, we have decided that the Supreme Court is the more appropriate forum to hear in the first instance appeals from arbitration awards. Whatever advantages there may be in appeals direct to the Court of Appeal, there are also a number of disadvantages that, in our view, militate against that approach. One of the principal disadvantages is the time that it takes for a matter to come before the Court of Appeal. We understand that on average it now takes about three months before a matter can be heard in that Court. In contrast, a matter can be brought before a Chambers Judge of the Supreme Court in two or three weeks or sooner in cases of urgency. Furthermore, it is probable that in the majority of appeals, the matter will be resolved finally by the decision of a Supreme Court Judge. Only those cases raising complex legal issues are likely to be appealed further. Thus, while direct appeals to the Court of Appeal would eliminate one step in the sequence of appeals and save some time, this time saving might be illusory because most matters would
ordinarily be settled in the trial court.

If appeals go to the Supreme Court, those appeals could be conveniently and quickly heard in any judicial district throughout the Province by Local Judges if the *Supreme Court Act* were to be amended to give them the jurisdiction of a Supreme Court Judge in proceedings under the *Arbitration Act*. This could produce a substantial saving in both time and expense. Appeals to the Court of Appeal can only be heard in Vancouver or Victoria when a division of the court is sitting there.

Finally, we believe that as a matter of policy it is desirable that reviews of arbitration awards should all be initiated in one court. Review mechanisms which provide for appeals to different courts depending upon the ground for review can be a source of confusion. As the Supreme Court will continue to have jurisdiction to set aside an award for an "arbitral error," it is desirable that it be given jurisdiction to entertain an appeal on questions of law.

The Commission recommends:

39. (a) An appeal under recommendation 38 should lie to the Supreme Court of British Columbia.
(b) Local Judges of the Supreme Court have the jurisdiction of a Supreme Court Judge in proceedings under the Arbitration Act.

3. Leave to Appeal

We believe that an appeal on a point of law should not lie unless all the parties to the arbitration consent or the Court has given leave. At a minimum, frivolous and unarguable appeals should be screened as should appeals brought for the purposes of delay. In England, leave to appeal to the High Court is not to be given unless the question of law in issue could substantially affect the rights of the parties under the award. Furthermore, an appeal from the High Court to the Court of Appeal can only be brought if leave has been given by the High Court or the Court of Appeal and the High Court has certified that the question of law is one of general public importance or is one which for some other special reason should be considered by the Court of Appeal. Although the 1979 Act has only been in force a short time, the circumstances in which leave to appeal should or should not be given have generated substantial judicial debate. In *Pioneer Shipping* v. *B.T.P. Tioxide*, for example, Lord Denning, M.R. observed:

> The position under the Act of 1979 is very different from the Act of 1950. Under that Act we set out guidelines as to the circumstances in which an arbitrator should state his award in the form of a special case. We did it in *Halfdan Grieg & Co. A/S* v. *Sterling Coal & Navigation Corporation* [1973] Q.B. 843, 862. Those guidelines should be discarded. They are not applicable to the new Act.
>
> The first guideline is given by section 1 (4) of the Act. Leave is not to be given unless the point of law could "substantially affect the rights" of one or both of the parties. In short, it be a point of practical importance not an academic point nor a minor point.
>
> The second guideline is given by section 1 (2),(3) and (7). The decision of the arbitrator is final unless the judge gives leave. Once he gives leave, the judge is to hear the appeal. His decision is final unless he certifies that the question is one of general importance, or is one which for some other special reason should be considered by the Court of Appeal. This finality gives rise to these reflections:
>
> Take a case where the sole question is the proper interpretation of a commercial contract. Not a standard form. But a "oneoff" clause in a "oneoff" contract. The interpretation of it is unlikely ever to arise again. The parties agree, as here, to the "final arbitrament" of an arbitrator carrying on business in the City of London. To my mind in the ordinary way, once the arbitrator has given his award, containing his interpretation of the clause, the judge should not give leave to appeal. Not even when a large sum of money is involved. For this reason. On such a clause, the arbitrator is just as likely to be right as the judge - probably more likely. Because he, with his expertise, will interpret the clause in its commercial sense: whereas the judge, with no knowledge of the trade, may interpret the clause in its literal sense. And, once the judge has decided it, there is no appeal: because it is not a case for a certificate. Then as between the arbitrator and the judge, whose decision is to be preferred? I should say that in general in the absence of some special reason it should be the decision of the arbitrator, because it was he to whom the parties agreed to submit it on the basis that his decision was to be final, and not the judge's. But if the arbitrator intimated that he would welcome an appeal, that would be a special reason for giving leave.
>
> It is different with a clause in a standard form, and a question arises which is likely to come up again and again. The decision on such a question may well be one of "general public importance" within section 1(7)(b) of the Act of 1979. If a judge is prepared so to certify, he may often consider it desirable to give leave. But, even then, he should hesitate a little before giving it. He must remember that, even in a standard a commercial arbitrator is better placed to interpret it in a commercial sense or in a sense acceptable to the parties than the judge himself is. He should not give leave unless it is a really debatable point. If the arbitrator has put upon the clause the meaning generally accepted in the trade, leave should be refused, because that is what the parties would have expected when they agreed to the arbitration. I would repeat what I said in *Pilgrim Shipping Co. Ltd.* v. *State Trading Corporation of India Ltd*. [1975] 1 Lloyd's Rep. 356, 36061, in the hope that the commercial judges will accept it as the correct approach since the Act of 1979.

In subsequent cases, however, Robert Goff, J. rejected and declined to follow these guidelines. In The Oinussian Virtue, he said that he could "find nothing in the Act which, as a matter of construction, suggests that the court should give leave in the case of some questions of law, but to decline to give leave in others." In *The Wenjiang* he said that in his view whenever any question of construction of a written contract could be discerned as arising out of an arbitrator's award, then, except where its determination could not substantially affect the rights of any of the parties, the only proper exercise of his discretion by the judge was to grant leave to appeal; though if the argument that the arbitrator had erred in point of law appeared to the judge to be flimsy it was open to him to impose conditions, such as payment of the whole or part of the amount of the award into court or the provision of security.

The House of Lords has recently considered the discretion to grant leave to appeal under section 1 of the 1979 Act. In an appeal from the Court of Appeal's decision in *Pioneer Shipping Ltd*. v. *B.T.P. Tioxide Ltd.*, Lord Diplock noted that the discretion had given rise to divergencies of opinion between those judges called upon to exercise it. In his view, these divergences of opinion, if permitted to continue, might endanger the maintenance of the reputation of London arbitration as a forum for the resolution of commercial disputes. He went on to consider the guidelines suggested by Lord Denning and Robert Goff, J.'s "vigorous and critical rejection of these guidelines." With regard to this, he said:

> My Lords, with great respect, I do not think that the learned judge's reasoning, in concentrating as it appears to have done, on subsection (4) of section 1, pays sufficient regard to the general discretion of the High Court to refuse leave absolutely. This is conferred not by subsection (4) but by subsection (3)(b). Nor, as it seems to me, has he given proper effect to the terms in which the right of appeal is conferred in subsection (1).
>
> The judicial discretion conferred by subsection (3)(b) to refuse leave to appeal from an arbitrator's award in the face of an objection by any of the parties to the reference is in terms unfettered; but it must be exercised judicially; and this, in the case of a dispute that parties have agreed to submit to arbitration, involves deciding between the rival merits of assured finality on the one hand and upon the other the resolution of doubts as to the accuracy of the legal reasoning followed by the arbitrator in the course of arriving at his award, having regard in that assessment to the nature and circumstances of the particular dispute.

In weighing the rival merits of finality and meticulous legal accuracy, Lord Diplock found several indications in the Act itself of a parliamentary intention to "give effect to the turn of the tide in favour of finality in arbitral awards ... at any rate where this does not involve exposing arbitrators to a temptation to depart from 'settled principles of law.'" He said:

> My Lords, in view of the cumulative effect of all these indication of Parliament's intention to promote greater finality in arbitral awards than was being achieved under the previous procedure as it was applied in practice, it would, in my view, defeat the main purpose of the first four sections of the Act if judges, when determining whether a case was one in which the new discretion to grant leave to appeal should be exercised in favour of an applicant against objection by any other party to the reference, did not apply much stricter criteria than those stated in The Lysland [1973] Q.B. 843 which used to be applied in exercising the former discretion to require an arbitrator to state a special case for the opinion of the court.
>
> Where, as in the instant case, a question of law involved is the construction of a "oneoff" clause the application of which to the particular facts of the case is an issue in the arbitration, leave should not normally be given unless it is apparent to the judge upon a mere perusal of the reasoned award itself without the benefit of adversarial argument, that the meaning ascribed to the clause by the arbitrator is obviously wrong: But if on such perusal it appears to the judge that it is possible that argument might persuade him, despite first impression to the contrary, that the arbitrator might be right, he should not grant leave; the parties should be left to accept, for better or for worse, the decision of the tribunal that they had chosen to decide the matter in the first instance.

and:

> For reasons already sufficiently discussed, rather less strict criteria are in my view appropriate where questions of construction of contracts in standard terms are concerned. That there should be as high a degree of legal certainty as it is practicable to obtain as to how such terms apply upon the occurrence of events of a kind that it is not unlikely may reproduce themselves in similar transactions between other parties engaged in the same trade, is a public interest that is recognised by the Act particularly in section 4. So, if the decision of the question of construction in the circumstances of the particular case would add significantly to the clarity and certainty of English commercial law it be proper to give leave in a case sufficiently substantial to escape the ban imposed by the first part of section 1(4) bearing in mind always that a superabundance of citable judicial decisions arising out of slightly different facts is calculated to hinder rather than to promote clarity in settled principles of commercial law. But leave should not be given even in such a case, unless the judge considered that a strong prima facie case had been made out that the arbitrator had been wrong in his construction; and when the events to which the standard clause fell to be applied in the particular arbitration were themselves "oneoff" events, stricter criteria should be applied on the same lines as those that I have suggested as appropriate to "oneoff" clauses.

Lord Roskill, also, made the following observation:

> My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Diplock on the second question. I entirely agree with it and respectfully adopt the criticisms which he has made of the several judgments of Robert Goff J. on this question in the instant case and in the two subsequent cases, *The Oinussian Virtue* [1981] 1 Lloyd's Rep. 533 and *The Wenjiang* (unreported), in which that learned judge felt free not to follow the decision of the Court of Appeal in the instant case. I only add with profound respect to Robert Goff J. that if the learned judge's view were allowed to prevail I find it difficult to see what useful purpose has been served by the passing of the Act of 1979 which had as one of its primary targets the abolition of the special case since it seems to me that if leave to appeal from an arbitral tribunal to the High Court is to be given in accordance with the principles which the learned judge there enunciated, the notoriously unsatisfactory results to which special cases have given rise in recent years will be perpetuated albeit in a different form.

The other Law Lords concurred with the opinions of both Lord Diplock and Lord Roskill.

The House of Lords has therefore adopted a liberal approach to interpretation, one that appears consistent with the intent of the recommendations of the Commercial Court Committee. The question arises, however, whether the English leave requirement, as interpreted by the House of Lords, should be adopted in British Columbia. We have concluded that they should not. While we are generally sympathetic with the spirit of these requirements and the manner in which they have been interpreted, we believe that local circumstances do not warrant as limited an approach to this question in this Province. We are of the view that alternative criteria for granting leave should be specified in the legislation. Thus, we would recommend that leave to appeal to the Supreme Court should not be granted unless:

(i) the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a substantial miscarriage of justice,
(ii) the point of law is of importance to some class or body of persons of which the applicant is a member, or
(iii) the point of law is of general or public importance.

These requirements have been adapted in part from paragraph 4 of Appendix B to the Supreme Court Rules which allow the court to order costs to be taxed as though a greater amount were involved.

The general thrust of these criteria is to permit appeals where the determination of the point of law has ramifications beyond the immediate issue in dispute, either as between the parties or for the population at large. The intent is to prevent substantial miscarriages of justice, and also to ensure that there is some systematic development of law in arbitrations. We would also recommend that the court may give leave to appeal upon any terms and conditions it considers appropriate.

We have also concluded that, unlike in England, there should be no restriction of the right to appeal to the Court of Appeal from a decision of the Supreme Court. We believe that once an award is brought into the judicial system, any rights of appeal from a determination by the Supreme Court should be governed in the
same manner as any other decision of that Court.

The Commission recommends that:

40. (a) An appeal should not be brought under recommendations 38 unless

(i) all the parties to the arbitration consent, or
(ii) the court has given leave.

(b) The court should not grant leave under recommendation 40(a)(ii) unless (i) the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a substantial miscarriage of justice,

(ii) the point of law is of importance to some class or body of persons of which the applicant is a member, or
(iii) the point of law is of general or public importance.

(c) Where the court grants leave under recommendation 40(a)(ii), it should be permitted to attach conditions to the order that it considers appropriate.

4. References During an Arbitration

Section 2 of the *English Act* enables an arbitrator or one of the parties with the arbitrator's concurrence, to seek the assistance of the court during the course of an arbitration when a difficult point of law arises. The High Court is not permitted, however, to take an application under section 2 unless it is satisfied that the determination of the question of law "might produce substantial savings in cost to the parties," and that it is generally a question of law which could substantially affect the rights of one or more of the parties. Restrictions, similar to those placed on the appeal procedure, are placed on the right to appeal, under the reference procedure, from the High Court to the Court of Appeal.

This procedure complements the appeal procedure and, in our view, would be a useful mechanism for resolving difficult points of law that might arise during the course of an arbitration. We would therefore recommend the adoption of a similar procedure in British Columbia to the extent that it complements the appeal
procedure in recommendation 40.

We would also recommend that legislation should provide specifically that an appeal lies to the Court of Appeal from a determination made by the Supreme Court during a reference. We make this recommendation because although the Court of Appeal has jurisdiction to hear an appeal from "every judgment, order or decree made by the Supreme Court," it might be argued that a determination made by the Court under this recommendation is only an "opinion" of that Court. It has been held that in such circumstances no appeal lies to the Court of Appeal.

The Commission recommends that:

41. (a) The Supreme Court should have jurisdiction to determine any question of law arising in the course of an arbitration proceeding on the application of any party to the proceeding

(i) with the consent of the arbitrator, or
(ii) with the consent of all the other parties.

(b) An appeal should lie to the Court of Appeal from a determination made pursuant to recommendation 41(a).

42. The Supreme Court should not entertain an application under recommendation 41 unless it is satisfied that the determination of the question of law will produce substantial savings in costs to the parties.

5. Reasons for Awards

In British Columbia, unless the parties have agreed otherwise, an arbitrator need not give reasons for his award, and a failure to give reasons is not in itself a ground upon which an award may be set aside or remitted. It has been suggested that it is desirable, and only fair to the parties, in those cases which involved complex issues offact and law, for arbitrators to give reasons, explaining, at least in brief, how they reached their decisions. Others take the view, however, that to require arbitrators to give reasons might prove an undue burden, and might also lead to delay. This, to some extent, was pointed out by

Bramwell L.J. in *Dunkirk Colliery Co.* v. *Lever*, where the court was dealing with a reference to a special referee whose report was
the subject of appeal. Bramwell L.J. said:

> I should like further to say for the assistance of the referee, that I think he should pronounce his decision and not give his reasons. I am now told that the Master of the Rolls has decided in some case that the referee ought to state his reasons. If he has done so, all I can say is that he gave a direction which a most experienced and learned Judge said would, if acted upon by juries, render by jury impossible. If juries had to give reasons for their verdict, trial by jury would not last five years. The same thing cannot be said to such an extent with respect to a lawyer, let us hope, or otherwise it would be applicable to ourselves; but I think it would be a dangerous rule to lay down, that a man should give minute reasons for the conclusions at which he arrives.

These comments were cited in *Dominion Natural Gas Co.* v. *United Gas and Fuel Co.* of Hamilton, where Henderson J. added a further reason for not requiring an arbitrator to give reasons. Counsel in that case argued that a section of the Ontario *Arbitrations Act* empowered the court to ask that arbitrators state their reasons in the award. Henderson J. held that the section only applied where an appeal from an award is pending or where a special case has been stated for the opinion of the court, and went on to point out that:

> ... to adopt the construction of the section contended for by plaintiff's counsel would be to hold that the effect of the present section is to abrogate the well settled rules of law in regard to setting aside awards, and to substitute therefor the principle that arbitrators should be asked for their reasons and findings in order to furnish grounds for attacking their award.

The Commercial Court Committee took the view that it would be an improvement if arbitrators were encouraged to give reasons for their awards, stating:

> The making of an award is, or should be, a rational process. Formulating and recording the reasons tends to accentuate its rationality. Furthermore, unsuccessful parties will often, and not unreasonably wish to know why they have been unsuccessful. This change in the law would make this possible.
>
> 27. Given a reasoned award, an unsuccessful party could know whether he had a just cause for complaint. Where no reasons were given initially and he thought that an error had been made, he could ask for reasons to be supplied. If the arbitrator refused to supply them, the Court could, in appropriate cases, order him to do so. This would no great burden on the arbitrator provided that the application was made promptly. He would have had some reasons for making the award and all that he would need to do would be to summarize them in ordinary language. Nothing formal would be required.
>
> 28. Armed with the reasons for an award, the unsuccessful party could apply to the Court for leave to appeal. The right of appeal could be restricted to questions of law arising out of the decision, leaving all questions of fact to be decided finally by the arbitrator. Furthermore, unlike the position when the Court is being asked to order an arbitrator to state an award in the form of a special case, the Court would know whether any particular question of law really arose for decision since both it and the parties would have access to the facts as found by the arbitrator. Additional restrictions could be imposed on the circumstances in which leave to appeal would be given and in which a further appeal to the Court of Appeal would be permitted.

