

Commercial Arbitration Bill 2011

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Western Australia

LEGISLATIVE ASSEMBLY

(As amended in Committee)

Commercial Arbitration Bill 2011

A Bill for

An Act relating to the conduct of commercial arbitrations, to repeal the *Commercial Arbitration Act 1985* and for other purposes.

The Parliament of Western Australia enacts as follows:

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Part 1A — Preliminary

1A. Short title

This is the *Commercial Arbitration Act 2011*.

1B. Commencement

This Act comes into operation as follows —

- (a) sections 1A and 1B — on the day on which this Act receives the Royal Assent;
- (b) the rest of the Act — on a day fixed by proclamation, and different days may be fixed for different provisions.

1C. Paramount object of Act

- (1) The paramount object of this Act is to facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense.
- (2) This Act aims to achieve its paramount object by —
 - (a) enabling parties to agree about how their commercial disputes are to be resolved (subject to subsection (3) and such safeguards as are necessary in the public interest); and
 - (b) providing arbitration procedures that enable commercial disputes to be resolved in a cost effective manner, informally and quickly.
- (3) This Act must be interpreted, and the functions of an arbitral tribunal must be exercised, so that (as far as practicable) the paramount object of this Act is achieved.
- (4) Subsection (3) does not affect the application of the *Interpretation Act 1984* section 18 for the purposes of interpreting this Act.

1 **1D. Explanation of origin and structure of Act**

2 (1) Sections of this Act that contain a reference to the “Model Law”
3 in the heading are substantially the same as the provisions of the
4 UNCITRAL Model Law on International Commercial
5 Arbitration (as adopted by the United Nations Commission on
6 International Trade Law on 21 June 1985 with amendments as
7 adopted by that Commission in 2006) so as to be as uniform as
8 possible with the UNCITRAL Model Law.

9 (2) Some changes have been made to those provisions of the Act
10 based on the UNCITRAL Model Law to amend or supplement
11 the provisions in their application to domestic arbitrations in
12 Western Australia or to accommodate modern drafting styles
13 and conventions (for example, provisions are drafted in gender
14 neutral terms and archaisms are replaced with modern
15 alternatives).

16 (3) Notes draw attention to substantive changes.

17 (4) The original numbering of the “articles” of the UNCITRAL
18 Model Law has been retained but converted to references to
19 “sections” and articles containing more than one sentence have
20 been re-formatted into subsections. There are a number of
21 additional provisions to those based on the UNCITRAL Model
22 Law.

23 (5) This section does not affect the interpretation or application of
24 this Act.

25 **1E. Act to bind Crown**

26 This Act binds the State and, so far as the legislative power of
27 the State permits, the Crown in all its other capacities.

28 Note: There is no equivalent to this section in the Model Law.

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Part 1 — General provisions

1. Scope of application (cf. Model Law Art 1)

(1) This Act applies to domestic commercial arbitrations.

Note: The *International Arbitration Act 1974* of the Commonwealth covers international commercial arbitrations and the enforcement of foreign arbitral awards.

(2) The provisions of this Act, except sections 8, 9, 17H, 17I, 17J, 35 and 36, apply only if the place of arbitration is in Western Australia.

(3) An arbitration is *domestic* if —

- (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in Australia; and
- (b) the parties have (whether in the arbitration agreement or in any other document in writing) agreed that any dispute that has arisen or may arise between them is to be settled by arbitration; and
- (c) it is not an arbitration to which the Model Law (as given effect by the *International Arbitration Act 1974* (Commonwealth)) applies.

(4) For the purposes of subsection (3) —

- (a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement; and
- (b) if a party does not have a place of business, reference is to be made to the party’s habitual residence.

(5) This Act does not affect any other Act by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Act.

- 1 (6) Subject to subsection (5), this Act applies to arbitrations
2 provided for in any other Act as if —
3 (a) the other Act were an arbitration agreement; and
4 (b) the arbitration were pursuant to an arbitration
5 agreement; and
6 (c) the parties to the dispute which, by virtue of the other
7 Act, is referred to arbitration were the parties to the
8 arbitration agreement,
9 except in so far as the other Act otherwise indicates or requires.

10 Model

11 Law Note: The term “commercial” should be given a wide interpretation so as
12 to cover matters arising from all relationships of a commercial
13 nature, whether contractual or not. Relationships of a commercial
14 nature include, but are not limited to, the following transactions: any
15 trade transaction for the supply or exchange of goods or services;
16 distribution agreement; commercial representation or agency;
17 factoring; leasing; construction of works; consulting; engineering;
18 licensing; investment; financing; banking; insurance; exploitation
19 agreement or concession; joint venture and other forms of industrial
20 or business co-operation; carriage of goods or passengers by air,
21 sea, rail or road.

22 Note: This section differs from the Model Law to the extent necessary to
23 apply Art 1 as incorporated in this Act to domestic commercial
24 arbitrations.

25 **2. Definitions and rules of interpretation (cf. Model Law Art 2)**

26 (1) In this Act —

27 ***arbitral tribunal*** means a sole arbitrator or a panel of
28 arbitrators;

29 ***arbitration*** means any domestic commercial arbitration whether
30 or not administered by a permanent arbitral institution;

31 ***arbitration agreement*** has the meaning given in section 7;

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1 **confidential information**, in relation to arbitral proceedings,
2 means information that relates to the arbitral proceedings or to
3 an award made in those proceedings and includes the
4 following —

- 5 (a) the statement of claim, statement of defence and all
6 other pleadings, submissions, statements or other
7 information supplied to the arbitral tribunal by a party;
- 8 (b) any information supplied by a party to another party in
9 compliance with a direction of the arbitral tribunal;
- 10 (c) any evidence (whether documentary or otherwise)
11 supplied to the arbitral tribunal;
- 12 (d) any notes made by the arbitral tribunal of oral evidence
13 or submissions given before the arbitral tribunal;
- 14 (e) any transcript of oral evidence or submissions given
15 before the arbitral tribunal;
- 16 (f) any rulings of the arbitral tribunal;
- 17 (g) any award of the arbitral tribunal;

18 **disclose**, in relation to confidential information, includes
19 publishing or communicating or otherwise supplying the
20 confidential information;

21 **domestic commercial arbitration** has the meaning given in
22 section 1(3);

23 **exercise** a function includes perform a duty;

24 **interim measure** has the meaning given in section 17(2);

25 **Model Law** means the UNCITRAL Model Law on International
26 Commercial Arbitration (as adopted by the United Nations
27 Commission on International Trade Law on 21 June 1985, and
28 as amended by the United Nations Commission on International
29 Trade Law on 7 July 2006);

30 **party** means a party to an arbitration agreement and includes —

- 31 (a) any person claiming through or under a party to the
32 arbitration agreement; and

- 1 (b) in any case where an arbitration does not involve all of
2 the parties to the arbitration agreement, those parties to
3 the arbitration agreement who are parties to the
4 arbitration;

5 *the Court* means, subject to section 6(2), the Supreme Court.