It was the Committee's conclusion that:

> ... a system of judicial review based upon reasoned awards would place very grave obstacles in the way of those seeking unmeritoriously to avoid meeting their just obligations, would improve the standard of awards and would render them more easily and speedily enforceable.

Sections 1(5) and 1(6) of the *Arbitration Act 1979* now empower the High Court to order arbitrators to give reasons for their awards. Such an order can be made on application with the consent of all parties or with the leave of the court, if it appears that the award does not sufficiently set out the reasons for the award. The form of the order is that the arbitrator is to state the reasons for his award in sufficient detail to enable the

court, should an appeal be brought, to consider any question of law arising out of the award. The court is not to make such an order unless it is satisfied that before the award was made notice was given to the arbitrator that a reasoned award would be required or that there was some special reason why such a notice was not given.

The English Court of Appeal recently made some observations on the approach to be taken by arbitrators in making reasoned awards under the 1979 Act. The court stated that the award need not be in any particular form. All that was necessary was for the arbitrators to set out what, in their view, happened and to explain how they reached their decision. The court noted that a reasoned award within the 1979 Act was totally different from an award in the form of a special case; it was not technical nor difficult to draw up, and should be produced promptly at the end of the hearing.

We agree with the views expressed by the Commercial Court Committee and quoted above, and believe that procedure for obtaining reasoned awards provided in the *Arbitration Act 1979* should also be adopted in British Columbia. We do not believe that in every case an arbitrator should be compelled to give reasons for
his award. Indeed, in the majority of cases the parties themselves may not necessarily want a reasoned award. All they may be interested in is a quick final decison on the matter in dispute. The procedure provided in the *Arbitration Act 1979*, however, enables a party, who is sufficiently concerned that reasons be given, to obtain such reasons. The notice requirement also ensures that the arbitrator is also given warning that reasons will be required.

The Commission recommends that:

43 (a) The Supreme Court should be empowered to order an arbitrator to state the reasons for his award in sufficient detail to enable the court, should an appeal be brought, to consider any question of law arising out of the award.
(b) The court should not make an order under this recommendation unless

(a) before the award was made, one of the parties to the reference gave notice to the arbitrator that a reasoned award would be required, or
(b) there is some special reason why such a notice was not given.

6. Contracting Out

The *Arbitration Act 1979* contains elaborate and complicated provisions concerning the rights of parties to arbitration agreements to exclude all judicial review. The validity of such an exclusion agreement depends on whether it is in a "domestic" or "foreign" agreement, the time it was made and the category of dispute. The provisions relating to exclusion agreements were enacted, to some extent, not in response to any
concern that the law was defective in the sense that it worked an injustice, but rather that the invalidity of such exclusion agreements under English law made England less attractive as a forum for international arbitrations. Arbitrations involving supranational disputes are, apparently, a valuable "invisible" export playing an important role in the British economy. As the Commercial Court Committee pointed out:

> This country can retain its position as the international leader in commercial law and arbitration only so long as it provides the service which its customers need. The existing customers, many of whom are of long standing, need an appeals system which is speedy and efficient, yet cannot be abused. Our future customers, the parties to supranational contracts, need to be able to contract out of the appeals system if so advised. Only when this becomes possible will they consider England as a possible venue for arbitration. Time is short, for if they once establish arbitral links with other countries, it will become very ore difficult to attract them to this country.

While we have concluded that in some circumstances parties to an arbitration agreement should be able to exclude judicial review for error of law, local circumstances in British Columbia do not in our view warrant the enactment of the type of provisions that are contained in the English *Arbitration Act 1979*.

We recognize that there may be situations where speed and finality of decision are critical. The parties in such situations might be willing and prepared to accept the risk that the arbitrator's decision might be incorrect in law. As the Commercial Court Committee pointed out, however, whether such a situation has arisen can only be determined after a particular dispute has arisen. The Committee therefore recommended that exclusion clauses in "domestic" agreements should only be valid if they are agreed upon after the arbitration has begun. As the Committee pointed out:

> ... in practice one party's interest in obtaining an agreement to oust the jurisdiction of the Courts will, at this stage, almost always be counterbalanced by the other party's interest in refusing to enter into such an agreement. In the view of the Committee, agreements to forego the right to review by the Court will be extremely rare and will only be made when they are justified in the interest of all parties. The Committee therefore recommends that in the case of all types of arbitration agreement, there shall be no entrenched right of appeal in relation to particular disputes once those disputes have arisen and have been referred to arbitration. At that stage the parties should be able, if they wish, to contract out of the right to appeal to the High Court.

This means that it would not be possible for one of the parties who may be in a weak bargaining position, to be coerced by the stronger party into agreeing in advance to forego the benefits of the right of appeal to the courts if a dispute should arise. This is particulary important when one considers the plethora of standard form contracts that increasingly contain arbitration clauses. The party who does not prepare the standard form may well enter into it without any real understanding of its implications. An exclusion clause in such a contract might be unappreciated by one party who would be surprised later to learn that an arbitration
award could be made against him contrary to law and that he could do nothing about it. Such a person might well have acted in accordance with sound advice in law given him by his solicitor only to find that his having done so was futile because the arbitrator wrongly decided the question of law on which he acted.

We would therefore recommend that exclusion agreements be permitted but only after a particular dispute has arisen and the commencement of the hearing of the arbitration of that dispute.

The Commission recommends that:

44 (a) The Supreme Court should not have jurisdiction to entertain applications made pursuant to recommendations 38 to 44 where the parties to a reference have entered into an agreement in writing which excludes the right of appeal under recommendation 38.
(b) An exclusion agreement should be of no effect unless it is entered into after the commencement of the hearing of the arbitration.

Memorandum of Dissent of Bryan Williams

It is with regret that I find myself in disagreement with my fellow Commissioners on the role of the Courts in supervising arbitration awards.

We all agree that some judicial supervision is a necessary part of any arbitral system. We seem, also, to be in agreement that such judicial supervision and review should be minimal.

Where I differ from my fellow Commissioners is on the issue of the form and extent of such intervention. The majority of the Commission recommends what I consider to be an unnecessarily complicated system of appealing an arbitral award to the Supreme Court, in some instances with leave, in some instances without, and with a further appeal to the Court of Appeal.

I believe that no appeal should lie from any arbitration award except in respect of arbitral error, an excess or failure to exercise jurisdiction, or a failure to observe the duty to act fairly (including natural

justice). I would also allow an appeal on point of law, provided that the parties be permitted to exclude such appeals by agreement.

Historically, persons in conflict have developed their own methods for resolving disputes among themselves. The Courts and the formal judicial system have, of course, provided the ultimate forum. In certain fields, such as labour relations, expropriation, commercial contracts, and construction disputes (to name a few), parties found that the Court system did not meet their needs. This meant that those persons sought an alternate method for the resolution of their disputes. In most instances, they settled on arbitration.

They favoured arbitration as opposed to litigation in the courts for several reasons:

a) The burgeoning costs of litigation through the courts.
b) Delay in both the preparation and trying of cases involving lawyers scheduling their time, obtaining court time, reserved judgments and appeals.
c) The formality in both structure and performance within the court system.

Furthermore, in arbitration the parties can choose an arbitrator who has a special knowledge of the industry or subject matter. There is also a personal trust relationship between parties and their arbitrator, and greater flexibility in the method employed by the arbitrator for resolving the dispute, and it is easier to deal with documents and other evidence such as the admissibility of hearsay and parol evidence. For these reasons it is apparent why the latter model was chosen.

It must never be overlooked that the most important feature of an arbitration system is that it was intended to be quick and final.

Wherever people are in conflict, however, it is predictable that they will take advantage of the weapons at hand, including using the system itself through delay, overkill or arguing highly technical points. Here the "endurance test" prevails and the party with the greatest financial resources will succeed.

In view of the priorities of most parties, it seems to me there is a need of a system for resolving disputes that is as simple and economical as possible. When one considers the type of disputes submitted to arbitration and what I perceive to be the priorities of the parties, I cannot concur with the observation on page 130 of the Report:

> Justice, in our view, should not be subordinated to considerations of speed and convenience. Simply because the parties have chosen one forum in preference to another for the resolution of a dispute between them should not carry with it the implication that the parties have waived their rights to have that dispute resolved in accordance with the law and widely accepted legal norms of conduct.

In my respectful opinion, the omnipotence of justice in these disputes is something which the lawyers and judges continue to insist upon. If the parties themselves, who have chosen arbitration, were asked for their opinion rather than the lawyers and judges, they might well ask that the court be excluded altogether, or at best, that the court be involved in only a minimum of supervision, so that the arbitrator's decision, right or wrong, finally resolves the problem. A decision or an award which is wrong, after two months of dispute, may be better for the longterm relationship of the parties than one which is correct after three years of appeals and references back to the Board.

To men of commerce a mechanism to resolve disputes is a necessary evil en route to accomplishing their own business goals. It is we, the lawyers, who insist on redress for a decision which is wrong in law. It is worth noting that the arbitrators, generally speaking, do not consider themselves bound by other arbitrators' decisions, even, in some cases, where a similar dispute occurs between the same parties. That, in my view,

indicates that the parties they serve are more concerned with resolving a dispute than establishing a body of precedent or arbitral law. In my experience, the parties do not address their minds to the law, though once they hire a lawyer they will naturally expect him to protect their legal position. In the final analysis, however, what they really want is an arbitrator with the common sense to "sort out the problem ..."

We are now designing a new statute and constructing the framework for an arbitration scheme that will operate for many years to come. We must therefore be sensitive to the needs of the people whom the system will serve and recognize their needs and expectations rather than the existing system they have sought to avoid.

There must, of course, be a jurisprudential base to ensure that the unbridled discretion of an arbitrator cannot exceed the objectives and expectations of the parties. An arbitrator, in my view, may be wrong in fact or sometimes even wrong in law within the expectations of the parties. He cannot go beyond their expectations by exceeding his jurisdictional mandate or violating the general duty to act fairly.

The supervisor, of course, could be a government body, or it could be a specially appointed independent tribunal. In my view, the courts are eminently equipped and capable of handling this ultimate supervisory role so long as it is limited and procedurely simple. Keeping in mind that the parties here have chosen to have their disputes resolved by an arbitrator rather than the courts, the courts' role, in my view, should be limited to setting aside or referring back awards only on the basis of an excess or failure to exercise jurisdiction or on the basis that there has been a breach of their duty to act fairly. I would include an appeal on point of law provided the parties have the right by agreement to exclude such an appeal.

Any scheme for court review must be as simple and expeditious as possible. It is important to recognize that the disputant in the arbitration forum has had his trial when the arbitration is concluded in the same way as a litigant in the trial court has. Accordingly his appeal, in my view, within the limited grounds should be directly to the Court of Appeal.

The more leave applications and appeal avenues there are, the more advantage will be taken of the system, particularly by the party with the greatest financial resources or the one who wishes to delay. Were we to adopt recommendations 38 to 40, such a party, following any arbitration, would make application for leave to appeal on a point of law to the Supreme Court and, if granted, would be at liberty to prepare and present the case in the Supreme Court on the merits. Should the appellant be unsuccessful, he would be at liberty to appeal to the Court of Appeal.

With the greatest of respect to my fellow Commissioners, I have concluded that recommendations 38 to 40 complicate and enlarge the courts' supervisory role beyond what is necessary and beyond that which now prevails.

I see no purpose in possibly frustrating the arbitral system with a judicial review scheme which could result in applications for leave, appeals therefrom, an appeal to the Supreme Court on the merits and an appeal therefrom, when all that is really required is one final judicial determination within the limited grounds the statute is intended to provide.

This suggestion is not without precedent. So far as I am aware, the scheme which presently prevails under section 109 of the *Labour Code* of British Columbia has worked to the satisfaction of the parties and the judges of the Court of Appeal without the intervening applications at the Supreme Court level. In addition,
the direct appeal to the Court of Appeal from federal administrative tribunals under Section 28 of the *Federal Court Act* has also worked reasonably well, to the best of my information.

It has been suggested that the Court of Appeal is not equipped to deal with factual disputes. I would not anticipate that appeals from the decision of an arbitrator based upon arbitral error, jurisdiction, duty to act fairly or point of law would involve factual disputes except on rare occasions. On the occa-

sions when factual disputes arise, I see no reason why they could not be resolved in the same manner as they are under the
Federal Court system, where affidavits are filed and crossexamination outside the courtroom takes place on those affidavits.

In summary, I would delete Recommendations 38 to 40 and substitute the following:

Recommendation 38

An appeal should lie to the Court of Appeal of British Columbia on any question of law arising out of an award unless such right of appeal has been excluded by the agreement of the parties.

Recommendation 39

An appeal should lie to the Court of Appeal of British Columbia from any award rendered by an arbitrator under the *Arbitration Act* on grounds that the arbitrator has exceeded or failed to exercise his jurisdiction, that he has failed to act fairly, or on the basis of arbitral error.

CHAPTER XI CONCLUSION

A. Summary of Recommendations

A summary of the recommendations made in this Report is set out below. In each case the page at which a recommendation may be found in the body of the Report is indicated.

The Commission recommends:

1. *The* Arbitration Act *should apply to all agreements, whether or not in writing, to submit present or future differences to arbitration, whether or not an arbitrator is named in the agreement.*

2. *Unless the parties otherwise agree:*

   (a) *An arbitration agreement should not be discharged by the death of any party and in such an event it should be enforceable by or against the personal representatives of the deceased.*
   (b) *The authority of an arbitrator should not be revoked by the death of any party.*

   (c) *Nothing in (a) and (b) should 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.*

3. *The phrase in section 3 "and has the same effect in all respects as if it had been made an order of the court" should be repealed.*

4. *Sections 7 and 8 of the* Arbitration Act *should be replaced by legislation similar to section 8 of The* Arbitrations Act *of Ontario.*

5. *The court should have the power to remove an arbitrator or umpire who makes an arbitral error or who does not proceed with reasonable dispatch in conducting the arbitration and making an award, and the court should have a discretion, where it removes an arbitrator or umpire for conduct amounting to corruption or or for failing to use reasonable dispatch, to order that he is not entitled to receive any remuneration for his services and that he be liable for the costs that the parties have incurred to the date of his removal.*

6 *(a) Where an arbitrator or umpire is removed by the court under recommendation 5, the parties should be permitted to appoint a replacement as if a vacancy had been created.*
(b) Where the parties do not concur in the appointment of a replacement under recommendation (a), the court should have the power to appoint a person to act as arbitrator or umpire in place of the person removed unless the person so removed was designated by name in the arbitration agreement.

7. *The arbitrator's lien in respect of his fees and expenses should be abolished.*

8. *Notwithstanding any agreement prohibiting taxation, there should be a general power to tax an arbitrator's bill in respect of his fees and expenses at the instance of the arbitrator or any party to the arbitration.*

9. *The procedure for taxing an arbitrator's bill under recommendation 8 should be similar to that established under section 92 of the* Barristers and Solicitors Act *for the taxation of solicitors' bills, and when the bill of an arbitrator is taxed, the certificate of the taxing officer should be enforceable as a judgment of the Supreme Court.*

10. *Arbitrators should continue to be required to adjudicate disputes according to the law, rather than by reference only to equity and good conscience, unless the parties agree otherwise in a valid exclusion agreement made pursuant to recommendation 44.*

11. *An arbitrator should be permitted to call a witness on his own motion but any party to the reference should have the opportunity to examine the witness and offer evidence in rebuttal.*

12. *Unless the parties agree otherwise, an arbitrator should have the power to admit evidence and information on oath, affidavit or otherwise as in his discretion he considers proper, whether or not the evidence is admissible in a court of law, but he should not be permitted to refuse to admit evidence that is admissible in a court of law.*

13. *Where there are three or more arbitrators then, unless the parties agree otherwise,*
(a) the arbitrators may act by majority, and
(b) if there is no majority, the decision of the chairman of the arbitration panel should be the decision of the panel.

14. *Unless the parties otherwise agree:*
(a) The costs of the reference and award should be in the discretion of the arbitrator, who should be able to direct to and by whom those costs are to be paid, and be able to tax or settle the amount of those costs, and
(b) if the arbitrator fails to make an award as to costs, either party, within 30 days of the award, should be able to apply to the arbitrator for an order as to costs and for the amount to be fixed, but where no such application is made, or the arbitrator refuses or neglects to make an order as to costs, each party should as between themselves bear his own costs of the reference and his prorated share of the cost of the award.

15. *If a party to an arbitration agreement, or a person claiming through him, commences legal dings against another party to the arbitration agreement, or a person claiming through him in respect of any matter agreed to be referred, any party to such legal proceedings or to the arbitration agreement should be permitted to apply to the court to stay the proceedings.*

16. *Once the party applying for a stay pursuant to recommendation 15 has shown that the matter is one that was agreed to be referred, the burden of showing cause why effect should not*

be given to the arbitration agreement should be upon the party opposing the application to stay.