6 Note: The definitions of *arbitration agreement*, *confidential information*,
7 *disclose*, *domestic commercial arbitration*, *exercise*, *interim*
8 *measure*, *Model Law*, *party* and *the Court* are not included in the
9 Model Law.

- 10 (2) Where a provision of this Act, except section 28, leaves the
11 parties free to determine a certain issue, such freedom includes
12 the right of the parties to authorise a third party, including an
13 institution, to make that determination.
- 14 (3) Where a provision of this Act refers to the fact that the parties
15 have agreed or that they may agree or in any other way refers to
16 an agreement of the parties, such agreement includes any
17 arbitration rules referred to in that agreement.
- 18 (4) Where a provision of this Act, other than sections 25(1)(a)
19 and 32(2)(a), refers to a claim, it also applies to a counter-claim,
20 and where it refers to a defence, it also applies to a defence to
21 such counter-claim.
- 22 (5) Notes (other than the Model Law note to section 1) included in
23 this Act do not form part of this Act.

24 Note: This provision is not included in the Model Law.

25 **2A. International origin and general principles (cf. Model Law**
26 **Art 2A)**

- 27 (1) Subject to section 1C, in the interpretation of this Act, regard is
28 to be had to the need to promote so far as practicable uniformity
29 between the application of this Act to domestic commercial
30 arbitrations and the application of the provisions of the Model
31 Law (as given effect by the *International Arbitration Act 1974*
32 (Commonwealth)) to international commercial arbitrations and
33 the observance of good faith.

- 34 (2)

s. 3

- 1 (3) Without limiting subsection (1), in interpreting this Act,
2 reference may be made to the documents relating to the Model
3 Law of —
4 (a) the United Nations Commission on International Trade
5 Law; and
6 (b) its working groups for the preparation of the Model
7 Law.

- 8 (4) Subsection (3) does not affect the application of the
9 *Interpretation Act 1984* section 19 for the purposes of
10 interpreting this Act.

11 Note: This section differs from the Model Law. Art 2A(1) has been changed
12 as a consequence of the application of the Act to domestic (instead of
13 international) commercial arbitrations. Art 2A(2) is omitted because it is
14 covered by the provision referred to in section 1C (4). Subsections (3)
15 and (4) reflect section 17 of the *International Arbitration Act 1974* of the
16 Commonwealth.

17 **3. Receipt of written communications (cf. Model Law Art 3)**

- 18 (1) Unless otherwise agreed by the parties —
19 (a) any written communication is taken to be received if —
20 (i) it is delivered to the addressee personally; or
21 (ii) it is delivered at the addressee's place of
22 business, habitual residence or mailing address;
23 or
24 (iii) if none of these can be found after making a
25 reasonable inquiry, it is delivered to the
26 addressee's last-known place of business,
27 habitual residence or mailing address by
28 registered letter or any other means which
29 provides a record of the attempt to deliver it;
30 and
31 (b) the communication is taken to have been received on the
32 day it is so delivered.
33 (2) The provisions of this section do not apply to communications
34 in court proceedings.

1 **4. Waiver of right to object (cf. Model Law Art 4)**

2 A party who knows that any provision of this Act from which
3 the parties may derogate or any requirement under the
4 arbitration agreement has not been complied with and yet
5 proceeds with the arbitration without stating the party's
6 objection to such non-compliance without undue delay or, if a
7 time-limit is provided for stating the party's objection, within
8 such period of time, is taken to have waived the party's right to
9 object.

10 **5. Extent of court intervention (cf. Model Law Art 5)**

11 In matters governed by this Act, no court must intervene except
12 where so provided by this Act.

13 **6. Court for certain functions of arbitration assistance and**
14 **supervision (cf. Model Law Art 6)**

15 (1) The functions referred to in sections 11(3) and (4), 13(4), 14(2),
16 16(9), 17H to 17J, 19(6), 27 to 27B, 27H to 27J, 33D, 34 and
17 34A are, subject to subsection (2), to be performed by the
18 Supreme Court.

19 (2) If —

20 (a) an arbitration agreement provides that the District Court
21 or the Magistrates Court is to have jurisdiction under
22 this Act; or

23 (b) the parties to an arbitration agreement have agreed in
24 writing that the District Court or the Magistrates Court
25 is to have jurisdiction under this Act and that agreement
26 is in force,

27 the functions are to be performed, in relation to that agreement,
28 by the District Court or the Magistrates Court, as the case
29 requires.

30 Note: This section differs from the Model Law to the extent that it relates to
31 functions conferred on the Court with respect to domestic commercial
32 arbitrations that are not referred to in the Model Law.

1 **Part 2 — Arbitration agreement**

2 **7. Definition and form of arbitration agreement (cf. Model**
3 **Law Art 7)**

- 4 (1) An *arbitration agreement* is an agreement by the parties to
5 submit to arbitration all or certain disputes which have arisen or
6 which may arise between them in respect of a defined legal
7 relationship, whether contractual or not.
- 8 (2) An arbitration agreement may be in the form of an arbitration
9 clause in a contract or in the form of a separate agreement.
- 10 (3) The arbitration agreement must be in writing.
- 11 (4) An arbitration agreement is in writing if its content is recorded
12 in any form, whether or not the arbitration agreement or contract
13 has been concluded orally, by conduct, or by other means.
- 14 (5) The requirement that an arbitration agreement be in writing is
15 met by an electronic communication if the information
16 contained in it is accessible so as to be useable for subsequent
17 reference.
- 18 (6) In this section —
19 *data message* means information generated, sent, received or
20 stored by electronic, magnetic, optical or similar means,
21 including, but not limited to, electronic data interchange (EDI),
22 electronic mail, telegram, telex or telecopy;
23 *electronic communication* means any communication that the
24 parties make by means of data messages.
- 25 (7) Furthermore, an arbitration agreement is in writing if it is
26 contained in an exchange of statements of claim and defence in
27 which the existence of an agreement is alleged by one party and
28 not denied by the other.
- 29 (8) The reference in a contract to any document containing an
30 arbitration clause constitutes an arbitration agreement in

1 writing, provided that the reference is such as to make that
2 clause part of the contract.

3 Note: This section is substantially the same as Option 1 set out in Art 7 of the
4 Model Law.

5 **8. Arbitration agreement and substantive claim before court**
6 **(cf. Model Law Art 8)**

7 (1) A court before which an action is brought in a matter which is
8 the subject of an arbitration agreement must, if a party so
9 requests not later than when submitting the party's first
10 statement on the substance of the dispute, refer the parties to
11 arbitration unless it finds that the agreement is null and void,
12 inoperative or incapable of being performed.

13 (2) Where an action referred to in subsection (1) has been brought,
14 arbitral proceedings may nevertheless be commenced or
15 continued, and an award may be made, while the issue is
16 pending before the court.

17 **9. Arbitration agreement and interim measures by court (cf.**
18 **Model Law Art 9)**

19 It is not incompatible with an arbitration agreement for a party
20 to request, before or during arbitral proceedings, from a court an
21 interim measure of protection and for a court to grant the
22 measure.

1 **Part 3 — Composition of arbitral tribunal**

2 **10. Number of arbitrators (cf. Model Law Art 10)**

3 (1) The parties are free to determine the number of arbitrators.