17. *In determining whether cause has been shown in recommendation 16, the court may consider:*

    (a) *whether or not the agreement to arbitrate was freely made;*
    (b) *whether the questions in issue raise issues of factual or legal complexity ether it is appropriate that these issues be settled by arbitration in the light of the qualifications of the arbitrator;*
    (c) *the comparative expense and delay involved in the proceedings as opposed to arbitration proceedings;*
    (d) *if there are several parties to the arbitration agreement, whether those s, other than the applicant, prefer the proceedings to be continued;*
    (e) *whether there are other parties to the proceedings who are not parties to the arbitration agreement;*
    (f) *the stage the proceedings have reached;*
    (g) *whether the applicant has delivered any pleadings or has taken any other step in the litigation;*
    (h) *whether the applicant was, at the time the proceedings were commenced and at the date of the hearing remains ready and willing to do all things necessary to the proper conduct of the arbitration;*
    (i) *whether the arbitrator may not be capable of impartiality;*
    (j) *whether fraud is alleged by any party to the proceedings;*
    (k) *any other matter the court considers significant.*

18. *The authority of an arbitrator should continue to be irrevocable except by leave of the court.*

19. *The court in exercising its discretion in giving leave to revoke should as far as posssible apply the same general principles that lies in exercising its discretion to refuse a stay of litigation.*

20. *A provision comparable to section 24(1) of the English* Arbitration Act 1950*, should be enacted in British Columbia.*

21. *A clause in a contract that makes adjudication by arbitration a condition precedent to a cause of action or a defence (a* Scott *v.* Avery *clause) should not be given effect according to its terms but should be construed it were an agreement to submit differences under the contract to arbitration.*

22. *Where the terms of an agreement to refer future disputes to arbitration provide that any claims to which the agreement applies shall be barred unless notice to appoint an arbitrator is given or an arbitrator is appointed or some other step to commence arbitration proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the court, if it is of the opinion that in the circumstances of the case undue hardship would otherwise be caused and, notwithstanding that the time so fixed has expired, should be able, on such terms, if any, as the justice of the case may require, to extend the time for such period as it thinks proper.*

23. *Every arbitration agreement should be deemed to include a provision that, subject to the provisions of the* Arbitration Act*, the award is final and binding on the parties and those claiming under or through them, unless the parties agree otherwise.*

24. *There should be no specific time in which an award must be made unless the parties have agreed otherwise.*

25. *Where the parties have agreed as to the time in which an award must be made the arbitrator or the court should have the power to extend such time notwithstanding any agreement to the contrary and whether or not the time has expired.*

26. *The right of an arbitrator to extend the time for making an award should not affect the power of the court to remove an arbitrator for delay under recommendation 5.*

27. *Unless the parties agree otherwise, an award should not be required to be in writing or signed by the arbitrator.*

28. *If an award is not in writing the arbitrator should, if requested by a party, give a statement of the terms of the award, in writing and signed by him, within 15 days of the request.*

29. *Unless the parties agree otherwise, every arbitration agreement should be deemed to contain a provision that the arbitrator may make an interim award.*

30. *Unless the parties agree otherwise, every arbitration agreement should be deemed to include a provision that the arbitrator has the same power as the court to order specific performance of any contract for the sale of goods.*

31. *Notwithstanding any agreement to the contrary,*
    - *(a) Any party to a reference should be permitted, within 15 days of being notified that an award has been made and of its to apply in writing to the arbitrator or umpire to reopen the award, and to amend or vary it in respect of anything that was raised on the reference.*
    - *(b) On receipt of an application made pursuant to recommendation (a), the arbitrator or umpire should notify the parties*
        - *(i) whether or not the arbitrator or umpire is willing to consider the application, and*
        - *(ii) if the arbitrator or umpire is willing to consider the application the place where, and a time and date when, the matters raised in the application shall be heard, and the date so fixed should be no more than 30 days after the receipt of the application.*
    - *(c) After hearing the application the arbitrator or umpire should be permitted to reopen the award and amend or vary it in such manner as is just and reasonable, and the award so amended or varied should be deemed to be the award of the arbitrator or umpire in the matter.*

32. *The* Arbitration Act *should provide that a sum directed to be paid by an award should carry both prejudgment and postjudgment interest.*

33. *An award on an arbitration agreement should be enforceable by leave of the court in the same manner as a judgment or order to the same effect and, where leave is so given, judgment may be entered in the terms of the award.*

34. *The court, on an application for leave to enforce an award in the same manner as a judgment or order, should have the power to make such orders as are necessary for carrying the award into effect.*

35. *The right to bring an action on the award should be retained.*

36. *The Government of British Columbia should request the Government of Canada to accede to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and upon accession by Canada to that Convention, the Government of British Columbia should enact legislation to give effect to the Convention.*

37. *(a) Sections 10(b) and 21 of the* Arbitration Act *be repealed.*
(b) The Arbitration Act *should provide specifically that subject to the right of appeal in the Act the court does not have jurisdiction to set aside or remit an award on the ground of errors of fact or law on the face of the award.*
(c) The Arbitration Act *should provide that the court may set aside an award where an arbitrator has committed or whose conduct amounts to an "arbitral error" to be defined as an error made by an arbitrator that constitutes misconduct and as including*

(i) corrupt or fraudulent conduct,
(ii) bias,
(iii) exceeding his powers,
(iv) failure to observe the rules of natural justice.

(d) On an application to set aside an award for an arbitral error, where the sole ground of relief established is a defect in form or a technical irregularity, the court, if it finds that no substantial wrong or miscarriage of justice has occurred, should have the power to refuse to set aside the award.

38. *(a) An appeal should lie on any question of law arising out of an award.*
(b) In an appeal brought under (a) the court should have the power to

(i) confirm, vary or set aside the award, or
(ii) remit the award to the arbitrator.

39. *(a) An appeal under recommendation 38 should lie to the Supreme Court of British Columbia.*
(b) Local Judges of the Supreme Court have the jurisdiction of a Supreme Court Judge in proceedings under the Arbitration Act.

40. *(a) An appeal should not be brought under recommendations 38 unless*

(i) all the parties to the arbitration consent, or
(ii) the court has given leave.

(b) The court should not grant leave under recommendation 40(a)(ii) unless

(i) the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a substantial miscarriage of justice,
(ii) the point of law is of importance to some class or body of persons of which the applicant is a member, or
(iii) the point of law is of general or public importance.

(c) Where the court grants leave under recommendation 40(a)(ii), it should be permitted to attach conditions to the order that it considers appropriate.

41. *(a) The Supreme Court should have jurisdiction to determine any question of law arising in the course of an arbitration proceeding on the application of any party to the proceeding*

(i) with the consent of the arbitrator, or
(ii) with the consent of all the other parties.

(b) An appeal should lie to the Court of Appeal from a determination made pursuant to recommendation 41(a).

42. The Supreme Court should not entertain an application under recommendation 41 unless it is satisfied that the determination of the question of law will produce substantial savings in costs to the parties.

43. (a) The Supreme Court should be empowered to order an arbitrator to state the reasons for his award in sufficient detail to enable the court, should an appeal be brought, to consider any question of law arising out of the award.
(b) The court should not make an order under this recommendation unless

(a) before the award was made, one of the parties to the reference gave notice to the arbitrator that a reasoned award would be required, or
(b) there is some special reason why such a notice was not given.

44. (a) The Supreme Court should not have jurisdiction to entertain applications made pursuant to recommendations 38 to 44 where the parties to a reference have entered into an agreement in writing which excludes the right of appeal under recommendation 38.
(b) An exclusion agreement should be of no effect unless it is entered into after the commencement of the hearing of the arbitration.

B. A New Arbitration Act

The implementation of our recommendations will require extensive amendments to the present *Arbitration Act*. In view of this, we thought it might be helpful to the reader if a draft *Arbitration Act* incorporating our recommendations, and which could replace the present Act, were to be included in this Report. Such a draft has been prepared by Commission Counsel, with the assistance of a member of Legislative Counsel's staff, and is reproduced as Appendix G. We should emphasize that the Commission has not considered the draft in detail and that it is not a formal recommendation of the Commission that any legislation should follow the draft set out in Appendix G. The draft Act is offered only for the purpose of illustrating the lines along which legislation might proceed and to place our recommendations in context. It is not intended to bind any legislative draftsman who might ultimately be called upon to prepare a Bill implementing our recommendations.

C. Acknowledgements

Our arbitration study has been a relatively longterm project and we thank all those whose efforts have contributed to the development of our final recommendations. This includes all those who took the time to consider and respond to the Working Paper that preceded this Report. It also includes a number of former members of the Commission. While this Report reflects the conclusions of the Commission as presently constituted, it would be inappropriate not to acknowledge the contribution of two former Chairmen, The Honourable Mr. Justice Lambert and Mr. Leon Getz, and of Mr. Paul Fraser, a former Commissioner. Each took a part in the preparation of the Working Paper. We also express our gratitude to Clifford Watt of Legislative Counsel's office for his help in the preparation of the draft Act.

Finally, we express our thanks to Mr. Anthony J. Spence, Counsel to the Commission. He carried the main burden of research and, subject to directions from the Commission, wrote the Working Paper and this Report. His has been a major contribution.

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APPENDICES

APPENDIX A

CHAPTER 18
ARBITRATION ACT

Interpretation

1. In this Act

"court" means the Supreme Court;
"submission" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named or not.
RS1960142; 19763313

Application to other Acts

2. This Act applies to an arbitration under an 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 recognized by that Act. RS19601425.

Submission irrevocable; has effect of court order

3. A submission, unless a contrary intention appears, is irrevocable except by leave of the court and has the same effect in all respects as if it had been made an order of the court. RS1960143; 19763313.

Provisions implied in submission

4. A submission, unless a contrary intention appears, is deemed to include the following provisions so far as they are applicable to the reference under the submission:

(a) the reference is to a single arbitrator unless otherwise provided;
(b) if the reference is to 2 arbitrators, they may appoint an umpire at any time within the period for making an award;
(c) the arbitrators shall make their award in writing within 3 months after entering on the reference, or after having been called on to act by notice in writing from a party to

the submission or on or before any later day to which the arbitrators in writing extend 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 advised a party or the umpire in writing that they cannot agree, the umpire may promptly enter on the reference in place of the arbitrators;

(e) the umpire shall make his award within one month after the original or extended time expired, or by any later day to which the umpire in writing extends the time for making his award;

(f) the parties to the reference and persons claiming through them shall, subject to any legal objection, submit to be examined on oath by the arbitrators or umpire on the matter in dispute and shall, subject to the Act, produce before the arbitrators or umpire all records within their possession or power, which may be 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;

(h) the award is final and binding on the parties and the persons claiming through them;

(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 of them shall be paid, may tax or settle the amount of those costs and may award costs to be paid as between solicitor and client; but the fees and expenses to be taken by or allowed to any arbitrator, umpire, clerk, secretary or reporter shall not be more than those prescribed by the Lieutenant Governor in Council. RS1960144,Sch; 1977312.

Reference to official referee

5. Where a submission provides that the reference shall be to an official referee, any master, registrar or special referee to whom application is made shall, subject to any order of the court for transfer or otherwise, hear and determine the matters agreed to be referred. RS1960145; 19763313.

Court may stay legal proceedings

6. If a party to a submission or a person claiming through him commences legal proceedings against another party to the submission or a person claiming through him in respect of any matter agreed to be referred, a party to the legal proceedings may after appearance and before delivery of any pleadings or taking any other step in the proceedings, apply to the court to stay the proceedings. The court, 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. RS1960146; 19763313.

Appointment in default of single arbitrator

7. Where a submission provides that the reference be to a single arbitrator

(a) if an appointed arbitrator refuses to act, is incapable of acting or dies, and the submission does not indicate to the contrary, a new arbitrator may be appointed;

(b) if all the parties do not, after differences have arisen, concur in the appointment of an arbitrator or of a new arbitrator, a party may serve the other party with a written notice to concur in the appointment of an arbitrator or of a new arbitrator;

(c) if the appointment is not made within 7 clear days after the notice is served, the court shall, on application by the party who gave the notice, appoint an arbitrator who has the same powers to act in the reference and to make an award as if he had been appointed by consent of all parties. RS1960147; 19763313.

Appointment in other cases of default

8. Where a submission provides that the reference be to 2 arbitrators, one appointed by each party, or to 3 arbitrators, one appointed by each party and the third by the 2 arbitrators or another person or in any other manner, or to 2 arbitrators and an umpire, appointed by the 2 arbitrators or another person or in any other manner, then unless the submission expresses a contrary intention,

(a) if either of the arbitrators appointed by the parties refuses to act, is incapable of acting or dies, the party appointing him may appoint a new arbitrator in his place;
(b) if a third arbitrator or an umpire refuses to act, is incapable of acting or dies, a new third arbitrator or umpire may be appointed in the same manner as his predecessor;
(c) if either party fails to appoint an arbitrator either originally or after an arbitrator appointed by him refuses to act or dies, any party having appointed his arbitrator may serve the other party with a written notice to appoint an arbitrator or new arbitrator;
(d) if the 2 arbitrators fail to appoint a third arbitrator or an umpire either originally or after a third arbitrator or an umpire appointed by them refuses to act or dies, in substitution for the third arbitrator or umpire, any party may serve the arbitrators with a written notice to appoint or concur in the appointment of a third arbitrator or new third arbitrator, umpire or new umpire;
(e) if any appointment is not made pursuant to the notice mentioned in the last 2 preceding paragraphs within 7 clear days after the notice is served, the court shall, on application by the party who gave the notice, appoint an arbitrator, third arbitrator or umpire, as the case may be, who has the same power to act in the reference and make an award as if he had been appointed by the parties or by the arbitrators respectively and by consent of all parties;
(f) the court, on hearing an application under the last preceding paragraph and on terms thought proper, may permit the party in default under paragraph (c) to appoint an arbitrator to act for him. RS1960148; 19763313.

When majority may make award

9. Where a submission provides that the reference shall be to 3 arbitrators then, unless the submission expresses a contrary intention, the award may be made by a majority of the arbitrators. RS1960149.

Powers of arbitrator

10. The arbitrators or umpire may, unless the submission expresses a contrary intention,

(a) administer oaths to witnesses;
(b) state an award for the whole or part of the submission as a special case for the opinion of the court; and
(c) correct any clerical mistake or error in an award arising from any accidental slip or omission. RS19601410.

Subpoena to witness or to a reference from court

11. A party to a submission or to a reference from the court may issue a subpoena to a witness but not for a document which the witness could not be compelled to produce in an action. RS19601411,21(1); 19763313.

Extending time for award

12. The court may extend the time for making an award, whether the time has expired or not. RS19601412; 19763313.

Power to remit award

13. (1) On an arbitration, the court may remit the matter referred or some of it for reconsideration by the arbitrators or umpire.
(2) The arbitrators or umpire shall, unless the order otherwise directs, make their new award within 3 months of the order. RS19601413; 19763313.

Power to remove arbitrator or set aside award

14. (1) The court may remove an arbitrator or umpire who has misconducted himself and may set the award aside.
(2) The court may set the award aside where an arbitration or award has been improperly procured or an arbitrator or umpire has misconducted himself. RS19601414.

Enforcing award

15. An award or submission may, by leave of the court, be enforced in the same manner as a judgment or order to the same effect. RS19601415; 19763313.

Reference by court order

16. In any proceeding, other than a criminal proceeding,

(a) if all parties interested and not under disability consent;
(b) if the proceeding requires a prolonged examination of documents, or a scientific or local investigation which cannot in the opinion of the court 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 may at any time order the whole matter, or a question of fact arising in the proceeding, to be tried before an arbitrator agreed on by the parties. [Note: *see also Supreme Court Act*.] RS19601417; 19763313.

Powers on reference

17. (1) In a reference by the court to an arbitrator, the arbitrator is deemed to be an officer of the court and has the authority and shall conduct the reference in the manner prescribed by rules of court and as the court may direct.
(2) The report or award of an arbitrator on a reference is, unless set aside by the court, equivalent to the verdict of a jury. RS19601418(1,2); 197633 13.

Remuneration

18. The remuneration to be paid to an arbitrator on a reference, or in cases of voluntary arbitration should the parties differ, shall be determined by the court. RS19601418(3); 19763313.

Court powers

19. The court and the Court of Appeal have for references the powers which are conferred on the court in references out of court. RS19601419,20; 19763313.

Attendance of prisoner

20. The court may order the attendance of a prisoner for examination before an arbitrator. RS19601421(2); 19763313.

Special case

21. An arbitrator may at any stage of a reference, and shall if directed by the court, state a special case for the opinion of the court on any question of law arising in the course of the reference. RS19601422; 19763313.

Costs

22. An order under this Act may be made on terms, as to costs or otherwise, as the authority making the order thinks just. RS19601423.

Application to Crown

23. (1) This Act applies to an arbitration to which the Crown in the right of the Province, or a ministry or minister of the Province, is a party.
(2) Nothing in this Act empowers the court to order a proceeding to which the Crown, ministry or minister is a party, or a question or issue in the proceeding, to be tried before an arbitrator without the consent of the Crown,or affects the law on costs payable by or to the Crown. RS19601424; 19763313.

Applications to court

24. (1) An application to set aside, remit or enforce an award under this Act shall be made by petition under the rules of court.
(2) Without leave of the court, an application to set aside or remit an award shall not be made more than 2 months after the parties have been notified of the award. 19763313.

APPENDIX B

Other Statutory Provisions relating to Arbitration (excluding Expropriation and Labour Matters)

CHAPTER 57
COMMUNITY CARE FACILITY ACT

Arbitration in case of conflicting regulations

8. (1) Where the building or structure, for which an application for a licence as a community care facility is made under this Act, does not comply with the applicable municipal enactments referred to in section 5 (a) (iii) or (iv), but is otherwise in compliance with that sec-

tion, and where the municipality, on application for a variation of the enactment or for an exemption from it, refuses the application, the applicant for a licence may notify the minister and the municipality in writing that he requires the matter to be determined by *arbitration*.
(2) Upon receipt of the notification, the minister and the municipality may each appoint one arbitrator, and the 2 arbitrators so appointed shall, within 10 days of the date of the last appointment, appoint a third arbitrator.
(3) If the 2 arbitrators fail to appoint a third arbitrator within the time limited by subsection (2), the applicant or the minister or the municipality may apply to the Supreme Court, after notice to the other parties as required by the Rules of Court, for the appointment of a third arbitrator.
(4) Upon their appointment as provided in this section, the arbitrators, after considering the public interest, may

(a) dismiss the application; or enactment.
(b) order that the applicant be exempted from the provisions of the enactment.