4 (2) Failing such determination, the number of arbitrators is to be
5 one.

6 Note: Subsection (2) differs from Art 10(2) of the Model Law, which provides
7 for 3 arbitrators if the parties do not determine the number of
8 arbitrators.

9 **11. Appointment of arbitrators (cf. Model Law Art 11)**

10 (1)

11 Note: Art 11(1) of the Model Law (which provides that no person is precluded
12 by nationality from acting as an arbitrator unless otherwise agreed by
13 the parties) has been omitted.

14 (2) The parties are free to agree on a procedure of appointing the
15 arbitrator or arbitrators, subject to the provisions of
16 subsections (4) and (5).

17 (3) Failing such agreement —

18 (a) in an arbitration with 3 arbitrators and 2 parties, each
19 party is to appoint one arbitrator, and the 2 arbitrators so
20 appointed are to appoint the third arbitrator; if a party
21 fails to appoint the arbitrator within 30 days of receipt of
22 a request to do so from the other party, or if the
23 2 arbitrators fail to agree on the third arbitrator within
24 30 days of their appointment, the appointment is to be
25 made, on the request of a party, by the Court; and

26 (b) in an arbitration with a sole arbitrator, if the parties are
27 unable to agree on the arbitrator, an arbitrator is to be
28 appointed, on the request of a party, by the Court; and

29 (c) in an arbitration with 2, 4 or more arbitrators or with
30 3 arbitrators and more than 2 parties, the appointment is
31 to be made, at the request of a party, by the Court.

- 1 (4) Where, under an appointment procedure agreed on by the
2 parties —
- 3 (a) a party fails to act as required under the procedure; or
4 (b) the parties, or 2 or more arbitrators, are unable to reach
5 an agreement expected of them under the procedure; or
6 (c) a third party, including an institution, fails to perform
7 any function entrusted to it under the procedure,
- 8 any party may request the Court to take the necessary measure,
9 unless the agreement on the appointment procedure provides
10 other means for securing the appointment.
- 11 (5) A decision within the limits of the Court's authority on a matter
12 entrusted by subsection (3) or (4) to the Court is final.
- 13 (6) The Court, in appointing an arbitrator, is to have due regard to
14 any qualifications required of the arbitrator by the agreement of
15 the parties and to such considerations as are likely to secure the
16 appointment of an independent and impartial arbitrator.

17 Note: This section (other than subsections (3)(c), (5A) and (6)) is
18 substantially the same as Art 11 of the Model Law. Subsection (3) (c)
19 is added to cover the contingency of the parties failing to agree on the
20 procedure to appoint arbitrators in certain circumstances not covered
21 by the Model Law as incorporated in this Act. It is based on
22 clause 11(6) of Schedule 1 to the *Arbitration Act 1996* (NZ).
23 Subsection (5) makes it clear that, although a decision of the Court is
24 generally final, review of a decision of the Court that is not made within
25 the limits of its powers and functions is not precluded. Subsection (6)
26 does not include the requirement in Art 11(5) of the Model Law that the
27 Court take into account the advisability of appointing an arbitrator of a
28 nationality other than those of the parties in appointing a sole or third
29 arbitrator as this is not relevant in the context of domestic commercial
30 arbitrations.

31 **12. Grounds for challenge (cf. Model Law Art 12)**

- 32 (1) When a person is approached in connection with the person's
33 possible appointment as an arbitrator, the person must disclose
34 any circumstances likely to give rise to justifiable doubts as to
35 the person's impartiality or independence.

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- 1 (2) An arbitrator, from the time of the arbitrator's appointment and
2 throughout the arbitral proceedings, must without delay disclose
3 any circumstances of the kind referred to in subsection (1) to the
4 parties unless they have already been informed of them by the
5 arbitrator.
- 6 (3) An arbitrator may be challenged only if circumstances exist that
7 give rise to justifiable doubts as to the arbitrator's impartiality
8 or independence, or if the arbitrator does not possess
9 qualifications agreed to by the parties.
- 10 (4) A party may challenge an arbitrator appointed by the party, or in
11 whose appointment the party has participated, only for reasons
12 of which the party becomes aware after the appointment has
13 been made.
- 14 (5) For the purposes of subsection (1), there are justifiable doubts as
15 to the impartiality or independence of a person approached in
16 connection with a possible appointment as arbitrator only if
17 there is a real danger of bias on the part of the person in
18 conducting the arbitration.
- 19 (6) For the purposes of subsection (3), there are justifiable doubts as
20 to the impartiality or independence of an arbitrator only if there
21 is a real danger of bias on the part of the arbitrator in conducting
22 the arbitration.

23 Note: This section (other than subsections (5) and (6)) is substantially the
24 same as Art 12 of the Model Law. Subsections (5) and (6) provide that
25 the test for whether there are justifiable doubts as to the impartiality or
26 independence of a person or arbitrator is whether there is a real
27 danger of bias.

28 **13. Challenge procedure (cf. Model Law Art 13)**

- 29 (1) The parties are free to agree on a procedure for challenging an
30 arbitrator, subject to subsection (4).
- 31 (2) Failing such agreement, a party who intends to challenge an
32 arbitrator must, within 15 days after becoming aware of the
33 constitution of the arbitral tribunal or after becoming aware of

1 any circumstance referred to in section 12(3), send a written
2 statement of the reasons for the challenge to the arbitral tribunal.

3 (3) Unless the challenged arbitrator withdraws from office or the
4 other party agrees to the challenge, the arbitral tribunal must
5 decide on the challenge.

6 (4) If a challenge under any procedure agreed on by the parties or
7 under the procedure of subsections (2) and (3) is not successful,
8 the challenging party may request, within 30 days after having
9 received notice of the decision rejecting the challenge, the Court
10 to decide on the challenge.

11 (5) A decision of the Court under subsection (4) that is within the
12 limits of the authority of the Court is final.

13 Note: Section 13 (other than subsection (5)) is substantially the same as
14 Art 13 of the Model Law. Subsection (5) makes it clear that, although a
15 decision of the Court is generally final, review of a decision of the Court
16 that is not made within the limits of its powers and functions is not
17 precluded.

18 **14. Failure or impossibility to act (cf. Model Law Art 14)**

19 (1) If an arbitrator becomes in law or in fact unable to perform the
20 arbitrator's functions or for other reasons fails to act without
21 undue delay, the arbitrator's mandate terminates if the arbitrator
22 withdraws from office or if the parties agree on the termination.

23 (2) Otherwise, if a controversy remains concerning any of these
24 grounds, any party may request the Court to decide on the
25 termination of the mandate.

26 (3) A decision of the Court under subsection (2) that is within the
27 limits of the authority of the Court is final.

28 (4) If, under this section or section 13(3), an arbitrator withdraws
29 from office or a party agrees to the termination of the mandate
30 of an arbitrator, this does not imply acceptance of the validity of
31 any ground referred to in this section or section 12(3).