(5) An order made under subsection (4) is final and binding on the applicant and the municipality, and if the building or structure is exempted under subsection (4) (b), the subsequent owners of the building or structure shall, subject to compliance with the provisions of this Act, continue to be exempted from the provisions of the enactment so long as the building or structure is licensed as a community care facility under this Act.
(6) Except as otherwise provided in this section, the *Arbitration Act* applies to an *arbitration* under this Act, but the applicant for a licence shall pay all the costs of the arbitration. 196948; 1971107; 1972137; 1973165; 1974176,11; 1975135.

CHAPTER 59
COMPANY ACT

Division (2)

Dissent procedure

231. (1) Where,

(a) being entitled to give notice of dissent to a resolution as provided in section 37, 127, 150, 246, 268, 273 or 313, a member of a company (in this Act called a "dissenting member") gives notice of dissent;
(b) the resolution referred to in paragraph (a) is passed; and
(c) the company or its liquidator proposes to act on the authority of the resolution referred to in paragraph (a), the company or the liquidator shall first give to the dissenting member notice of the intention to act and advise the dissenting member of his rights under this section.

(2) On receiving a notice of intention to act in accordance with subsection (1), a dissenting member is entitled to require the company to purchase all his shares in respect of which the notice of dissent was given.
(3) The dissenting member shall exercise his right under subsection (2) by delivering to the registered office of the company, within 14 days after the company, or the liquidator, gives the notice of intention to act,

(a) a notice that he requires the company to purchase all his shares referred to in subsection (2); and
(b) the share certificates representing all his shares referred to in subsection (2); after which he is bound to sell those shares to the company and the company is bound to purchase them.

(4) A dissenting member who has complied with subsection (3), the company, or, if there has been an amalgamation, the amalgamated company, may apply to the court, which may

(a) require the dissenting member to sell, and the company or the amalgamated company to purchase, the shares in respect of which the notice of dissent has been given;
(b) fix the price and terms of the purchase and sale, or order that the price and terms be established by *arbitration*, in either case having due regard for the rights of creditors;
(c) join in the application any other dissenting member who has complied with subsection (3); and
(d) make consequential orders and give directions it considers appropriate.

(5) The price to be paid to a dissenting member for his shares shall be their fair value as of the day before the date on which the resolution referred to in subsection (1) was passed, including any appreciation or depreciation in anticipation of the vote on the resolution, and every dissenting member who has complied with subsection (3) shall be paid the same price.
(6) The amalgamation or winding up of the company, or any change in its capital, assets or liabilities resulting from the company acting on the authority of the resolution referred to in subsection (1), shall not affect the right of the dissenting member and the company under this section or the price to be paid for the shares.
(7) Every dissenting member who has complied with subsection (3) may

(a) not vote, or exercise or assert any rights of a member, in respect of the shares for which notice of dissent has been given, other than under this section;
(b) not withdraw the requirement to purchase his shares, unless the company consents; and
(c) until he is paid in full, exercise and assert all the rights of a creditor of the company.

(8) Where the court determines that a person is not a dissenting member, or is not otherwise entitled to the right provided by subsection (2), the court may make the order, without prejudice to any acts or proceedings which the company, its members, or any class of members may have taken during the intervening period, it considers appropriate to remove the limitations imposed on him by subsection (7).
(9) The relief provided by this section is not available if, subsequent to giving his notice of dissent, the dissenting member acts inconsistently with his dissent; but a request to withdraw the requirement to purchase his shares is not an act inconsistent with his dissent.
(10) A notice of dissent ceases to be effective if the member giving it consents to or votes in favour of the resolution of the company to which he is dissenting, except where the consent or vote is given solely as a proxy holder for a person whose proxy required an affirmative vote. 197318228; 197612 47.

CHAPTER 60
COMPANY CLAUSES ACT

***Arbitration* and appointment of arbitrators**

163. (1) When any dispute authorized or directed by this or the special Act, or an Act incorporated with them, to be settled by arbitration arises, then unless both parties concur in the appointment of a single arbitrator, each party, on the request of the other party, shall by writing under his hand nominate and appoint an arbitrator to whom the dispute shall be referred. After that appointment has been made neither party has power to revoke it without the consent of the other, nor does the death of either party operate as a revocation.
(2) If for the space of 14 days after the dispute arises, and after a request in writing is served by the one party on the other party to appoint an arbitrator, the last mentioned party fails to appoint an arbitrator, then on such failure the party making the request, and having himself appointed an arbitrator, may appoint the arbitrator to act on behalf of both parties, and he may proceed to hear and determine the matters which are in dispute. In that case the award or determination of the single arbitrator is final. RS196068163.

Appointment of umpire

164. Where more than one arbitrator is appointed, the arbitrators shall, before they enter on the matters referred to them, nominate and appoint by writing under their hands an umpire to decide on matters on which they differ. If the umpire dies, or refuses or for 7 days neglects to act, they shall, immediately after the death, refusal or neglect, appoint another umpire in hisplace. The decision of the umpire on the matters referred to him is final.RS196068164.

***Arbitration Act* to apply**

165. The *Arbitration Act* applies to the arbitrations, except where it is inconsistent with this or the special Act or an Act incorporated with them. RS196068165.

CHAPTER 61
CONDOMINIUM ACT
[Part to be repealed]

Certificate of full payment

38. (1) The strata corporation, on the application of the owner, shall, within 7 days, issue a certificate in Form A that no money is owing to it by the owner.
(2) In preparing the certificate, the strata corporation may take into account arrears in contributions to common expenses, fines for breach of the bylaws, money expended under section 34 (2), unsatisfied judgments against the owner and pecuniary awards of an *arbitrator*. It shall not take into account claims for damages caused by the owner and not determined by an arbitrator or a court.
(3) The strata corporation may issue the certificate on arrangements with the owner, satisfactory to it, that will ensure that money owing to the corporation will be paid on sale of the strata lot.
(4) A fee of not more than $5 may be charged for the certificate. 19748922(1,2,3); 19776419.

Oppressive acts

42. An owner may refer to *arbitration* or may apply to the court to prevent or remedy a matter where he alleges

(a) the affairs of the strata corporation are being conducted, or the powers of the corporation or strata council are being exercised, in a manner oppressive to one or more owners, including himself; or
(b) that some act of the strata corporation has been done or is threatened, or that some resolution of the owners or a class of owners has been passed or is proposed that is unfairly prejudicial to one or more owners, including himself. 19776420.

Arbitration

44. (1) The strata corporation or an owner may, prior to the commencement of a court proceeding about a dispute, refer to arbitration the dispute between the strata corporation and an owner or between 2 or more owners about any matter, including, without limiting that statement, a dispute about

(a) contributions to common expenses or money paid under section 34 (2);
(b) fines for the breach of the bylaws or rules and regulations;
(c) damages to common property, common facilities and other assets of the strata corporation; and
(d) decisions of the strata council or the strata corporation where the strata corporation consists of 2 strata lots.

(2) Notice shall be given to the strata council, the strata corporation or the owner affected, as the case may be. Within 2 weeks after the notice is received, the parties to the reference shall agree on and appoint a single arbitrator.
(3) If they cannot agree on a single arbitrator, each party shall, within one further week, appoint an arbitrator, and the 2 arbitrators so appointed shall appoint a third arbitrator who shall be the chairman. If the 2 arbitrators cannot agree on a chairman, the *Arbitration Act* applies.
(4) Unless the parties otherwise agree, each arbitrator shall be an owner and occupier of a strata lot in another strata development for at least one year, but may not be a member of the strata corporation affected by the arbitration. 19748924(1 to 5); 19757411.

Arbitration proceedings

45. (1) The arbitrators shall hear the reference as soon as possible at a convenient location in the strata plan or nearby.
(2) The arbitrators shall conduct the hearing as they believe proper, allowing each party adequate opportunity to present or rebut evidence.
(3) The arbitrators may accept evidence on oath, affidavit or otherwise, as they believe proper, whether or not admissible in a court. Members of the corporation who are not parties may present evidence only if requested to do so by a party, but the hearing is open to all members.
(4) The arbitrators may make whatever award they consider just and equitable, including an order in the nature of a mandatory or prohibitive injunction, or for payment of pecuniary damages and shall make an order about the contrition of the parties to the cost of the arbitration and remuneration of the arbitrators.
(5) The award of the arbitrators may be entered in the registry of the court and enforced with the leave of the court in the same manner as an order of that court.
(6) Subject to section 44 (3), the *Arbitration Act* does not apply.
(7) Neither section 44 nor this section requires a strata corporation to be a party to an arbitration proceeding between 2 or more owners only and the proceeding is not about a breach of the bylaws or regulations, or about the common property, common facilities or other assets of the strata corporation. 19748924(6 to 12); 19776421.

Separate residential and commercial sections

51. (1) The owners of residential strata lots in a strata plan that includes lots that are residential and not residential may petition the strata corporation for permission to form a separate section within the corporation consisting of all the residential strata lots in the strata plan.
(2) The owners of nonresidential strata lots in a similar strata plan may petition the strata corporation for permission to form a separate section within the corporation consisting of all the lots in the strata plan that are not residential.
(3) The petition shall include amendments to the bylaws necessary for the formation and administration of the separate section, and, if applicable, an application to have an area designated as limited common property.
(4) Where the petition is signed by 75%, or more, of the owners whose strata lots are included in the proposed separate section, the strata corporation shall approve the formation of the section, may approve the amendments to the bylaws and may designate an area as limited common property.
(5) The owner developer may, as the owner of all strata lots, cause the strata corporation to form the separate sections.
(6) A change in the bylaws on formation of a separate section requires the consent of the superintendent if made within one year after the strata plan is filed.
(7) Any matter on which the strata corporation and the members of the proposed separate section cannot agree may be referred to *arbitration* under section 44. 19716423.

Lessor's right to purchase strata lot

97. (1) The Crown or other lessor shall purchase the strata lot lessee's interest in the strata lot on the termination of the strata lot lease.
(2) The purchase price shall be arrived at as of the date of expiration of the strata lot lease, and shall be

    (a) the price calculated on the basis set out in a schedule filed with the leasehold strata plan; or
    (b) if none, the fair market value of the lessee's interest in the strata lot evaluated as if the lease did not expire.

(3) The Crown or other lessor under the strata lot may, if the strata corporation consents by unanimous resolution, change the basis of calculation of the purchase price of the strata lots set out in the schedule, and shall file the amended schedule with the registrar.
(4) Unless otherwise expressly provided in the strata lot lease or agreed in writing by the Crown or other lessor and the strata lot lessee, where the Crown or other lessor and the strata lot lessee have failed to agree on the purchase price under subsection (2) (b), 30 days prior to the date of termination on expiry or 30 days after the date of termination under section 109(2), the purchase price under subsection (2) (b) shall be determined by *arbitration* under the *Arbitration Act*. 19748954; 19776441.

Renewal of lease

100. (1) Where, at the expiration of the term of a strata lot lease or a renewal of it the Crown or other lessor elects to renew the strata lot lease, it shall be renewed for a term of not less than 5 years.
(2) The Crown or other lessor shall in writing, at least one year prior to the expiry of the lease, advise the lessee that the Crown or other lessor has elected

    (a) to renew the lease for the renewal term specified; or

(b) not to renew the strata lot lease.

(3) Where the advice is not given under subsection (2), the Crown or other lessor shall be deemed to have elected to renew the strata lot lease for a term of 5 years.
(4) Where the election is not to renew, the Crown or other lessor shall purchase the lessee's interest in the strata lot under section 97 within 15 days after the earlier of the dates on which the purchase price is agreed to, or has been finally determined by *arbitration*. 19776443.

Renewal terms

101. (1) A renewal of a strata lot lease shall be on the same terms as the strata lot lease, other than for rent.
(2) Unless otherwise expressly provided in the lease, or otherwise agreed to in writing between the lessor and the lessee, the rent for the renewal period shall be determined by agreement between the Crown or other lessor and the strata lot lessee by a date not later than the beginning of the renewal period, and, failing agreement, shall be determined by arbitration.
(3) Where *arbitration* is required, the *Arbitration Act* applies. The rent shall be that share of the current market rental value of the land included in the strata plan, excluding all buildings and improvements, apportioned to the strata lot in accordance with the schedule filed under section 4 (g). 19776443.

CHAPTER 66
COOPERATIVE ASSOCIATION ACT

Arbitration of disputes

33. (1) Every dispute arising out of the affairs of an association, between a member, or any person aggrieved who has for not more than 6 months ceased to be a member, or any person claiming through a member or person aggrieved, or claiming under the rules, and the association or a director, shall be decided by arbitration, and the decision made is binding on all parties, and may be enforced on application to a County Court, and unless the bylaws otherwise provide there is no appeal from such decision.
(2) The arbitration shall be under the *Arbitration Act* unless the rules prescribe some other method. RS19607730.

CHAPTER 114
ESTATE ADMINISTRATION ACT

Powers of executors to pay

71. An executor may pay or allow any debt or claim on any evidence that he thinks sufficient, and accept a composition, or a security, real or personal, for a debt due to the deceased, and allow any time for payment of the debt as he thinks fit, and may also compromise, compound or submit to *arbitration* all debts, accounts, claims and things relating to the estate of the deceased. For any of these purposes an executor may enter into, give and execute agreements, instruments of composition, releases and other things he thinks expedient, without being responsible for a loss to be occasioned by them. RS1960377.

Claims dependent on conditions or contingency

116. (1) If a creditor of the deceased claims on a contract dependent on a condition or contingency which does not happen previous to the declaration of the first dividend or distribution of or out of the insolvent estate, a dividend shall be reserved on the amount of the conditional or contingent claim, until the condition or contingency is determined; but if it appears to the court by which the administration of the insolvent estate is decreed or ordered that the administration may then be kept open for an undue length of time, the court may direct that the value of the contingent or conditional claim be ascertained before a special referee or *arbitrator*, to be appointed by the court, and the referee or *arbitrator* has and is invested with, for the purposes of his appointment, all the rights, powers and authorities given under the *Arbitration Act*, and shall make his award, which award the court, after hearing all interested parties, may reject or confirm.
(2) Where the award is rejected, another special referee or arbitrator shall be appointed, as provided in subsection (1), to establish the value of the claims, subject to the control of the court, and shall make his award. If his award is confirmed, the amount mentioned in it shall be that for which the creditor shall rank on the insolvent estate as for a debt payable absolutely. RS19603124.

CHAPTER 137
FISHERIES ACT

Arbitration of price

21. (1) Where a dispute or difference arises in any year between the licensees of herring canneries, herring reduction plants, herring dry salteries, salmon canneries, salmon dry salteries or tierced salmon plants, and fishermen engaged in blueback fishing, and fishermen owning or operating nets or seines for the catching of fish of the kind processed in plants of that class, as to the price to be paid by the licensees for fish caught by the fishermen, and where no agreement for the settlement of the dispute or difference is arrived at before April 1 in that year, the matter of the dispute or difference may be referred to *arbitration* under this section.
(2) On application to the Lieutenant Governor in Council on behalf of the licensees or of the fishermen, the matter may be referred to 3 arbitrators to be appointed by the Lieutenant Governor in Council, one of whom may be nominated by an association representative of the licensees and designated by the minister, and one by an association representative of the fishermen and designated by the minister.
(3) For this subsection, an application on behalf of licensees may be made by an association representative of the licensees, and an application on behalf of fishermen may be made by an association representative of the fishermen.
(4) The order in council appointing the 3 arbitrators shall designate the parties to the arbitration, and shall define the scope of the arbitration.
(5) The order in council shall as between the parties be a submission to arbitration within the meaning of the *Arbitration Act*, and is conclusive evidence that all the requirements of this Part and the regulations in respect of the appointment of arbitrators and of matters precedent and incidental to the arbitration have been complied with.
(6) Every award of arbitrators appointed under this section shall fix the price of fish as between the parties to the arbitration for the current season or any part of the current season. RS196015025; 19611919; 19752221.

CHAPTER 140

Deletions and reductions

53. (1) The minister may, in a notice served on its holder at least one year in advance,

(a) delete Crown land from a tree farm licence area or woodlot licence area, where the deletion does not affect the allowable annual cut approved for the tree farm licence or woodlot licence;

(b) delete from a tree farm licence area, Crown land referred to in section 28(b)(i), 31(1) or (2), or 32(1), to be used

(i) for the purposes of highway, pipeline or power transmission line rights of way or of water storage; or

(ii) for a purpose other than referred to in subparagraph (I) and other than timber production;

(c) delete from a woodlot licence area or the area described in a timber licence Crown land to be used

(i) for the purposes of highway, pipeline or power transmission line rights of way or of water storage; or

(ii) for a purpose other than referred to in subparagraph (I) and other than timber production; or

(d) reduce the allowable annual cut authorized in a forest licence or timber sale licence where Crown land in the public sustained yield unit or timber supply area specified in it is to be used

(i) for the purposes of highway, pipeline and power transmission line rights of way or of water storage; or

(ii) for a purpose other than referred to in subparagraph (I) and other than timber production.

(2) Where the total deletions made during a deletion period

(a) from a tree farm licence area under subsection (1)(b),

(i) for purposes referred to in subsection (1)(b)(i), have the effect of reducing the portion of the allowable annual cut then approved for the tree farm licence that the chief forester determines is attributable to the Crown land referred to in sections 28(b)(i), 31(1) and (2) and 32(1) by more than 5% of the portion of the allowable annual cut for the tree farm licence that the chief forester determines was attributable to that land at the beginning of the deletion period; or

(ii) for purposes referred to in subsection (1)(b)(ii), have the effect of reducing the portion of the allowable annual cut then approved for the tree farm licence area that the chief forester determines is attributable to the Crown land referred to in sections 28(b)(i), 31(1) and (2) and 32(1) by more than 5% of the portion of the allowable annual cut for the tree farm licence that the chief forester determines was attributable to that land at the beginning of the deletion period; or

(b) from a woodlot licence area under subsection (1)(c),

(i) for purposes referred to in subsection (1)(c)(i), have the effect of reducing the allowable annual cut approved for the woodlot licence by more than 5% of the allowable annual cut approved at the beginning of the deletion period; or
(ii) for purposes under subsection (1)(c)(ii), have the effect of reducing the allowable annual cut approved for the woodlot licence by more than 5% of the allowable annual cut approved at the beginning of the deletion period, the Crown shall compensate its holder in respect of the amount of the reduction exceeding 5%, for the unexpired portion of its term.