32 Note: Section 14 (other than subsection (3)) is substantially the same as
33 Art 14 of the Model Law. Subsection (3) makes it clear that, although a

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1 decision of the Court is generally final, review of a decision of the Court
2 that is not made within the limits of its powers and functions is not
3 precluded.

4 **15. Appointment of substitute arbitrator (cf. Model Law Art 15)**

5 Where the mandate of an arbitrator terminates under section 13
6 or 14 or because of the arbitrator's withdrawal from office for
7 any other reason or because of the revocation of the arbitrator's
8 mandate by agreement of the parties or in any other case of
9 termination of the arbitrator's mandate, a substitute arbitrator
10 must be appointed according to the rules that were applicable to
11 the appointment of the arbitrator being replaced.

Part 4 — Jurisdiction of arbitral tribunal

16. Competence of arbitral tribunal to rule on its jurisdiction (cf. Model Law Art 16)

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.

(2) For that purpose, an arbitration clause which forms part of a contract is to be treated as an agreement independent of the other terms of the contract.

(3) A decision by the arbitral tribunal that the contract is null and void does not of itself entail the invalidity of the arbitration clause.

Note: The Model Law provides that such a decision does not “ipso jure” entail the invalidity of the arbitration clause.

(4) A plea that the arbitral tribunal does not have jurisdiction must be raised not later than the submission of the statement of defence.

(5) A party is not precluded from raising such a plea by the fact that the party has appointed, or participated in the appointment of, an arbitrator.

(6) A plea that the arbitral tribunal is exceeding the scope of its authority must be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(7) The arbitral tribunal may, in the case of a plea referred to in subsection (4) or (6), admit a later plea if it considers the delay justified.

(8) The arbitral tribunal may rule on a plea referred to in subsection (4) or (6) either as a preliminary question or in an award on the merits.

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1 (9) If the arbitral tribunal rules as a preliminary question that it has
2 jurisdiction, any party may request, within 30 days after having
3 received notice of that ruling, the Court to decide the matter.

4 (10) A decision of the Court under subsection (9) that is within the
5 limits of the authority of the Court is final.

6 (11) While a request under subsection (9) is pending, the arbitral
7 tribunal may continue the arbitral proceedings and make an
8 award.

9 Note: Section 16 (other than subsection (10)) is substantially the same as
10 Art 16 of the Model Law. Subsection (10) makes it clear that, although
11 a decision of the Court is generally final, review of a decision of the
12 Court that is not made within the limits of its powers and functions is
13 not precluded.

1 **Part 4A — Interim measures**

2 **Division 1 — Interim measures**

3 **17. Power of arbitral tribunal to order interim measures (cf.**
4 **Model Law Art 17)**

5 (1) Unless otherwise agreed by the parties, the arbitral tribunal may,
6 at the request of a party, grant interim measures.

7 (2) An *interim measure* is any temporary measure, whether in the
8 form of an award or in another form, by which, at any time prior
9 to the issuance of the award by which the dispute is finally
10 decided, the arbitral tribunal orders a party to —

11 (a) maintain or restore the status quo pending determination
12 of the dispute; or

13 (b) take action that would prevent, or refrain from taking
14 action that is likely to cause, current or imminent harm
15 or prejudice to the arbitral process itself; or

16 (c) provide a means of preserving assets out of which a
17 subsequent award may be satisfied; or

18 (d) preserve evidence that may be relevant and material to
19 the resolution of the dispute.

20 (3) Without limiting subsection (2), the arbitral tribunal may make
21 orders with respect to any of the following —

22 (a) security for costs;

23 (b) discovery of documents and interrogatories;

24 (c) giving of evidence by affidavit;

25 (d) the inspection of any property which is or forms part of
26 the subject matter of the dispute;

27 (e) the taking of photographs of any property which is or
28 forms part of the subject matter of the dispute;

- 1 (f) samples to be taken from, or any observation to be made
2 of or experiment conducted on, any property which is or
3 forms part of the subject matter of the dispute;
- 4 (g) dividing, recording and strictly enforcing the time
5 allocated for a hearing between the parties (a *stop clock*
6 arbitration).

7 Note: Subsections (1) and (2) are substantially the same as Art 17 of the
8 Model Law. There is no equivalent to subsection (3) in the Model Law.

9 **17A. Conditions for granting interim measures (cf. Model Law**
10 **Art 17A)**

- 11 (1) The party requesting an interim measure under section 17(2)(a),
12 (b) or (c) must satisfy the arbitral tribunal that —
- 13 (a) harm not adequately reparable by an award of damages
14 is likely to result if the measure is not ordered, and that
15 harm substantially outweighs the harm that is likely to
16 result to the party against whom the measure is directed
17 if the measure is granted; and
- 18 (b) there is a reasonable possibility that the requesting party
19 will succeed on the merits of the claim.
- 20 (2) The determination on the possibility referred to in
21 subsection (1)(b) does not affect the discretion of the arbitral
22 tribunal in making any subsequent determination.
- 23 (3) With regard to a request for an interim measure under
24 section 17(2)(d), the requirements in subsection (1)(a) and (b)
25 and subsection (2) apply only to the extent the arbitral tribunal
26 considers appropriate.

27 **Division 2 — Preliminary orders**

28 **17B. (Not used)**

29 Note: Art 17B of the Model Law, which provides for ex parte requests for
30 interim measures together with applications for preliminary orders
31 directing parties not to frustrate the interim measures, has been
32 omitted.

1 **17C. (Not used)**

2 Note: Art 17C of the Model Law, which contains safeguards for the party
3 against whom a preliminary order is directed under Art 17B, is omitted
4 as a consequence of the omission of Art 17B.

5 **Division 3 — Provisions applicable to interim measures**

6 **17D. Modification, suspension, termination (cf. Model Law**
7 **Art 17D)**

8 The arbitral tribunal may modify, suspend or terminate an
9 interim measure it has granted, on application of any party or, in
10 exceptional circumstances and on prior notice to the parties, on
11 the arbitral tribunal's own initiative.

12 Note: This section is substantially the same as Art 17D of the Model Law but
13 contains no reference to preliminary orders as a consequence of this
14 Act not including an equivalent of Arts 17B and 17C of the Model Law.

15 **17E. Provision of security (cf. Model Law Art 17E)**

16 (1) The arbitral tribunal may require the party requesting an interim
17 measure to provide appropriate security in connection with the
18 measure.

19 (2)

20 Note: Subsection (1) is the same as Art 17E(1) of the Model Law. Art 17E(2)
21 is omitted as a consequence of this Act not including equivalents to
22 Arts 17B and 17C of the Model Law.

23 **17F. Disclosure (cf. Model Law Art 17F)**

24 (1) The arbitral tribunal may require any party promptly to disclose
25 any material change in the circumstances on the basis of which
26 the measure was requested or granted.

27 (2)

28 Note: Subsection (1) is the same as Art 17F(1) of the Model Law. Art 17F(2)
29 is omitted as a consequence of this Act not including equivalents to
30 Arts 17B and 17C of the Model Law.

1 **17G. Costs and damages (cf. Model Law Art 17G)**

2 (1) The party requesting an interim measure is liable for any costs
3 and damages caused by the measure to any party if the arbitral
4 tribunal later determines that, in the circumstances, the measure
5 should not have been granted.

6 (2) The arbitral tribunal may award such costs and damages at any
7 point during the proceedings.

8 Note: This section is substantially the same as Art 17G of the Model Law but
9 the reference to applications for preliminary orders is omitted as a
10 consequence of this Act not including equivalents to Arts 17B and 17C
11 of the Model Law.

12 **Division 4 — Recognition and enforcement of interim measures**

13 **17H. Recognition and enforcement (cf. Model Law Art 17H)**

14 (1) An interim measure issued by an arbitral tribunal under the law
15 of this State is to be recognised as binding and, unless otherwise
16 provided by the arbitral tribunal, enforced on application to the
17 Court, subject to the provisions of section 17I.

18 (2) An interim measure issued by an arbitral tribunal under the law
19 of another State or Territory is to be recognised as binding in
20 this State and, unless otherwise provided by the arbitral tribunal,
21 enforced on application to the Court, irrespective of the State or
22 Territory in which it was issued, subject to the provisions of
23 section 17I.

24 (3) The party who is seeking or has obtained recognition or
25 enforcement of an interim measure must promptly inform the
26 Court of any termination, suspension or modification of that
27 interim measure.

28 (4) The Court may, if it considers it proper, order the requesting
29 party to provide appropriate security if the arbitral tribunal has
30 not already made a determination with respect to security or
31 where such a decision is necessary to protect the rights of third
32 parties.

33 Note: This section differs from Art 17H of the Model Law to the extent
34 necessary to apply Art 17H as incorporated in this Act in the context of
35 domestic commercial arbitrations.

1 **17I. Grounds for refusing recognition or enforcement (cf. Model**
2 **Law Art 17I)**

- 3 (1) Recognition or enforcement of an interim measure may be
4 refused only —
- 5 (a) at the request of the party against whom it is invoked if
6 the Court is satisfied that —
- 7 (i) such a refusal is warranted on the grounds set out
8 in section 36(1)(a)(i), (ii), (iii) or (iv); or
- 9 (ii) the arbitral tribunal's decision with respect to the
10 provision of security in connection with the
11 interim measure issued by the arbitral tribunal
12 has not been complied with; or
- 13 (iii) the interim measure has been terminated or
14 suspended by the arbitral tribunal or, where so
15 empowered, by the court of the State or Territory
16 in which the arbitration takes place or under the
17 law of which that interim measure was granted;
- 18 or
- 19 (b) if the Court finds that —
- 20 (i) the interim measure is incompatible with the
21 powers conferred on the Court unless the Court
22 decides to reformulate the interim measure to the
23 extent necessary to adapt it to its own powers
24 and procedures for the purposes of enforcing that
25 interim measure and without modifying its
26 substance; or
- 27 (ii) any of the grounds set out in section 36(1)(b)(i)
28 or (ii) apply to the recognition and enforcement
29 of the interim measure.
- 30 (2) Any determination made by the Court on any ground in
31 subsection (1) is effective only for the purposes of the
32 application to recognise and enforce the interim measure.

- 1 (3) The Court must not, in making a determination with respect to
2 the recognition or enforcement sought, undertake a review of
3 the substance of the interim measure.

4 Note: This section is substantially the same as Art 17I of the Model Law but
5 has been modified to the extent necessary to apply Art 17I as
6 incorporated in this Act in the context of domestic commercial
7 arbitrations.

8 **Division 5 — Court-ordered interim measures**

9 **17J. Court-ordered interim measures (cf. Model Law Art 17J)**

- 10 (1) The Court has the same power of issuing an interim measure in
11 relation to arbitration proceedings as it has in relation to
12 proceedings in courts.

- 13 (2) The Court is to exercise the power in accordance with its own
14 procedures taking into account the specific features of a
15 domestic commercial arbitration.

16 Note: This section is substantially the same as Art 17J of the Model Law but
17 has been modified to the extent necessary to apply Art 17J as
18 incorporated in this Act in the context of domestic commercial
19 arbitrations.

1 **Part 5 — Conduct of arbitral proceedings**

2 **18. Equal treatment of parties (cf. Model Law Art 18)**

3 The parties must be treated with equality and each party must be
4 given a reasonable opportunity of presenting the party's case.

5 Note: This section differs from the Model Law to the extent that it requires a
6 party to be given a "reasonable", instead of "full", opportunity of
7 presenting the party's case.

8 **19. Determination of rules of procedure (cf. Model Law Art 19)**

9 (1) Subject to the provisions of this Act, the parties are free to agree
10 on the procedure to be followed by the arbitral tribunal in
11 conducting the proceedings.

12 (2) Failing such agreement, the arbitral tribunal may, subject to the
13 provisions of this Act, conduct the arbitration in such manner as
14 it considers appropriate.

15 (3) The power conferred on the arbitral tribunal includes the power
16 to determine the admissibility, relevance, materiality and weight
17 of any evidence.

18 (4) The power conferred on the tribunal also includes the power to
19 make orders or give directions for the examination of a party or
20 witness on oath or affirmation.

21 (5) For the purposes of the exercise of the power referred to in
22 subsection (4), the arbitral tribunal may administer any
23 necessary oath or take any necessary affirmation.

24 (6) An order made or direction given by an arbitral tribunal in the
25 course of arbitral proceedings is, by leave of the Court,
26 enforceable in the same manner as if it were an order of the
27 Court and, where leave is so given, judgment may be entered in
28 terms of the order or direction.

29 Note: This section (other than subsections (4)–(6)) is substantially the same
30 as Art 19 of the Model Law. Subsections (4)–(6) elaborate on the
31 powers conferred on arbitral tribunals.

- 1 **20. Place of arbitration (cf. Model Law Art 20)**
- 2 (1) The parties are free to agree on the place of arbitration.
- 3 (2) Failing such agreement, the place of arbitration is to be
4 determined by the arbitral tribunal having regard to the
5 circumstances of the case, including the convenience of the
6 parties.
- 7 (3) Despite subsection (1), the arbitral tribunal may, unless
8 otherwise agreed by the parties, meet at any place (whether or
9 not in Western Australia) it considers appropriate for
10 consultation among its members, for hearing witnesses, experts
11 or the parties, or for inspection of goods, other property or
12 documents.
- 13 **21. Commencement of arbitral proceedings (cf. Model Law**
14 **Art 21)**
- 15 Unless otherwise agreed by the parties, the arbitral proceedings
16 in respect of a particular dispute commence on the date on
17 which a request for that dispute to be referred to arbitration is
18 received by the respondent.
- 19 **22. Language (cf. Model Law Art 22)**
- 20 (1) The parties are free to agree on the language or languages to be
21 used in the arbitral proceedings.
- 22 (2) Failing agreement as referred to in subsection (1), the arbitral
23 tribunal is to determine the language or languages to be used in
24 the proceedings.
- 25 (3) This agreement or determination, unless otherwise specified in
26 the agreement or determination, is to apply to any written
27 statement by a party, any hearing and any award, decision or
28 other communication by the arbitral tribunal.
- 29 (4) The arbitral tribunal may order that any documentary evidence
30 is to be accompanied by a translation into the language or

1 languages agreed on by the parties or determined by the arbitral
2 tribunal.