(3) Where the total deletions made under subsection (1)(c) during a deletion period from the area described in a timber licence

(a) for purposes referred to in subsection (1)(c)(i) exceed 5% of the area described in the timber licence at the beginning of the deletion period; or
(b) for purposes under subsection (1)(c)(ii) exceed 5% of the area described in the timber licence at the beginning of the deletion period, the Crown shall compensate its holder in respect of the area exceeding 5%.

(4) Where the total reductions in the allowable annual cut authorized in a forest licence or timber sale licence made during a deletion period, in consequence of Crown land use

(a) for purposes referred to in subsection (1)(d)(i) exceed 5% of the allowable annual cut authorized for the licence at the beginning of the deletion period; or
(b) for purposes under subsection (1)(d)(ii) exceed 5% of the allowable annual cut authorized for the licence at the beginning of the deletion period, the Crown shall compensate its holder in respect of the amount of the reduction exceeding 5%, for the unexpired portion of its term.

(5) In addition to compensation otherwise payable under this section, the Crown shall compensate the holder of a tree farm licence, woodlot licence, timber licence, forest licence or timber sale licence for improvements made to Crown land that

(a) are authorized by the Crown; and
(b) are not paid for by the Crown under this or the former Act.

(6) Where the amount of compensation is not agreed on, it shall be submitted for determination by one *arbitrator* or 3 arbitrators appointed under the *Arbitration Act* and

(a) the person who is to be compensated shall, in a notice served on the minister, elect whether one or 3 arbitrators shall be appointed; and
(b) the *Arbitration Act* applies to the submission.

(7) Notwithstanding this Act but subject to the consent of the person entitled, compensation payable under subsection (2), (3) or (4) may take the form of an agreement authorized under Part 3.
(8) A tree farm licence, woodlot licence, timber licence, forest licence or timber sale licence is deemed to be amended to the extent provided in a notice served under subsection (1) and its holder shall enter into an agreement with the Crown, evidencing the amendment.
19782353.

CHAPTER 176

Conditions applicable to hospital receiving financial assistance

41. (1) Where the Province has granted financial assistance toward the planning, constructing, reconstructing, purchasing and equipping of a hospital as defined in section 1, 5 or 25, or the acquiring of land or buildings for hospital purposes, the owner or operator of it shall

(a) secure the written approval of the minister before making

(i) a structural alteration to an area in the hospital used for housing or serving patients, where the total cost of labour and materials exceeds $500; or

(ii) an increase or decrease in the space used for housing patients, or in the number of beds ordinarily maintained for patients, or before using an area designed for housing patients for any other purpose;

(b) if the hospital premises or equipment is damaged or destroyed, set aside from the payment received under an insurance policy covering the loss or from other compensation received in regard to it a sum determined by the minister to be proportionate to the amount of financial assistance granted by the Province;

(c) secure the written approval of the minister to a proposed lease or transfer of the hospital land, building or equipment, or any part of it, to another person and where a lease or transfer is made, there shall be set aside from the consideration or purchase price a sum determined by the minister in the manner set forth in paragraph (b), except that where the minister determines that a lease or transfer is in the public interest and is made for consideration or purchase price that is less than the leasehold or market value, the minister may direct that no sum be set aside in that instance, and he may further direct that this section applies to a subsequent lease or transfer; and no lease or transfer of hospital land, building or equipment for which the Province has granted financial assistance is effective unless approved by the minister; or

(d) if the hospital land, building or equipment ceases to be used for hospital purposes, set aside a sum determined by the minister to be proportionate to the amount of financial assistance granted by the Province, but the minister may direct that no sum need be set aside if he determines that the land, building or equipment is to be used for a purpose that is in the public interest, and, in that case, he may require the owner or operator to subsequently set aside a sum if the land, building or equipment is leased or transferred or ceases to be used for a purpose that is in the public interest.

(2) In the event that the sum determined by the minister to be set aside under subsection (1)(b), (c) or (d) is not acceptable to the owner or operator of the hospital, the sum to be set aside shall be submitted to *arbitration* under the *Arbitration Act*, and the sum determined by the arbitration board shall be the sum to be set aside under subsection (1) (b), (c) and (d).

(3) A sum required to be set aside under subsection (1) (b) or (c) shall be paid into the consolidated revenue fund within one month of the day on which the owner or operator of a hospital receives payment, in full or in part, of insurance money or other compensation, or the proceeds of a lease or transfer.

(4) A sum required to be set aside under subsection (1) (d) shall be paid into the consolidated revenue fund by the owner or operator of the land, building or equipment in the manner determined by the minister and within a period specified by him which shall not exceed

one year, or a longer period specified by the Lieutenant Governor in Council, from the date on which the minister notifies the owner or operator of the sum to be set aside. RS196017841; 1961278; 1970137.

Extended application of s. 41

42. (1) Section 41 shall, with the necessary modifications, apply to the owner or operator of a hospital in respect of financial assistance provided under the *Hospital District Act*.
(2) The determination under this section of the sum to be set aside under this section, including sums related to money provided to the owner or operator of a hospital by the board of a regional hospital district in payment of items of expense determined to be the sole responsibility of the regional hospital district under the *Hospital District Act*, shall be made by the minister and shall, subject to proceedings under the *Arbitration Act*, be paid to the board of the regional hospital district in which the hospital is located within the appropriate period specified in section 41.
(3) The board of a regional hospital district shall hold each sum received under this section separate from all other money, and use each sum only for purposes approved by the minister. 1970138.

CHAPTER 261
MINERAL PROCESSING ACT

Board of arbitration

5. (1) The Lieutenant Governor in Council is by this Act authorized and empowered to constitute a board to be called a Board of *Arbitration*, referred to as the "board", not exceeding 3 members.
(2) Where a board is constituted, the Lieutenant Governor in Council shall appoint the members of the board and shall designate one of the members as chairman.
(3) The chairman and each member of the board shall receive the remuneration fixed by the Lieutenant Governor in Council. 1970266.

CHAPTER 265
MINING REGULATION ACT

Connection between mines

137. (1) Where the inspector considers it necessary for the protection of workers employed underground, the inspector may recommend in writing to the chief inspector that a connection between mines be established at a place the inspector considers advisable and may further recommend that the connection be made and equipped so as to constitute a refuge station.
(2) The inspector, on the direction of the chief inspector, shall cause a copy of the recommendations, accompanied by a copy of this section, to be served personally on or mailed by registered post to the owner or the agent and the manager of each of the mines affected, to afford an opportunity for the making of representations in the matter on behalf of the respective owners.
(3) The chief inspector may in any case give directions for the time and manner of the making of representations on behalf of an owner, and may in writing approve the recommendations of the inspector in whole or in part and may determine

(a) the design, specifications and locations of the connection passages, bulkheads or other structures to be constructed in order to safeguard the present and future operations of the mines affected;
(b) the work to be done by the owner of each of the mines affected and the proportion in which the cost of the work and of establishing and maintaining the connection shall be borne by the owners of the mines affected;
(c) the time when the work shall be commenced and completed; and
(d) other provisions or requirements the chief inspector considers necessary or advisable.

(4) On the approval and determination of the chief inspector under subsection (3), the inspector may issue an order for the establishment and maintenance of the connection and refuge station, if any, in accordance with the terms of the chief inspector's approval and determination.
(5) A copy of the approval and determination shall be attached to the order and form a part of it, and the order is, subject to subsections (7) to (9), binding in accordance with its terms on all persons affected by it.
(6) A copy of the order shall be served immediately on the owner, agent or manager of each mine affected by the order.
(7) If, within 30 days after receiving a copy of the order, the owner, agent or manager of a mine affected by the order sends to the minister written objections to the order and requests arbitration, the matter shall be referred to arbitration under the *Arbitration Act*, and the date of the receipt of the objections by the minister shall be considered to be the date of reference.
(8) The reference shall be to a board of arbitrators composed of one arbitrator to be appointed by the minister and one by the owner of each mine affected by the order and the minister shall confirm, vary or rescind the order in accordance with the award of the arbitrators.
(9) The owner of each mine affected by the order shall implement the order according to its terms. 19672523 (Rule 115).

CHAPTER 290
MUNICIPAL ACT

Division (3) Leases

Leasing municipal property

542. (1) The council may by bylaw absolutely lease any real property held or owned by the municipality, other than land acquired or held under section 679, for any term or terms, including an option for renewal not exceeding in the aggregate 99 years.
(2) Every lease made under this section may be made subject to the *Land Transfer Form Act* and shall contain

(a) a proviso for reentry by the lessor on failure to pay rent or to observe and perform the covenants contained in it; and
(b) a prohibition against subletting without the approval of the council.

(3) A lease may contain provisions requiring that

(a) the rental be renegotiated periodically during the term of the lease; and

(b) if, on renegotiation, the parties to the lease fail to agree, the matter will be referred to arbitration under the *Arbitration Act*. RS1960255477; 19614323; 19643351; 197313354.

CHAPTER 312
PARTNERSHIP ACT

Rules for determining rights and duties of partners in relation to partnership

27. The interests of partners in the partnership property and their rights and duties in relation to the partnership shall be determined, subject to any agreement express or implied between the partners, by the following rules:

(a) all the partners are entitled to share equally in the capital and profits of the business and must contribute equally towards the losses, whether of capital or otherwise, sustained by the firm;
(b) the firm must indemnify every partner in respect of payments made and personal liabilities incurred by him

(i) in the ordinary and proper conduct of the business of the firm; or
(ii) in or about anything necessarily done for the preservation of the business or property of the firm;

(c) a partner making, for the purpose of the partnership, any actual payment or advance beyond the amount of capital which he has agreed to subscribe is entitled to interest at a fair rate from the date of the payment or advance;
(d) a partner is not entitled, before the ascertainment of profits, to interest on the capital subscribed by him;
(e) every partner may take part in the management of the partnership business;
(f) no partner is entitled to remuneration for acting in the partnership business;
(g) no person may be introduced as a partner without the consent of all existing partners;
(h) any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners, but no change may be made in the nature of the partnership business without the consent of all existing partners;
(i) the partnership books are to be kept at the place of business of the partnership, or the principal place, if there is more than one, and every partner may, when he thinks fit, have access to and inspect and copy any of them; and
(j) a partner may refer a difference concerning the interpretation or application of the partnership agreement to *arbitration* for a final and binding decision under the *Arbitration Act*. RS196027727; 1978334.

CHAPTER 341
PROVINCIAL COURT ACT
[Part to be proclaimed]

Power of court to refer matters to arbitration

34. (1) In a proceeding other than a criminal proceeding where requested to do so by all parties, the court may order that a financial question in dispute between the parties in the pro-

ceeding be referred to arbitration by a court referee authorized under section 6 (3) to act as arbitrator.

(2) On completion of an arbitration under subsection (1), the court referee shall file the arbitration award with the court and deliver a copy of it to each party to the arbitration and the award, on filing, is, subject to subsection (4), an order of the court.

(3) Sections 15 and 24 of the *Arbitration Act* and the tariff set out in the Schedule do not apply to an arbitration under this section.

(4) The court may, on application made by a party within 14 days after delivery to him under subsection (2) of an arbitration award,

(a) set aside the award and proceed with trial where the court referee misconducted himself, or the arbitration or arbitration award has been improperly procured; or

(b) remit the matters referred under subsection (1), or any of them, to the reconsideration of the court referee.

(5) Except as otherwise provided in this section, the *Arbitration Act* applies to an arbitration under this section and "court", where referred to in that Act, shall be deemed to mean the court. 1977606.

CHAPTER 355
RANGE ACT

Amount payable

25. Where the amount of compensation payable under sections 23 and 24 is not agreed on, it shall be submitted for determination by one arbitrator or 3 arbitrators appointed under the *Arbitration Act* and

(a) the person who is to be compensated shall, in a notice served on the minister, elect whether one or 3 arbitrators shall be appointed; and

(b) the *Arbitration Act* applies to the submission. 19783625.

CHAPTER 364
RESIDENCE AND RESPONSIBILITY ACT

Interpretation

1. In this Act

"local area" or "area" means the area comprised in a municipality or in a rural area of the Province;

"local authority" or "authority" for a person who is a resident in a municipality, means the municipality; and, for a person who is a resident in a rural area, means the Crown in right of the Province;

"municipality" includes every municipal area or corporation incorporated as a city, city municipality, district municipality, township municipality or village municipality by or under any general or special Act of the Legislature;

"reside" means to have a home, whether in a lodging house, hotel, apartment house or private dwelling, that is a permanent place of abode to which, whenever a person is absent, he has the intention of returning. In the case of a married man, the place where his family resides may be considered as his

home, even though he is absent for considerable periods in the course of his employment, if he does not establish a permanent home elsewhere. In the case of a single person who has no fixed place of abode to which he usually returns after absence in the course of his employment, his home may generally be considered to be at the place where he spends the greater portion of his time;

"social assistance" means aid in money or in kind that is granted to a person residing in the Province on account of his needy circumstances, to provide him with the necessities of life, by Canada or a province, or by any municipality in the form of unemployment relief, poor relief, mothers' allowance, cost of living bonus granted to old age security recipients, or old age assistance, blind persons' allowances, disability allowances with or without cost of living bonus, maintenance of a child other than a child in the care and custody of a children's aid society or the Superintendent of Child Welfare by reason of apprehension or committal under the *Family and Child Service Act* or the *Juvenile Delinquents Act*, war veterans' allowance, war veterans' unemployment assistance, or other public measure to aid destitute persons, or that is granted to a person by any private association or agency designated for the purpose of this paragraph by the *Board of Arbitration* established under this Act; and means also institutional care or foster home care provided for any person in any institution or foster home catering to the needs of the indigent, the sick or the infirm, wholly or partially at public expense or at the expense of a private association or agency designated for the purpose of this paragraph by the Board of Arbitration, where such person is unable to meet the charges for his care. RS19603402.

Board of *Arbitration*

7. (1) There shall be a Board of Arbitration for the purposes of this Act composed of 3 members appointed by the Lieutenant Governor in Council, one of whom shall be nominated by the Minister of Human Resources, one by the Union of British Columbia Municipalities, and the other by the 2 members so nominated. The members shall hold office for a term of 3 years or until their successors are appointed. Where a vacancy occurs by reason of the death or resignation of a member, his successor shall be nominated and appointed in the same manner in which that member was originally appointed. The members of the board shall not receive any remuneration for their services, but shall be paid out of the consolidated revenue fund the amount of the travelling and other personal expenses necessarily incurred by them in the discharge of their official duties.

(2) All disputes, including disputes to which the Crown in right of the Province is a party, arising out of the application of this Act shall be referred to the Board of Arbitration for decision, and the decisions of the board shall be final. The board has power to disallow any claim made by one local authority against another under section 5, or to reduce the amount of the claim if the board considers it unreasonable or excessive.

(3) In order to govern the eligibility to obtain social assistance of persons who move from one local area to another, the Board of Arbitration has power to grant to any person a permit of removal from the local area in which he is a resident and, if the person has already removed, may make the permit retroactive to the actual date of removal. The board may cancel any permit of removal which it has issued or which has been issued by any local authority, either on its own initiative or at the request of any local authority. The board shall grant and approve permits of removal only in those cases where it appears that the best interests of a person and his dependents (if any) will clearly be served by removal from one local area to another. RS1960340 9(1,2,3).

CHAPTER 365
RESIDENTIAL TENANCY ACT

Jurisdiction of rentalsman

50. (1) The rentalsman has and shall exercise, subject to this Act, exclusive jurisdiction to receive an application, investigate, hear and make an order respecting a matter for which he is specifically given jurisdiction under this Act.

(2) For the purposes of subsection (1), the rentalsman is specifically given jurisdiction under this Act to make an order

(a) designating premises as residential premises under section 2(1)(d);
(b) respecting procedure under sections 5(4), 5(5) and 6(2) for a matter that is before him or that is required under this Act to be before him;
(c) approving the contents and posting of a summary of this Act under section 6(1)(a) or requiring a landlord to post a notice under section 6(3);
(d) declaring a covenant unreasonable under section 10(3);
(e) permitting the discontinuance of a service or facility under section 12;
(f) respecting a right, under this Act or a tenancy agreement, to possess or occupy residential premises under section 13;
(g) determining that occupation is bona fide required notwithstanding section 16(2);
(h) permitting a corporation to give a notice of termination under section 16(4);
(i) determining that vacant possession is necessary under section 17 (1)(g);
(j) respecting a tenant's expenses under section 19;
(k) terminating a tenancy under section 21;
(l) setting aside a notice of termination under section 23;
(m) permitting the tenant to give a notice of dispute under section 24;
(n) requiring tenants to pay rent to the rentalsman under section 26(1), making a payment under section 26(2) and26(5) or requiring payment under section 26(6);
(o) authorizing alteration of a means of entry or access under section 27(1);
(p) determining what is a reasonable purpose of entry under section 28 (3);
(q) authorizing a larger security deposit under section 31(1)(b), authorizing a setoff under section 31(3) or requiring repayment under section 31(5);
(r) extending the time for a landlord to serve a notice of claim under section 33(2);
(s) determining the entitlement to a security deposit under section 34(1);
(t) extending the time for a landlord to serve a writ of summons or reduce a claim under section 35(1);
(u) determining what time and efforts are reasonable under section 36(2) and relieving from a forfeiture under that subsection;
(v) permitting a claim for cleaning under section 37;
(w) determining the value of a chattel under section 41(4);
(x) directing disposal of a chattel under section 41(5);
(y) authorizing an encumbrancer to treat a security agreement as being in default under section 42(1);
(z) authorizing a landlord to sell or dispose of a chattel under section 43;
(aa) approving an appearance under section 46(4);
(bb) respecting any matter that is before him under section 47;
(cc) prescribing records to be kept under this Act, except for Part 8, under section 49;
(dd) arbitrating a dispute under section 52; and
(ee) varying or cancelling an order made by him under subsection (3).

(3) The rentalsman may vary or cancel, on the terms he thinks just, an order or interim order made by him under this Act.

(4) Where special circumstances require it, the rentalsman may make an interim ex parte order in respect of a matter in which he has jurisdiction to make an order under this Act. 19776151.

Rentalsman and arbitration

52. (1) Notwithstanding that a matter in dispute between parties to a tenancy agreement is not within the rentalsman's exclusive jurisdiction, a party to the dispute may refer the dispute to the rentalsman, who may, with the written consent of all parties to the tenancy agreement, *arbitrate* the dispute and in that case the finding of the rentalsman is final and binding on all parties.
(2) Where the rentalsman acts as arbitrator under subsection (1), the *Arbitration Act* does not apply. 19776153.

CHAPTER 414
TRUSTEE ACT

Power to compound

9. (1) An executor or administrator, or 2 or more trustees acting together, or a sole acting trustee where by any instrument creating the trust a sole trustee is authorized to execute the trusts and powers, may, if and as he or they think fit, accept a composition or a security, real or personal, for a debt or for property claimed, and may allow time for payment of a debt, and may compromise, compound, abandon, submit to *arbitration* or otherwise settle a debt, account, claim or other thing relating to the testator's or intestate's estate or to the trust; and for any of those purposes may enter, give, execute and do the agreements, instruments of composition or arrangement, releases and other things that to him or them seem expedient, without being responsible for loss occasioned by an act or thing so done by him or them in good faith.
(2) This section applies only if and as far as a contrary intention is not expressed in any instrument creating the trust, and has effect subject to the terms of that instrument. RS196039010.

CHAPTER 419
UNIVERSITY ACT
[Part to be proclaimed]

Jurisdiction disputes

85. (1) Where a question arises respecting the powers and duties of the convocation, chancellor, president, faculties or an officer or employee of the university, that is not provided for in this Act, the board shall settle and determine the question, and its decision is final.
(2) Where a dispute respecting jurisdiction under this Act arises between a university and the universities council, the dispute may be referred to binding *arbitration* at the option of a party to the dispute.
(3) A party referring a matter in dispute to binding arbitration under this section shall mail to the other party to the dispute a written notice of intention to do so.
(4) Where a matter in dispute has been referred to arbitration under subsection (3), the arbitration board shall consist of

(a) one nominee of the university or universities;
(b) one nominee of the universities council; and
(c) a chairman agreed on and nominated by the parties.

(5) Where, under subsection (4),

(a) a party fails to nominate an arbitrator; or
(b) the parties fail to nominate a chairman, the minister shall nominate the arbitrator or chairman, as the case may be.

(6) The decision in writing of the arbitration board respecting a matter in dispute under this section shall be committed to writing by the chairman and copies sent by registered mail to each party to the dispute, and is final and binding on the parties.
(7) Unless the parties otherwise agree,

(a) each party to an arbitration shall bear its own fees, expenses and costs;
(b) each party to an arbitration shall bear the fees and expenses of a member of the arbitration board that is appointed by, or on behalf of, that party; and
(c) each party shall bear equally the fees and expenses of the chairman.

(8) The decision of a majority of the arbitrators shall be the decision of the arbitration board, and, if there is no majority decision, the decision of the chairman shall be the decision of the arbitration board.
(9) An arbitration board shall, within 10 days after making an award, file a copy of it with the minister, and the minister shall make available for public inspection a copy of the award.
(10) Except as otherwise provided in this section, the *Arbitration Act* applies to an arbitration under this section. 197410085.

CHAPTER 55
VANCOUVER CHARTER

314. (1) The Council may, subject to the *Electrical Energy Inspection Act*, provide

(a) for regulating and inspecting any electrical works, and for defining the same;
(b) for prohibiting any person from installing any electrical works until he has obtained a permit therefor from the City Electrician;
(c) for fixing the terms and conditions upon which the City Electrician may issue such permits, and for fixing the fees to be charged therefor;
(d) for compelling the removal and for preventing the sale or use of any electrical works which do not conform with the provisions of the bylaw;
(e) for adopting, in whole or in part or with such modifications as may be provided in the bylaw, the rules and provisions of the Canadian Electrical Code promulgated by the Canadian Standards Association with respect to electrical works, and constituting as regulations under the bylaw the rules and provisions so adopted or modified;
(f) for regulating the placing or maintenance in any street of any electrical works, including the poles or other means of support thereof;
(g) for requiring that any person permitted to erect any poles in a street shall afford to the city reasonable accommodation thereon for such wires or other equipment as may be required for the purposes of the city upon such terms as may be agreed upon or, failing agreement, upon terms to be fixed by *arbitration* under the *Arbitration Act*;
(h) for the construction of underground conduits in streets, and for permitting the use thereof for telegraph and telephone cables and other electrical works upon such terms and conditions, to such extent and for such charges, as may be prescribed in the bylaw;

(i) for the lighting of streets, squares, and other city property by the erection, construction, and installation of light standards or by any other means;
(j) for contracting for the supply of electrical energy for the purpose of lighting streets, squares, and other city property.

(2) Nothing in section 313, except in so far as it relates to electrical works (elsewhere than in a generating plant or substation) designed or intended for use for or in connection with the final consumption of electrical energy, and nothing in subsection (1) of this section, except clauses (f), (g), (h), and (i), shall apply to any electrical works maintained and used by any electric light, electric power, or streetrailway company or transportation company operating trolleycoaches.
(3) The powers conferred on the Council by the said clause (f) shall not be used

(a) to require any of the said companies to remove any presently existing electrical works or any renewal thereof, or to move the same to any new location, except upon condition that the city shall pay reasonable compensation to such company for the expense and loss of and from such removal or moving, the amount thereof to be such as the city and such company may agree upon or, in the event of failure to agree, as may be settled by arbitration pursuant to the *Arbitration Act*; or
(b) with respect to underground duct banks or vaults of any of the said companies, except as to the position and overall size thereof.

(4) The Council may make bylaws for regulating the placing and maintenance in any street by any gas company of gaspipes, governors, regulators, and other equipment and apparatus used in connection with the transmission or distribution of gas. 1953, c. 55, s. 314; 1961, c. 76, s. 6.

570. (1) Prior to the adoption of a zoning bylaw, or of an official development plan, or of an amendment to a zoning by law, or of an alteration, addition, or extension to an official development plan, the Council may cause to be withheld the issuance of any development or building permit for a period of thirty days from the date of application for such permit.
(2) Where any permit is so withheld, the application therefor shall be considered by the Council within the said period of thirty days, and, if in the opinion of the Council, the development proposed in the application would be at variance or in conflict with a development plan in the course of preparation, or with an alteration, addition, or extension to an official development plan in course of preparation, or with a zoning bylaw in course of preparation, or with an amendment to a zoning bylaw in course of preparation, the Council may withhold the permit for a further sixty days from the expiration of the thirtyday period hereinbefore referred to, or the Council may impose such conditions on the granting of the development permit as may appear to the Council to be in the public interest.
(3) In the event that the Council does not within the said period of sixty days adopt any such plan, alteration, addition, extension, or bylaw, the owners of the land in respect of which a development permit was withheld or conditions were imposed pursuant to this section shall be entitled to compensation for damages arising from the withholding of such development permit, or the imposition of such conditions. Such compensation shall be determined by arbitration pursuant to the *Arbitration Act*. 1959, c. 107, s. 20.

CHAPTER 429
WATER ACT

Claims against improvement districts to be arbitrated

47. Every claim against an improvement district arising out of the construction or maintenance of a dyke or out of the diversion of water for the reclamation or drainage of land in an improvement district shall be determined by *arbitration* under the *Arbitration Act*, and no action in respect of the claim may be brought in a court of the Province. The award made on an arbitration is, with the consent of the Attorney General, subject to review by the Court of Appeal, and the statutes and rules governing appeals from final judgments of the Supreme Court to the Court of Appeal shall govern appeals under this section. RS196040549.

Appendix C

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OR FOREIGN ARBITRAL AWARDS

The following States have deposited their ratifications (r) or accessions (a) with the Secretary-General of the United Nations:

Austria	(a)	-	2	May	1961
Botswana	(a)	-	20	December	1971
Bulgaria	(r)	-	10	October	1961
Byelorussian SSR	(r)	-	15	November	1960
Central African Republic	(a)	-	15	October	1962
Ceylon	(r)	-	9	April	1962
Czechoslovakia	(r)	-	10	July	1959
Ecuador	(r)	-	3	January	1962
Egypt	(a)	-	9	March	1959
Federal Republic of Germany	(r)	-	30	June	1961
Finland	(r)	-	19	January	1962
France	(r)	-	26	June	1959
Ghana	(a)	-	9	April	1968
Greece	(a)	-	16	July	1962
Hungary	(a)	-	5	March	1962
India	(r)	-	13	July	1960
Israel	(r)	-	5	January	1959
Italy	(a)	-	31	January	1969
Japan	(a)	-	20	June	1961
Khmer Republic	(a)	-	5	January	1960
Madagascar	(a)	-	16	July	1962
Mexico	(a)	-	14	April	1971
Morocco	(a)	-	12	February	1959
Netherlands	(r)	-	24	April	1964
Niger	(a)	-	14	October	1964
Nigeria	(a)	-	17	March	1970
Norway	(r)	-	14	March	1961
Philippines	(r)	-	6	July	1967
Poland	(r)	-	3	October	1961
Romania	(a)	-	13	September	1961
Sweden	(r)	-	20	January	1972
Switzerland	(r)	-	1	June	1965
Syrian Arab Republic	(a)	-	9	March	1959
Thailand	(a)	-	21	December	1959
Trinidad and Tobago	(a)	-	14	February	1966
Tunisia	(a)	-	17	July	1967
Ukrainian SSR	(r)	-	10	October	1960
Union of Soviet Socialist Republics	(r)	-	24	August	1960
United Republic of Tanzania	(a)	-	13	October	1964
United States of America	(a)	-	30	September	1970

The following States have signed the Convention: Argentina, Belgium, Costa Rica, El Salvador, Jordan, Luxembourg, Monaco, Pakistan.

Done at New York, 10 June 1958

United Nations, *Treaty Series*, vol. 330, p. 38 no. 4739 (1959)

Article I

This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical

or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

The term "agreement in writing" shall include an arbitral clause in a contracts or an arbitration agreement, signed by the parties or contained in an exchange of letters of telegrams.

The courts of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

   The duly authenticated original award or a duly certified copy thereof;
   The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

The recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V (1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extend allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

Article VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

Article IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into forced for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article XI

In the case of a federal or non-unitary State, the following provisions shall apply

With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of contracting States which are not federal States:

With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constitutent states or provinces at the earliest possible moment;

A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constitutent units in regard to any particular provision of this Convention, showing the extend to which effect has been given to that provision by legislative or other action.

Article XIII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

Article XIII

1. Any Contracting State may denounce this Convention by a written, notification to the Secretary-General of the unites Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any state which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extend that it is itself bound to apply the Conventioin

Article XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

Signatures and ratifications in accordance with article VIII;
Accessions in accordance with article IV;
Declarations and notifications under article I, X and XI;
The date upon which this Convention enters into force in accordance with article XII;
Denunciations and notifications in accordance with article XIII.

Article XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

Appendix D

Arbitration Act 1979
1979 CHAPTER 42

An Act to amend the law relating to arbitrations and for purposes connected therewith.

[4th April 1979]

BE IT ENACTED by the Queen's most Excellent Majesty, by and wit the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows: -

1. - (1) In the Arbitration Act 1950 (in this Act referred to as "the principal Act") section 21 (statement of case for a decision of the High Court) shall cease to have effect and, without prejudice to the right of appeal conferred by subsection (2) below, the High Court shall not have jurisdiction to set aside or remit an award on an arbitration agreement on the ground of errors of fact or law on the face of the award.

(2) Subject to subsection (3) below, an appeal shall lie to the High Court on any question of law arising out of an award made on an arbitration agreement; and on the determination of such an appeal the High Court may by order -

confirm, vary or set aside the award; or
remit the award to the reconsideration of the arbitrator or umpire together with the court's opinion on the question of law which was the subject of the appeal;

and where the award is remitted under paragraph (b) above the arbitrator or umpire shall, unless the order otherwise directs, make his award within three months after the date of the order.

(3) An appeal under this section may be brought by any of the parties to the reference -

with the consent of all the other parties to the reference; or

subject to section 3 below, with the leave of the court.

(4) The High Court shall not grant leave under subsection (3)(b) above unless it considers that, having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more of the parties to the arbitration agreement; and the court may make any leave which it gives conditional upon the applicant complying with such conditions as it considers appropriate.

(5) Subject to subsection (6) below, if an award is made and, on an application made by any of the parties to the reference, -

with the consent of all the other parties to the reference, or
subject to section 3 below, with the leave of the court,

it appears to the High Court that the award does not or does not sufficiently set out the reasons for the award, the court may order the arbitrator or umpire concerned to state the reasons for his award in sufficient detail to enable the court, should an appeal be brought under this section, to consider any question of law arising out of the award.

(6) In any case where an award is made without any reason being given, the High Court shall not make an order under subsection (5) above unless it is satisfied -

that before the award was made one of the parties to the reference gave notice to the arbitrator or umpire concerned that a reasoned award would be required; or

that there is some special reason why such a notice was not given.

(7) No appeal shall lie to the Court of Appeal from a decision of the High Court on an appeal under this section unless -

the High Court or the Court of Appeal gives leave; and

it is certified by the High Court that the question of law to which its decision relates either is one of general public importance or is one which for some other special reason should be considered by the Court of Appeal.

(8) Where the award of an arbitrator or umpire is varied on appeal, the award as varied shall have effect (except for the purposes of this section) as if it were the award of the arbitrator or umpire.

2. - (1) Subject to subsection (2) and section 3 below, on an application to the High Court made by any of the parties to a reference -

with the consent of an arbitrator who has entered on the reference or, if an umpire has entered on the reference, with his consent, or

with the consent of all the other parties.

The High Court shall have jurisdiction to determine any question of law arising in the course of the reference.

(2) The High Court shall not entertain an application under subsection (1)(a) above with respect to any question of law unless it is satisfied that -

the determination of the application might produce substantial savings in costs to the parties; and

the question of law is one in respect of which leave to appeal would be likely to be given under section 1(3)(b) above.

(3) A decision of the High Court under this section shall be deemed to be a judgment of the court within the meaning of section 27 of the Supreme Court of Judicature (Consolidation) Act 1925 (appeals to the Court of Appeal), but no appeal shall lie from such a decision unless -

the High Court or the Court of Appeal gives leave; and

it is certified by the High Court that the question of law to which its decision relates either is one of general public importance or is one which for some other special reason should be considered by the Court of Appeal.

3. - (1) Subject to the following provisions of this section and section 4 below -

the High Court shall not, under section 1(3)(b) above, grant leave to appeal with respect to a question of law arising out of an award, and

the High Court shall not, under section 1(5)(b) above, grant leave to make an application with respect to an award, and

no application may be made under section 2(1)(a) above with respect to a question of law,

If the parties to the reference in question have entered into an agreement in writing (in this section referred to as an "exclusion agreement") which excludes the right to appeal under section 1 above in relation to that award or, in a case falling within paragraph (c) above, in relation to an award to which the determination of the question of law is material.

(2) An exclusion agreement may be expressed so as to relate to a particular award, to awards under a particular reference or to any other description of awards, whether arising out of the same reference or not; and an agreement may be an exclusion agreement for the purposes of this section whether it is entered into before or after the passing of this Act and whether or not it forms part of an arbitration agreement.

(3) In any case where -

an arbitration agreement, other than a domestic arbitration agreement, provides for disputes between the parties to be referred to arbitration, and

a dispute to which the agreement relates involves the question whether a party has been guilty of fraud, and

the parties have entered into an exclusion agreement which is applicable to any award made on the reference of that dispute,

then, except in so far as the exclusion agreement otherwise provides, the High Court shall not exercise its powers under section 24(2) of the principal Act (to take steps necessary to enable the question to be determined by the High Court) in relation to that dispute.

(4) Except as provided by subsection (1) above, section 1 and 2 above shall have effect notwithstanding anything in any agreement purporting -

to prohibit or restrict access to the High Court; or

to restrict the jurisdiction of that court; or

to prohibit or restrict the making of a reasoned award.

(5) An exclusion agreement shall be of no effect in relation to an award made on, or a question of law arising in the course of a reference under, a statutory arbitration, that is to say, such an arbitration as is referred to in subsection (1) of section 31 of the principal Act.

(6) An exclusion agreement shall be of no effect in relation to an award made one, or a question of law arising in the course of a reference under, a arbitration agreement which is a domestic arbitration agreement unless the exclusion agreement is entered into after the commencement of the arbitration in which the award is made or, as the case may be, in which the question of law arises.

(7) In this section "domestic arbitration agreement" means an arbitration agreement which does not provide, expressly or by implication, for arbitration in a State other than the United Kingdom and to which neither -

an individual who is national of, or habitually resident in, any State other than the United Kingdom, nor

a body corporate which is incorporated in, or whose central management and control is exercise in, any State other than the United Kingdom,

is a party at the time the arbitration agreement is entered into.