3 **23. Statements of claim and defence (cf. Model Law Art 23)**

4 (1) Subject to any contrary agreement of the parties or a direction of
5 the arbitral tribunal, within the period of time agreed by the
6 parties or determined by the arbitral tribunal, the claimant must
7 state the facts supporting his or her claim, the points at issue and
8 the relief or remedy sought, and the respondent must state the
9 respondent's defence in respect of these particulars, unless the
10 parties have otherwise agreed as to the required elements of
11 such statements.

12 (2) The parties may submit with their statements all documents they
13 consider to be relevant or may add a reference to the documents
14 or other evidence they will submit.

15 (3) Unless otherwise agreed by the parties, either party may amend
16 or supplement the party's claim or defence during the course of
17 the arbitral proceedings, unless the arbitral tribunal considers it
18 inappropriate to allow such amendment having regard to the
19 delay in making it.

20 (4) Subsection (1) does not require a statement by a claimant or
21 respondent to be in a particular form.

22 Note: This section (other than subsections (1) and (4)) is substantially the
23 same as Art 23 of the Model Law. Subsection (1) has effect subject to
24 any contrary agreement of the parties or direction of the arbitral
25 tribunal. Subsection (4) makes it clear that it is not necessary to use a
26 particular form of statement of claim or defence.

27 **24. Hearings and written proceedings (cf. Model Law Art 24)**

28 (1) Subject to any contrary agreement by the parties, the arbitral
29 tribunal is to decide whether to hold oral hearings for the
30 presentation of evidence or for oral argument, or whether the
31 proceedings are to be conducted on the basis of documents and
32 other materials.

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- 1 (2) However, unless the parties have agreed that no hearings are to
2 be held, the arbitral tribunal must hold such hearings at an
3 appropriate stage of the proceedings, if so requested by a party.
- 4 (3) The parties must be given sufficient advance notice of any
5 hearing and of any meeting of the arbitral tribunal for the
6 purposes of inspection of goods, other property or documents.
- 7 (4) All statements, documents or other information supplied to the
8 arbitral tribunal by one party must be communicated to the other
9 party.
- 10 (5) Also, any expert report or evidentiary document on which the
11 arbitral tribunal may rely in making its decision must be
12 communicated to the parties.

13 **24A. Representation**

- 14 (1) The parties may appear or act in person, or may be represented
15 by another person of their choice, in any oral hearings under
16 section 24.
- 17 (2) A person who is not admitted to practise as a legal practitioner
18 in Western Australia does not commit an offence under or
19 breach the provisions of the *Legal Profession Act 2008* or any
20 other Act merely by representing a party in arbitral proceedings
21 in this State.

22 Note: There is no equivalent of this section in the Model Law.

23 **24B. General duties of parties**

- 24 (1) The parties must do all things necessary for the proper and
25 expeditious conduct of the arbitral proceedings.
- 26 (2) Without limitation, the parties must —
- 27 (a) comply without undue delay with any order or direction
28 of the arbitral tribunal with respect to any procedural,
29 evidentiary or other matter; and

1 (b) take without undue delay any necessary steps to obtain a
2 decision (if required) of the Court with respect to any
3 function conferred on the Court under section 6.

4 (3) A party must not wilfully do or cause to be done any act to
5 delay or prevent an award being made.

6 Note: There is no equivalent of this section in the Model Law.

7 **25. Default of a party (cf. Model Law Art 25)**

8 (1) Unless otherwise agreed by the parties, if, without showing
9 sufficient cause —

10 (a) the claimant fails to communicate the claimant's
11 statement of claim in accordance with section 23(1), the
12 arbitral tribunal may terminate the proceedings; or

13 (b) the respondent fails to communicate the respondent's
14 statement of defence in accordance with section 23(1),
15 the arbitral tribunal may continue the proceedings
16 without treating such failure in itself as an admission of
17 the claimant's allegations; or

18 (c) any party fails to appear at a hearing or to produce
19 documentary evidence, the arbitral tribunal may
20 continue the proceedings and make the award on the
21 evidence before it.

22 (2) Unless otherwise agreed by the parties, if a party fails to do any
23 other thing necessary for the proper and expeditious conduct of
24 the arbitration, the arbitral tribunal —

25 (a) if satisfied that there has been inordinate and
26 inexcusable delay on the part of the claimant in pursuing
27 the claim, may make an award dismissing the claim or
28 may give directions (with or without conditions) for the
29 speedy determination of the claim; or

30 (b) if without sufficient cause a party fails to comply with
31 any order or direction of the arbitral tribunal, may make
32 an order requiring the party to comply with the terms of

- 1 the earlier order or direction within the period specified
2 by the arbitral tribunal (a *peremptory order*).
- 3 (3) If a party fails to comply with a peremptory order, the arbitral
4 tribunal may do any of the following —
- 5 (a) direct that the party in default is not to be entitled to rely
6 on any allegation or material which was the subject
7 matter of the peremptory order;
- 8 (b) draw such adverse inferences from the failure to comply
9 as the circumstances justify;
- 10 (c) proceed to an award on the basis of any materials that
11 have been properly provided to the arbitral tribunal;
- 12 (d) without limiting section 33B(4), in making an award
13 give any direction or order that it thinks fit as to the
14 payment of the costs of the arbitration incurred in
15 consequence of the non-compliance.

16 Note: Subsection (1) is substantially the same as Art 25 of the Model Law.
17 There are no equivalents to the other provisions of the section in the
18 Model Law.

19 **26. Expert appointed by arbitral tribunal (cf. Model Law**
20 **Art 26)**

- 21 (1) Unless otherwise agreed by the parties, the arbitral tribunal —
- 22 (a) may appoint one or more experts to report to it on
23 specific issues to be determined by the arbitral tribunal;
24 and
- 25 (b) may require a party to give the expert any relevant
26 information or to produce, or to provide access to, any
27 relevant documents, goods or other property for the
28 expert's inspection.
- 29 (2) Unless otherwise agreed by the parties, if a party so requests or
30 if the arbitral tribunal considers it necessary, the expert must,
31 after delivery of the expert's written or oral report, participate in
32 a hearing where the parties have the opportunity to put

1 questions to the expert and present expert witnesses in order to
2 testify on the points at issue.

3 **27. Court assistance in taking evidence (cf. Model Law Art 27)**

4 (1) The arbitral tribunal or a party with the approval of the arbitral
5 tribunal may request from the Court assistance in taking
6 evidence.

7 (2) The Court may execute the request within its competence and
8 subject to and in accordance with rules of court.

9 Note: This section is substantially the same as Art 27 of the Model Law but
10 the reference to rules of court has been amended for consistency with
11 sections 27A and 27B and a request for assistance may only be made
12 to the Court, not any competent court.