4. - (1) Subject to subsection (3) below, if an arbitration award or a question of law arising in the course of a reference relates, in whole or in part, to -

a question or claim falling within the Admiralty jurisdiction of the High Court, or
a dispute arising out of a contract of insurance, or
a dispute arising out of a commodity contract,

An exclusion agreement shall have no effect in relation to the award or question unless either -

the exclusion agreement is entered into after the commencement of the arbitration in which the award is made or, as the case may be, in which the question of law arises, or
the award or question relates to a contract which is expressed to be governed by a law other than the law of England and Wales.

(2) In subsection (1)(c) above "commodity contract" mean a contract -

for the sale of goods regularly dealt with on a commodity market or exchange in England or Wales which is specified for the purposes of thsi section by an order made by the Secretary of State; and
of a description so specified.

(3) The Secretary of State may by order provide that subsection (1) above -

shall cease to have effect; or
subject to such conditions as may be specified in the order, shall not apply to any exclusion agreement made in relation to an arbitration award of a description so specified:

and an order under this subsection may contain such supplementary, incidental and transitional provisions as appear to the Secretary of State to be necessary or expedient.

(4) The power to make an order under subsection (2) or subsection (3) above shall be exercisable by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(5) In this section "exclusion agreement" has the same meaning as in section 3 above.

5. - (1) If any party to a reference under an arbitration agreement fails within the time specified in the order or, if no time is so specified, within a reasonable time to comply with an order made by the arbitrator or umpire in the course of the reference, then, on the application of the arbitrator or umpire or of any party to the reference, the High Court may make an order extending the powers of the arbitrator or umpire as mentioned in subsection (2) below.

(2) If an order is made by the High Court under this section, the arbitrator or umpire shall have power, to the extend and subject to any conditions specified in that order, to continue

with the reference in default of appearance or of any other act by one of the parties in like manner as a judge of the High Court might continue with proceedings in that court were a party fails to comply with an order of that court or a requirement of rules of court.

(3) Section 4(5) of the Administration of Justice Act 1970 (jurisdiction of the High Court to be exercisable by the Court of Appeal in relation to judge-arbitrators and judge-umpires) shall not apply in relation to the power of the High Court to make an order under this section, but in the case of a reference to a judge-arbitrator or judge-umpire that power shall be exercisable as in the case of any other reference to arbitration and also by the judge-arbitrator or judge-umpire himself.

(4) Anything done by a judge-arbitrator or judge-umpire in the exercise of the power conferred by subsection (3) above shall be done by him in his capacity as judge of the High Court and have effect as if done by that court.

(5) The preceding provisions of this section have effect notwithstanding anything in any agreement but do not derogate from any powers conferred on an arbitrator or umpire, whether by an arbitration agreement or otherwise.

(6) In this section "judge-arbitrator" and "judge-umpire" have the same meaning as in Schedule 3 to the Administration of Justice Act 1970.

6. - (1) In subsection (1) of section 8 of the principal Act (agreements where reference is to two arbitrators deemed to include provision that the arbitrators shall appoint an umpire immediately after their own appointment) -

for the words "shall appoint an umpire immediately" there shall be substituted the words "may appoint an umpire at any time"; and
at the end there shall be added the words "and shall do so forthwith if they cannot agree".

(2) For section 9 of the principal Act (agreements for reference to three arbitrators) there shall be substituted the following section: -

9. Unless the contrary intention is expressed in the arbitration agreement, in any case where there is a reference to three arbitrators, the award of any two of the arbitrators shall be binding."

(3) In section 10 of the principal Act (power of court in certain cases to appoint an arbitrator or umpire) in paragraph (c) after the word "are", in the first place where it occurs, there shall be inserted the words "required or are" and the words from "or where" to the end of the paragraph shall be omitted.

(4) At the end of section 10 of the principal Act there shall be added the following subsection: -

"(2) In any case where -

an arbitration agreement provides for the appointment of an arbitrator or umpire by a person who is neither one of the parties nor an existing arbitrator (whether the provision applies directly or in default of agreement by the parties or otherwise), and

that person refuses to make the appointment or does not make it within the time specified in the agreement or, if no time is so specified, within a reasonable time,

any party to the agreement may serve the person in question with a written notice to appoint an arbitrator or umpire and, if the appointment is not made within seven clear days after the service of the notice, the High Court or a judge thereof may, on the application of the party who gave the notice, appoint an arbitrator or umpire who shall have the like powers to act in the reference and make an award as if he had been appointed in accordance with the terms of the agreement."

7. - (1) References in the following provisions of Part I of the principal Act to that Part of that Act shall have effect as if the preceding provisions of this Act were included in that Part, namely, -

section 14 (interim awards);
section 28 (terms as to costs of orders);
section 30 (Crown to be bound);
section 31 (application to statutory arbitrations); and
section 32 (meaning of "arbitration agreement").

(2) Subsections (2) and (3) of section 29 of the principal Act shall apply to determine when an arbitration is deemed to be commenced for the purposes of this Act.

(3) For the avoidance of doubt, it is hereby declared that the reference in subsection (1) of section 31 of the principal Act (statutory arbitrations) to arbitration under any other Act does not extend to arbitration under section 92 of the County Courts Act 1959 (cases in which proceedings are to be or may be referred to arbitration) and accordingly nothing in this Act or in Part I of the principal Act applies to arbitration under the said section 92.

8. - (1) This Act may be cited as the Arbitration Act 1979.

(2) This Act shall come into operation on such day as the Secretary of State may appoint by order made by statutory instrument; and such an order -

may appoint different days for different provisions of this Act and for the purposes of the operation of the same provision in relation to different descriptions of arbitration agreement; and

may contain such supplementary, incidental and transitional provisions as appear to the Secretary of State to be necessary or expedient.

(3) In consequence of the preceding provisions of this Act, the following provisions are hereby repealed, namely -

in paragraph (c) of section 10 of the principal Act the words from "or where" to the end of he paragraph;
section 21 of the principal Act;
in paragraph 9 of Schedule 3 to the Administration of Justice Act 1970, in sub-paragraph (1) the words "21(1) and (2)" and sub-paragraph (2).

(4) This Act forms part of the law of England and Wales only.

Appendix E

Extract from the Commission's Report on Expropriation (1971) LRC 5

II - PROCEDURE

A. Arbitration tribunal

1. There should be a single arbitration tribunal for hearing all claims for compensation

for expropriation;
injurious affection; or
for damages resulting from the exercise of a statutory right of entry.

2. The tribunal should be a permanent board of seven members.

3. (a) The chairman of the board should serve on a full-time basis and be appointed for a 10-year term.

Initially, the other six members of the board should serve on a part-time bases and be appointed for five-year terms.

As the work load of the board warrants it, part-time members of the board should be replaced by full-time members.

Appointments should be renewable, and there should be a mandatory retirement age.

4. (a) The chairman of the board and three of the members should be qualified lawyers, one of whom should be appointed vic-chairman, and the other three members should be experienced in real estate valuation.
(b) The chairman of the board should be given the salary and a position comparable to a Judge of the Supreme Court of British Columbia.

5. (a) A quorum of the board for the purpose of holding hearings, with respect to determining matters under paragraph 1 (a) and (b) above, should consist of the chairman or vice-chairman, one of the lawyer members (which could include the vice-chairman where the chairman presides), and one of the other members.
(b) In damage claims arising out of the exercise of a statutory right of entry, the chairman should be able to designate a single member of the board to determine the matter.

6. (a) There should be a right of appeal from the board to the Court of Appeal on all questions of fact or law, or both.
(b) Where the jurisdiction of the board or the validity of its process is otherwise questioned, such matters should be determined by way of a stated case to the Court of Appeal.

7. The board should hold its hearing in the general area where the relevant lands are located, unless the parties agree on some other place of hearing that the board would consider appropriate.

8. The board should have a registrar, and adequate clerical and secretarial staff, all of whom should be appointed under the *Civil Service Act*.

9. (a) The board should have the power to summon witnesses and require them to testify, and to require the production of documents.
   (b) Except by leave of the board, a party should not be entitled to adduce the evidence of an expert witness at the hearing unless he has filed with the board and served on the party or parties at least 10 days before the hearing begins, where the expert is an appraiser, a copy of the appraisal report and, in all other cases, a full statement of the proposed evidence.
   (c) Each party should be entitled to call two expert witnesses, with the board having power to grant leave to call additional experts.
   (d) The board should have the power to appoint experts to assist it in interpreting evidence of a special or technical nature.

10. The board should have the power to make rules, subject to the approval of the Lieutenant-Governor in Council, governing its practice and procedure and the exercise o its powers.

11. Where a person fails to comply with an order of the board with respect to the giving of evidence, or does any other thing that would have amounted to contempt in a Court of law, a member of the board should be able to certify the offence to the Supreme Court, which should be able, after holding an inquiry into the alleged offence, to punish the offender as if he had been guilty of a contempt of court.

12. (a) The board should furnish the parties with written reasons for its decision.
   (b) The board should prepare and periodically publish a summary of all its decisions, and the reasons therefore.

B. The procedural steps

1. Notice of intention to expropriate

1. Expropriation proceedings should be commenced by the giving of a notice of intention to expropriate by the expropriating authority, as follows:

   By depositing the notice in the appropriate Land Registry Office:
   By serving a copy of the notice on each registered owner whose property interests are to be expropriated:
   By publishing the notice once a week for three weeks in a newspaper having general circulation in the locality where the lands to be expropriated are situated:
   By applying to the appropriate approval authority, where such authority is a different person or body from the expropriating authority, by serving a copy of the notice on the approving authority.

2. The notice of intention to expropriate should describe the lands to be expropriated, in a manner that meets the general requirements of the *Land Registry Act*, except in those instances where regulations under the *Land Registry Act* prescribe that a preliminary plan will be acceptable.

3. In the case of publishing the notice, it should be sufficient, where the description is by plan, to refer to such a plan as being on deposit in the Land Registry Office and by a description in words.

4. Service of the notice of intention on a registered owner should be effected personally or by registered mail addressed to the person to be served at his last-known address.

5. Where a notice of intention to expropriate has been deposited in the Land Registry Office, the Registrar of Titles should be required to make an entry on the appropriate certificate of title to that effect.

6. The copy of the notice of intention to expropriate served on each registered owner should be accompanied by a statement setting out

the owner's right to invoke the inquiry procedure and his entitlement to costs for legal and appraisal advice;
the name and address of the relevant approving authority;
the statutory provision which authorizes the proposed expropriation; and
a description of the undertaking for which the property is to be taken.

2. The inquiry

The general expropriation statute should contain an inquiry procedure under which persons could object to a proposed expropriation.

The function of the inquiry procedure should be to determine whether a proposed expropriation is fair, sound, and reasonably necessary for the purpose of achieving the objectives of the expropriating authority.

An inquiry should be conducted by a single inquiry officer.

There should be a chief inquiry officer and a roster of inquiry officers, all appointed by the Attorney-General.

The function of the chief inquiry officer, who should be an official in the Department of the Attorney-General, should be to assign inquiry officers to particular inquiries.

The inquiry officers, other than the chief inquiry officer, should not be civil servants and should be appointed from the legal profession in such number as the Attorney-General deems necessary (to conduct inquiries on an *ad hoc* basis).

The inquiry procedure should be available to persons whose property is to be expropriated or whose property is likely to be injuriously affected.

The Lieutenant-Governor in Council should have the power to dispense with the inquiry procedure in special circumstances where it would be necessary or expedient in the public interest to do so.

The chief inquiry officer should be able to cancel an inquiry if the expropriating authority has been notified in writing by all the person invoking the inquiry procedure that they no longer wish an inquiry to be held.

Copies of an inquiry officer's report should be made available to the parties to the expropriation and persons who objected to the expropriation at the inquiry.

A person wishing to invoke the inquiry procedure should so notify the approving authority in writing within 30 days of being served with the notice of intention to expropriate, or the publication of the notice for the third time, whichever is later.

After receiving such notification, and when the time for making objections in respect of the expropriated land has elapsed, the approving authority should refer the notice to the

chief inquiry officer, who should forthwith assign an inquiry officer to hold a hearing, notifying the expropriating authority and the person objecting that he has done so.

Within 10 days of his assignment, the inquiry officer should fix a time and place for a hearing and send copies of the notice of hearing to the expropriating authority and all persons who were entitled to be served a with a copy of the notice of intention to expropriate.

The inquiry should be held and the inquiry officer report to the approving authority within 30 days of his assignment to hold the inquiry, or such further period as the chief inquiry officer may deem necessary for the holdings of the inquiry.

On receiving the report, the approving authority should send forthwith a copy of it to each of the parties to the inquiry.

APPENDIX F

CHAPTER 26
BARRISTERS AND SOLICITORS ACT

Taxation

92. (1) Where a bill for fees, charges or disbursements has been delivered as provided in section 90, the member of the society, his agent or assignee, or, in the case of a partnership, one of the partners or his agent, may,

(a) on the expiration of 30 days after the bill has been delivered or sent; and
(b) on serving the person charged with the bill with not less than 5 days' notice in writing of an appointment, apply to have the bill taxed before a taxing officer of the Supreme Court.

(2) The person charged with the bill or by whom payment is to be made may apply to the district registrar or other taxing officer of the Supreme Court for an appointment to tax the bill, and he shall deliver a copy of the appointment to the solicitor at the address shown on the bill.

(3) Where

(a) judgment for the amount of the bill has been given in an action; or
(b) 12 months have expired since the bill was delivered or sent, the bill shall not be taxed unless the Supreme Court finds that circumstances justify a taxation of the bill, and in that case he may order the bill to be taxed before a taxing officer.

(4) Where an action has been commenced for the recovery of the amount of the bill for which an appointment for taxation under this section has been made, the action shall not proceed until the taxation has been completed.

(5) On a taxation of a bill under this section, the taxing officer may order further particulars or details of the services for which the bill was rendered.

(6) If a person who has applied for taxation of a bill under this section, or a person who is entitled to attend on the taxation and who has received notice in accordance with this section, fails to attend on the taxation, the taxing officer may tax the bill ex parte.

(7) The rules and regulations in force governing the taxation of costs in the Supreme Court shall apply, with the necessary changes to the taxation of bills under this section.
(8) Where a dispute arises respecting a retainer, or any other matter in the taxation of a bill, the taxing officer may refer the matter to the Supreme Court for directions.
(9) Unless the taxing officer, due to special circumstances, otherwise orders,

(a) a member of the society whose bill is taxed shall pay the costs of the taxation if 1/6 or more of the total amount of the bill is taxed off; and
(b) the person charged with the bill taxed under this section shall pay the costs of the taxation if less than 1/6 of the total amount of the bill is taxed off.

Review

93. A party to the taxation of a bill may, within 14 days from the date of the certificate of the taxing officer, or within the period the Supreme Court may allow, or the taxing officer specifies at the time of signing the certificate, apply to the Supreme Court to review the taxation, and the Supreme Court may review the taxation and make the order it thinks just. If the terms of the order require, the taxing officer shall amend his certificate.

Taxed bill as judgment

94. Where a bill has been taxed under section 92, the certificate of the taxing officer or district registrar may be filed in a registry of the Supreme Court and, on expiry of the time specified or allowed under section 93, the certificate is enforceable as a judgment of the Supreme Court.

APPENDIX G

DRAFT Arbitration Act

Interpretation

1. In this Act

"arbitration" means a hearing before an arbitrator to hear and resolve a dispute in accordance with an arbitration agreement;

"arbitrator" means the person, who as the context requires, pursuant to this Act or an arbitration agreement, hears and decides an arbitration and includes an umpire;

"arbitration agreement" means a written or oral agreement or term of an agreement between two or more persons to submit present or future disputes between them to arbitration, whether or not an arbitrator is named;

Notes: Recommendation 1, page 16.

"arbitral error" means an error made by an arbitrator in the course of an arbitration that constitutes misconduct and includes

(a) corrupt or fraudulent conduct,
(b) bias,
(c) exceeding his powers, or
(d) failure to observe the rules of natural justice;

"award" means the decision of the arbitrator on the dispute that was submitted to him and includes

(a) an interim award,
(b) the reasons for the decision, and
(c) any amendments or variation in the award made under this Act;

"court" means the Supreme Court;

Application

2. This Act applies to an arbitration under an enactment as if the arbitration were pursuant to an arbitration agreement, but when there is an inconsistency between any matter in this Act and in the enactment providing for the arbitration, that enactment prevails.

Notes: Modification of current section 2, see discussion on pages 1 and 2.

Death of a party

3. (1) Subject to an agreement by the parties to an arbitration agreement, where a party to an arbitration agreement dies, the personal representatives of the deceased party are bound by, and are not by the death precluded from enforcing, the terms of the arbitration agreement and the authority of an arbitrator to hear and decide on the arbitration is not revoked by the death of the party by whom he was appointed.
(2) Subsection (1) does not affect a rule of law or an enactment under which the death of a person extinguishes a right of action.

Notes: Recommendation 2, page 18.

Appointment of arbitrators

4. (1) Where an arbitration agreement does not provide for the appointment of an arbitrator, an arbitration under that agreement shall be before a single arbitrator.

Notes: Current section 4 (a).
N.B. section 40.

(2) Where an arbitration agreement provides for the appointment of an even number of arbitrators, the arbitrators may appoint an additional person to act as an umpire.

Notes: Modification of current section 4 (b).

(3) Where an umpire is appointed and the arbitrators who have appointed him cannot reach a majority decision on any matter before them, the umpire shall decide the matter and his decision shall for all purposes be the decision of the arbitrators.

Notes: N.B. section 40.

Examination and production of records and evidence

5. (1) All parties to an arbitration and any person claiming through them shall, when ordered by the arbitrator, submit to being examined by the arbitrator under oath and shall produce all records that the arbitrator may require.