13 **27A. Parties may obtain subpoenas**

14 (1) The Court may, on the application of any party, and subject to
15 and in accordance with rules of court, issue a subpoena
16 requiring a person —

17 (a) to attend for examination before the arbitral tribunal; or

18 (b) to produce to the arbitral tribunal the documents
19 specified in the subpoena; or

20 (c) to do both of those things.

21 (2) A party may only make an application to the Court under
22 subsection (1) with the permission of the arbitral tribunal.

23 (3) A person must not be compelled under any subpoena issued in
24 accordance with subsection (1) to answer any question or
25 produce any document that the person could not be compelled
26 to answer or produce in a proceeding before the Court.

27 Note: There is no equivalent to this section in the Model Law.

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- 1 **27B. Refusal or failure to attend before arbitral tribunal or to**
2 **produce document**
- 3 (1) For the purposes of this section, a person is a *person in default*
4 in relation to proceedings before an arbitral tribunal under an
5 arbitration agreement if the person —
- 6 (a) refuses or fails to attend before the arbitral tribunal for
7 examination when required under a subpoena or by the
8 arbitral tribunal to do so; or
- 9 (b) refuses or fails to produce a document that the person is
10 required under a subpoena or by the arbitral tribunal to
11 produce; or
- 12 (c) when appearing as a witness before the arbitral
13 tribunal —
- 14 (i) refuses or fails to take an oath or to make an
15 affirmation or affidavit when required by the
16 arbitral tribunal to do so; or
- 17 (ii) refuses or fails to answer a question that the
18 witness is required by the arbitral tribunal to
19 answer;
- 20 or
- 21 (d) refuses or fails to do any other thing which the arbitral
22 tribunal may require.
- 23 (2) Unless otherwise agreed by the parties, the Court may, on the
24 application of a party or the arbitral tribunal, order a person in
25 default to do any or all of the following —
- 26 (a) attend the Court to be examined as a witness;
27 (b) produce the relevant document to the Court;
28 (c) do the relevant thing.
- 29 (3) A party may only make an application to the Court under
30 subsection (2) with the permission of the arbitral tribunal.

- 1 (4) The Court must not make an order under subsection (2) in
2 relation to a person who is not a party to the arbitral proceedings
3 unless —
- 4 (a) before the order is made, the person is given an
5 opportunity to make representations to the Court; and
- 6 (b) the Court is satisfied that it is reasonable in all the
7 circumstances to make the order.
- 8 (5) A person must not be compelled under an order made under
9 subsection (2) to answer any question or produce any document
10 which the person could not be compelled to answer or produce
11 in a proceeding before the Court.
- 12 (6) If the Court makes an order under subsection (2), it may in
13 addition make orders for the transmission to the arbitral tribunal
14 of any of the following —
- 15 (a) a record of any evidence given under the order;
- 16 (b) any document produced under the order or a copy of any
17 such document;
- 18 (c) particulars of any thing done under the order.
- 19 (7) Any evidence, document or thing transmitted under
20 subsection (6) is taken to have been given, produced or done (as
21 the case requires) in the course of the arbitral proceedings.

22 Note: There is no equivalent of this section in the Model Law.

23 **27C. Consolidation of arbitral proceedings**

- 24 (1) Unless otherwise agreed by the parties, a party to arbitral
25 proceedings may apply to the arbitral tribunal for an order under
26 this section in relation to those proceedings and other arbitral
27 proceedings (whether before that tribunal or another tribunal or
28 other tribunals) on the ground that —
- 29 (a) a common question of law or fact arises in all those
30 proceedings; or

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- 1 (b) the rights to relief claimed in all those proceedings are in
2 respect of, or arise out of, the same transaction or series
3 of transactions; or
- 4 (c) for some other reason specified in the application, it is
5 desirable that an order be made under this section.
- 6 (2) In this section, 2 or more arbitral proceedings that are the
7 subject of an application under subsection (1) are called the
8 ***related proceedings***.
- 9 (3) The following orders may be made under this section in relation
10 to the related proceedings —
- 11 (a) that the proceedings be consolidated on terms specified
12 in the order;
- 13 (b) that the proceedings be heard at the same time or in a
14 sequence specified in the order;
- 15 (c) that any of the proceedings be stayed pending the
16 determination of any of the other proceedings.
- 17 (4) If all the related proceedings are being conducted by the same
18 tribunal, the tribunal may make any order under this section that
19 it thinks fit in relation to those proceedings and, if an order is
20 made, the proceedings must be dealt with in accordance with the
21 order.
- 22 (5) If 2 or more arbitral tribunals are conducting the related
23 proceedings —
- 24 (a) the tribunal that received the application must
25 communicate the substance of the application to the
26 other tribunals concerned; and
- 27 (b) the tribunals must, as soon as practicable, deliberate
28 jointly on the application.
- 29 (6) If the tribunals agree, after deliberation on the application, that a
30 particular order under this section should be made in relation to
31 the related proceedings —
- 32 (a) the tribunals are to jointly make the order; and

- 1 (b) the related proceedings are to be dealt with in
2 accordance with the order; and
- 3 (c) if the order is that the related proceedings be
4 consolidated, the arbitrator or arbitrators for the
5 purposes of the consolidated proceedings are to be
6 appointed, in accordance with sections 10 and 11, from
7 the members of the tribunals.
- 8 (7) If the tribunals are unable to make an order under
9 subsection (6), the related proceedings are to proceed as if no
10 application has been made under subsection (1).
- 11 (8) Before making an order under this section, the arbitral tribunal
12 or tribunals concerned must take into account whether any party
13 would or might suffer substantial hardship if the order were
14 made.
- 15 (9) This section does not prevent the parties to related proceedings
16 from agreeing to consolidate them and taking such steps as are
17 necessary to effect that consolidation.

18 Note: There is no equivalent to this section in the Model Law.

19 **27D. Power of arbitrator to act as mediator, conciliator or other**
20 **non-arbitral intermediary**

- 21 (1) An arbitrator may act as a mediator in proceedings relating to a
22 dispute between the parties to an arbitration agreement
23 (*mediation proceedings*) if —
- 24 (a) the arbitration agreement provides for the arbitrator to
25 act as mediator in mediation proceedings (whether
26 before or after proceeding to arbitration, and whether or
27 not continuing with the arbitration); or
- 28 (b) each party has consented in writing to the arbitrator so
29 acting.
- 30 (2) An arbitrator acting as a mediator —
- 31 (a) may communicate with the parties collectively or
32 separately; and

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- 1 (b) must treat information obtained by the arbitrator from a
2 party with whom he or she communicates separately as
3 confidential, unless that party otherwise agrees or unless
4 the provisions of the arbitration agreement relating to
5 mediation proceedings otherwise provide.
- 6 (3) Mediation proceedings in relation to a dispute terminate if —
7 (a) the parties to the dispute agree to terminate the
8 proceedings; or
9 (b) any party to the dispute withdraws consent to the
10 arbitrator acting as mediator in the proceedings; or
11 (c) the arbitrator terminates the proceedings.
- 12 (4) An arbitrator who has acted as mediator in mediation
13 proceedings that are terminated may not conduct subsequent
14 arbitration proceedings in relation to the dispute without the
15 written consent of all the parties to the arbitration given on or
16 after the termination of the mediation proceedings.
- 17 (5) If the parties consent under subsection (4), no objection may be
18 taken to the conduct of subsequent arbitration proceedings by
19 the arbitrator solely on the ground that he or she has acted
20 previously as a mediator in accordance with this section.
- 21 (6) If the parties do not consent under subsection (4), the
22 arbitrator's mandate is taken to have been terminated under
23 section 14 and a substitute arbitrator is to be appointed in
24 accordance with section 15.
- 25 (7) If confidential information is obtained from a party during
26 mediation proceedings as referred to in subsection (2)(b) and the
27 mediation proceedings terminate, the arbitrator must, before
28 conducting subsequent arbitration proceedings in relation to the
29 dispute, disclose to all other parties to the arbitration
30 proceedings so much of the information as the arbitrator
31 considers material to the arbitration proceedings.