Notes: Current section 4 (f).
N.B. section 40.

(2) In an arbitration, the arbitrator shall admit all evidence that would be admissible in a court, but he may admit other evidence that he considers relevant to the issues in dispute and, subject to the rules of natural justice, he may determine the manner by which that evidence shall be admitted.

Notes: Recommendation 12, page 46.
N.B. section 40.

Subpoena to witness

6. A party to an arbitration or to a reference from the court may issue a subpoena to a witness but not for a document which the witness could not be compelled to produce in an action, and the court may order that a subpoena shall issue to compel the attendance before an arbitration of a witness.

Notes: Current section 11.

Oath

7. (1) An arbitrator may order that a witness at an arbitration testify under oath.

Notes: Current section 4 (g).
N.B. section 40.

(2) Where an arbitrator requires the testimony of a witness or a party to an arbitration to be given under oath, the arbitrator may administer the oath.

Notes: Current section 10 (a).
N.B. section 40.

Interim award

8. An arbitrator may, during an arbitration, make an interim award on any matter with respect to which he may make a final award.

Notes: Recommendation 29, page 84.
N.B. section 40.

Specific performance

9. An arbitrator has the same power as the court to make an order for a specific performance of an agreement between the parties for the sale of goods.

Notes: Recommendation 30, page 86.
N.B. section 40.

Costs

10. (1) The costs of an arbitration shall be in the discretion of the arbitrator who may, in making an order for costs, specify

(a) the persons entitled to costs,
(b) the persons who shall pay the costs,

(c) the amount of the costs or the manner of determining that amount, and
(d) the manner by which all or part of the costs shall be paid.

(2) Where in his award, the arbitrator makes no order as to costs, a party may, within 30 days of being notified of the award, apply to him for an order respecting costs.
(3) Where no application is made under subsection (2), or where following an application under subsection (2), the arbitrator makes no order as to costs, each party to the arbitration shall bear his own costs and the fees and expenses referred to in section 23 (1) shall be borne equally among each of the parties to the arbitration.

Notes: Recommendation 14, page 51.

Majority decision

11. With respect to an arbitration having more than 2 arbitrators, the award may be made by a majority of arbitrators but where there is no majority decision on any matter to be decided, the decision of the arbitrator appointed by the arbitrators to be chairman shall be the decision on that matter.

Notes: Current section 9 as modified by Recommendation 13, page 48.
N.B. section 40.

Time for arbitrator's decision

12. (1) Subject to an agreement of the parties, there is no time by which an arbitrator must make his award.

Notes: Recommendation 24, page 78.
N.B. section 40.

(2) Notwithstanding any agreement of the parties, where the parties have agreed to a time limit by which an award of an arbitrator shall be made, the arbitrator or the court may extend the time limit, whether or not the time has expired.

Notes: Recommendation 25, page 78.

(3) Subsection (2) does not affect the power of the court to make an order under section 17 (1) (b).

Notes: Section 17 (1) (b) empowers the court to remove an arbitrator for delay.
Recommendation 26, page 78.

Award binding

13. The award of the arbitrator is binding on all parties to the award.

Notes: Current section 4 (h).
Recommendation 23, page 75.
N.B. section 40.

Stay of proceedings

14. (1) Where a party to an arbitration agreement commences legal proceedings claiming relief in respect of a matter that was agreed to be resolved by arbitration, any other party to the arbitration agreement may apply to the court for an order to stay the proceedings.

Notes: Recommendation 15, page 61.

(2) In an application under subsection (1), the court shall stay the court proceeding unless the party opposing the stay shows a good reason why the court proceeding should continue in place of the arbitration, and in determining whether good reason exists, the court may consider

(a) whether the arbitration agreement was freely made,
(b) whether the matters in dispute are factually or legally complex,
(c) whether the intended arbitrator is qualified to settle the legal and factual matters in dispute,
(d) the comparative expense and delay as between the court proceeding and the arbitration under the agreement,
(e) the wishes of other parties to the arbitration agreement who have been joined in the action,
(f) whether there are other parties to the court proceedings who are not parties to the arbitration agreement,
(g) the stage of the court proceedings,
(h) the extent to which the applicant has participated in the court proceedings by delivering pleadings or taking other steps,
(i) potential bias on the part of the intended arbitrator,
(j) whether fraud has been alleged by a party to the court proceeding.
(k) whether the applicant was at the time the proceedings were commenced and at the date of the hearing remains ready and willing to do all things necessary to the proper conduct of the arbitration, and
(l) any other matter the court considers significant.

Notes: Recommendation 16, page 61.

Revocation of arbitrator's authority

15. (1) Subject to an agreement referred to in section 3 (1), the parties may not revoke the authority of an arbitrator, except by leave of the court under subsection (2).

Notes: Recommendation 18, page 68 current section 3, modified to take into account that the parties may agree under section 3 (1) that the authority of an arbitrator is revoked on the death of the appointing party.

(2) A party to an arbitration may apply to the court for an order revoking the authority of an arbitrator and the court, in considering whether to revoke that authority, shall consider the factors referred to section 14 (2) (a) to (c), (i) and (j).

Notes: Recommendation 19, page 68.

(3) Where, after a dispute arises under an arbitration agreement that names a person as an arbitrator, a party to that agreement applies to the court

(a) for an order under subsection (2), or
(b) for an order in any other proceeding where the party seeks, on grounds of apprehended bias, to

(i) revoke the arbitrator's authority, or (ii) restrain the arbitration from proceeding, the court shall not refuse the order on the ground that the appli-

cant knew or ought to have known that the arbitrator, by reason of his relationship to

(c) another party to the arbitration agreement, or
(d) the subject matter of the dispute, may not be capable of acting impartially.

Notes: Recommendation 20, page 68, modification of section 24 (1) of the English *Arbitration Act*.

Appointment of arbitrator by court

16. (1) Where an arbitration agreement provides for

(a) the appointment of a single arbitrator, and the parties, after a dispute has arisen, cannot concur in the appointment of the arbitrator, or
(b) an arbitrator or another person to appoint an arbitrator, and the arbitrator or that person neglects or refuses to make the appointment, a party may serve written notice on the other party, the arbitrator or the other person, as the case may be, to concur in the appointment of a single arbitrator or to appoint an arbitrator.

(2) Where the appointment is not made within 7 days after the notice is served under subsection (1), the court shall, on application of the party who gave the notice, appoint an arbitrator, and an arbitrator so appointed has the same powers and duties as though he were appointed under the arbitration agreement.

(3) Where

(a) an arbitrator refuses to act, is incapable of acting or dies, and
(b) the arbitration agreement does not provide a means of filling the vacancy that has occurred, or
(c) the arbitration agreement provides a means of filling the vacancy, but a qualified person has not filled the vacancy

(i) within the time provided for in the agreement, or
(ii) where no time has been provided for then within a reasonable time the court may, on the application of any party, appoint an arbitrator and an arbitrator so appointed has the same powers and duties as though he were appointed under the arbitration agreement.

Notes: Recommendation 4, page 27.

Removal of arbitrator

17. (1) The court may, on the application of a party to an arbitration, remove an arbitrator who

(a) commits an arbitral error, or
(b) unduly delays in proceeding with the arbitration or the making of his award.

Notes: Recommendation 5, page 31.

(2) Where the court makes an order under subsection (1) and the grounds for removal consist of

(a) fraudulent or corrupt conduct, or

(b) undue delay in the proceeding with the arbitration or in the making of his award, the court may order that the arbitrator
(c) receive no remuneration for his services, and
(d) pay all or part of the costs as determined by the court, that the parties to the arbitration have incurred up to the date that the order removing him was made.

Notes: Recommendation 5, page 31.

(3) Except in the case where a person is named as arbitrator in an arbitration agreement, the court may, where it makes an order under subsection (1), appoint another arbitrator to act in the place of the arbitrator who is removed, and an arbitrator so appointed has the same powers and duties as though he were appointed under the arbitration agreement.

Notes: Recommendation 6, page 31.

Scott vs. Avery clauses

18. (1) A term of an agreement providing that

(a) an action may not be commenced, or
(b) a defence to an action may not be raised or pleaded until the matter that is the subject of the cause of action or defence has been adjudicated by arbitration under that, or some other, agreement has no effect except as provided in subsection (2).

(2) A term of an agreement referred to in subsection (1) (a) or (b) shall be deemed to be an arbitration agreement.

Notes: Recommendation 21, page 72.

Time limit on commencement of arbitration may be extended

19. Where the terms of an arbitration agreement provide that a claim to which the agreement applies is barred unless

(a) notice to appoint an arbitrator is given,
(b) an arbitrator is appointed, or
(c) some other step to commence the arbitration proceedings is taken, within the time limited by the arbitration agreement, the court may, where it considers that undue hardship would otherwise result, extend the time on terms, if any, as the justice of the case requires.

Notes: Recommendation 22, page 73.

Legal principles apply unless excluded

20. An arbitrator shall be bound to adjudicate the matter before him by reference to law, unless the parties as a term of an agreement referred to in section 30, agree that the matter in dispute may be decided on equitable grounds, grounds of conscience or on some other basis.

Notes: Recommendation 10, page 41.

Arbitrator may call own witnesses

21. (1) An arbitrator may call a witness on his own motion.
(2) A witness called by the arbitrator under subsection (1) may be crossexamined by all parties to the arbitration, and all parties may call evidence in rebuttal.

Notes: Recommendation 11, page 43.

Arbitrator's decision

22. (1) An award need not be in writing.

Notes: Recommendation 27, page 80.

(2) Where an award is not in writing, the arbitrator shall, within 15 days of receiving a request in writing from a party to the arbitration, give a written and signed statement of the terms of the award.

Notes: Recommendation 28, page 80.
N.B. section 40.

Arbitrator's fees

23. (1) The fees and expenses of an arbitrator or of a clerk, secretary or reporter assisting in the arbitration, shall not exceed the fair value of the services performed, together with necessary and reasonable expenses incurred.

Notes: Current regulation.
N.B. section 40.

(2) An arbitrator is not entitled to a lien on an award in respect of his fees and expenses, and where an arbitrator has delivered his account for fees and expenses, any party to the arbitration or the arbitrator may apply to the district registrar or other taxing officer of the court for an appointment to tax the bill, and he shall deliver a copy of the appointment to the arbitrator or the parties, as the case may be.

Notes: Recommendation 7, page 35 and Recommendation 9, page 36.
(3) Section 92 of the *Barristers and Solicitors Act* applies to the procedure at a taxation under subsection (2).

Notes: Recommendation 9, page 36, section 92 of the *Barristers and Solicitors Act* is reproduced in Appendix F.

(4) A term of an arbitration agreement prohibiting the taxation of an arbitrator's fees and expenses has no effect.

Notes: Recommendation 8, page 36.

(5) A party to a taxation under subsection (2) may,

(a) within 14 days of a certificate of the taxing officer,
(b) within a period allowed by the court, or
(c) a period specified by the taxation officer in his certificate, apply to the court for a review of the taxation, and the court may review the taxation and make any order it considers just, including an order that the taxing officer amend his certificate.

Notes: Recommendation 9, adapted from section 93 of the *Barristers and Solicitors Act*.

(6) Where a bill has been taxed under subsection (2), the certificate of the taxing officer or district registrar may be filed in the registry of the court and, on the expiry of the time specified in subsection (5), the certificate may be enforced as though it were a judgment of the court.

Notes: Recommendation 9, adapted from section 93 of the *Barristers and Solicitors Act*.

Amendments to the award

24. (1) Notwithstanding any agreement to the contrary, a party to an arbitration may, within 15 days of being notified of an award, apply to the arbitrator to vary or amend the award on any matter that was raised in the arbitration.
(2) An application under subsection (1) shall be in writing and shall

(a) state in what manner it is sought to have the award varied or amended, and
(b) give a summary of the reasons in support of the application.

(3) Where the arbitrator agrees to consider the application, he shall, within 30 days after receiving the notice under subsection (2), notify all parties to the arbitration of the time and place where he will hear the application.
(4) After hearing the application, the arbitrator may amend or vary the award in a manner that he considers just and reasonable.

Notes: Recommendation 31, page 89.

Interest

25. For the purposes of the *Court Order Interest Act* and the *Interest Act* (Canada) a sum directed to be paid by an award is deemed to be a pecuniary judgment of the court.

Notes: Recommendation 32, page 92.

Enforcement of an award

26. On obtaining leave of the court, an award may be enforced in the same manner as a judgment or order of the court to the same effect, and judgment may be entered in the terms of the award.

Notes: Recommendation 33, page 97.

Court may set aside award

27. (1) Where an award has been improperly procured or an arbitrator has committed an arbitral error the court may

(a) set aside the award, or
(b) remit the award to the arbitrator for reconsideration.

Notes: Recommendation 37 (c), page 135.

(2) Where, on an application made under subsection (1), the court finds that the arbitrator has committed an arbitral error, but that the error consists of a defect in form or a technical irregularity, the court may refuse to set aside the award where the refusal would not constitute a substantial wrong or miscarriage of justice.

Notes: Recommendation 37 (d), page 136.

(3) Except as provided in section 28, the court shall not set aside or remit an award on the grounds of an error of fact or law on the face of the award.

Notes: Recommendation 37 (b), page 135.

Appeal to the court

28. (1) A party to an arbitration may appeal to the court on any question of law arising out of the award where

(a) all of the parties to the arbitration consent, or
(b) the court grants leave to appeal.

Notes: Recommendation 38, page 137 and Recommendation 40, page 147.

(2) In an application for leave under subsection (1) (b), the court shall not grant leave except where it determines that

(a) the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a substantial miscarriage of justice,
(b) the point of law is of importance to some class or body of persons of which the applicant is a member, or
(c) the point of law is of general or public importance.

Notes: Recommendation 40 (b), page 147.

(3) Where the court grants leave to appeal under this section, it may attach conditions to the order granting leave that it considers just.
(4) On an appeal to the court, the court may

(a) confirm, vary or set aside the award, or
(b) remit the award to the arbitrator together with the court's opinion on the question of law that was the subject of the appeal.

Notes: Recommendation 38 (b), page 137.

Application for reasoned award

29. (1) A party to an arbitration may apply to the court for an order that the arbitrator give more detailed reasons for his award.
(2) On an application under subsection (1), the court may order that the arbitrator state the reasons for his award in detail that is sufficient to consider any question of law that arises out of the award,were an appeal to be brought under section 28.
(3) The court shall not make an order under this section unless

(a) notice is given to the arbitrator before the award is made that a reasoned award would be required, or
(b) a good reason is shown why no such written notice was given.

Notes: Recommendation 43, page 153.

Application to court to determine question of law

30. (1) The court may, on the application of a party, determine any question of law that arises during the course of an arbitration where that party either obtains the consent of the arbitrator or of the other parties to the arbitration.

Notes: Recommendation 41, page 148.

(2) The court shall not make a determination on the question submitted unless it is satisfied that substantial savings in costs of the arbitration would result.
(3) An appeal lies to the Court of Appeal from a determination made pursuant to this section.

Notes: Recommendation 42, page 149.

Exclusion agreements

31. Where, after an arbitration hearing has commenced, the parties to it agree in writing to exclude the jurisdiction of the court under sections 28, 29 and 30, the court has no jurisdiction to make an order under those sections except in accordance with the agreement, but otherwise an agreement to exclude the jurisdiction of the court under those sections has no effect.

Notes: Recommendation 44, page 155.

Reference by court order

32. In any proceeding, other than a criminal proceeding,

(a) if all parties interested and not under disability consent;
(b) if the proceeding requires a prolonged examination of documents, or a scientific or local investigation which cannot in the opinion of the court 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 may at any time order the whole matter, or a question of fact arising in the proceeding, to be tried before an arbitrator agreed on by the parties.

Notes: Current section 16.

Powers on reference

33. (1) In a reference by the court to an arbitrator, the arbitrator is deemed to be an officer of the court and has the authority and shall conduct the reference in the manner prescribed by rules of court and as the court may direct.
(2) The report or award of an arbitrator on a reference is, unless set aside by the court, equivalent to the verdict of a jury.

Notes: Current section 17.

Remuneration

34. The remuneration to be paid to an arbitrator on a reference by the court shall be determined by the court.

Notes: Current section 18.

Court powers

35. The court and the Court of Appeal have for references the powers which are conferred on the court in references out of court.

Notes: Current section 19.

Attendance of prisoner

36. The court may order the attendance of a prisoner for examination before an arbitrator.
Notes: Current section 20.

Costs

37. An order under this Act may be made on terms, as to costs or otherwise,as the authority making the order thinks just.

Notes: Current section 22.

Application to Crown

38. (1) This Act applies to an arbitration to which the Crown in the right of the Province, or a ministry or minister of the Province, is a party.
(2) Nothing in this Act empowers the court to order a proceeding to which the Crown, ministry or minister is a party, or a question or issue in the proceeding, to be tried before an arbitrator without the consent of the Crown, or affects the law on costs payable by or to the Crown.

Notes: Current section 23.

Application to the court

39. Applications to the court under this Act shall be made by originating application under the rules of court and, in the case of an application under section 27 and 28, the application shall be made within 60 days after the parties have been notified of the award and its terms.

Note: Current section 23.

Extensions of time limits

40. The court may extend any time limit provided for in this Act notwithstanding that the application for the extension and the order granting the extension are made after the time limit in respect of which the application is made has expired.

Application of provisions

41. The provision of sections 4, 5, 7, 8, 9, 10, 11, 12 (1), 13, 22 and 23 (1) apply to every arbitration agreement except insofar as the parties have agreed otherwise.

Supreme Court Act Amendment

42. Section 11(2)(c)(i) of the *Supreme Court Act*, R.S.B.C., 1979, c. 397 is amended by striking out "*Arbitration Act*."

Note: Recommendation 39(b), page 139.