- 1 (8) In this section, a reference to a *mediator* includes a reference to
2 a conciliator or other non-arbitral intermediary between parties.

3 Note: There is no equivalent of this section in the Model Law.

4 **27E. Disclosure of confidential information**

- 5 (1) The provisions of this section apply in arbitral proceedings
6 unless otherwise agreed by the parties.

- 7 (2) The parties must not disclose confidential information in
8 relation to the arbitral proceedings unless —

- 9 (a) the disclosure is allowed under section 27F; or
10 (b) the disclosure is allowed under an order made under
11 section 27G and no order is in force under section 27H
12 prohibiting that disclosure; or
13 (c) the disclosure is allowed under an order made under
14 section 27I.

- 15 (3) An arbitral tribunal must not disclose confidential information
16 in relation to the arbitral proceedings unless —

- 17 (a) the disclosure is allowed under section 27F; or
18 (b) the disclosure is allowed under an order made under
19 section 27G and no order is in force under section 27H
20 prohibiting that disclosure; or
21 (c) the disclosure is allowed under an order made under
22 section 27I.

23 Note: There is no equivalent to this section in the Model Law.

24 **27F. Circumstances in which confidential information may be**
25 **disclosed**

- 26 (1) This section sets out the circumstances in which confidential
27 information in relation to arbitral proceedings may be disclosed
28 by —

- 29 (a) a party; or
30 (b) an arbitral tribunal.

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- 1 (2) The information may be disclosed with the consent of all the
2 parties to the arbitral proceedings.
- 3 (3) The information may be disclosed to a professional or other
4 adviser of any of the parties.
- 5 (4) The information may be disclosed if it is necessary to ensure
6 that a party has a reasonable opportunity to present the party's
7 case and the disclosure is no more than reasonable for that
8 purpose.
- 9 (5) The information may be disclosed if it is necessary for the
10 establishment or protection of a party's legal rights in relation to
11 a third party and the disclosure is no more than reasonable for
12 that purpose.
- 13 (6) The information may be disclosed if it is necessary for the
14 purpose of enforcing an arbitral award and the disclosure is no
15 more than reasonable for that purpose.
- 16 (7) The information may be disclosed if it is necessary for the
17 purposes of this Act and the disclosure is no more than
18 reasonable for that purpose.
- 19 (8) The information may be disclosed if the disclosure is in
20 accordance with an order made or a subpoena issued by a court.
- 21 (9) The information may be disclosed if the disclosure is authorised
22 or required by a relevant law or required by a competent
23 regulatory body, and the person making the disclosure gives
24 written details of the disclosure (including an explanation of the
25 reasons for the disclosure) to —
- 26 (a) if the person is a party, the other parties and the arbitral
27 tribunal; and
- 28 (b) if the arbitral tribunal is making the disclosure, all the
29 parties.

- 1 (10) In this section —
2 *relevant law* means —
3 (a) a law of this State (other than this Act); and
4 (b) a law of the Commonwealth; and
5 (c) a law of another State or Territory.

6 Note: There is no equivalent to this section in the Model Law.

7 **27G. Arbitral tribunal may allow disclosure of confidential**
8 **information in certain circumstances**

- 9 (1) An arbitral tribunal may make an order allowing a party to
10 arbitral proceedings to disclose confidential information in
11 relation to the proceedings in circumstances other than those
12 mentioned in section 27F.
- 13 (2) An order under subsection (1) may only be made at the request
14 of one of the parties and after giving each of the parties the
15 opportunity to be heard.

16 Note: There is no equivalent to this section in the Model Law.

17 **27H. The Court may prohibit disclosure of confidential**
18 **information in certain circumstances**

- 19 (1) The Court may make an order prohibiting a party from
20 disclosing confidential information in relation to the arbitral
21 proceedings if the Court is satisfied, in the circumstances of the
22 particular case, that —
23 (a) the public interest in preserving the confidentiality of
24 arbitral proceedings is not outweighed by other
25 considerations that render it desirable in the public
26 interest for the confidential information to be disclosed;
27 and
28 (b) the disclosure is more than is reasonable for that
29 purpose.
- 30 (2) An order under subsection (1) may only be made on the
31 application of a party to the arbitral proceedings and after giving

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1 each of the parties to the arbitral proceedings the opportunity to
2 be heard.

3 (3) A party may only apply for an order under subsection (1) if the
4 arbitral tribunal has made an order under section 27G(1)
5 allowing disclosure of the information.

6 (4) The Court may order that the confidential information not be
7 disclosed pending the outcome of the application under
8 subsection (2).

9 (5) An order of the Court under this section that is made within the
10 limits of the authority of the Court is final.

11 Note: There is no equivalent to this section in the Model Law.

12 **27I. The Court may allow disclosure of confidential information**
13 **in certain circumstances**

14 (1) The Court may make an order allowing a party to disclose
15 confidential information in relation to the arbitral proceedings in
16 circumstances other than those mentioned in section 27F if the
17 Court is satisfied, in the circumstances of the particular case,
18 that —

19 (a) the public interest in preserving the confidentiality of
20 arbitral proceedings is outweighed by other
21 considerations that render it desirable in the public
22 interest for the confidential information to be disclosed;
23 and

24 (b) the disclosure is no more than is reasonable for that
25 purpose.

26 (2) An order under subsection (1) may only be made on the
27 application of a person who is or was a party to the arbitral
28 proceedings and after giving each person who is or was a party
29 to the arbitral proceedings the opportunity to be heard.

- 1 (3) A party to arbitral proceedings may only apply for an order
2 under subsection (1) if —
3 (a) the mandate of the arbitral tribunal has been terminated
4 under section 32; or
5 (b) a request by the party to the arbitral tribunal to make an
6 order under section 27G has been refused.
- 7 (4) An order of the Court under this section that is made within the
8 limits of the authority of the Court is final.

9 Note: There is no equivalent to this section in the Model Law.

10 **27J. Determination of preliminary point of law by the Court**

- 11 (1) Unless otherwise agreed by the parties, on an application to the
12 Court made by any of the parties to an arbitration agreement the
13 Court has jurisdiction to determine any question of law arising
14 in the course of the arbitration.
- 15 (2) An application under this section may be made by a party only
16 with the consent of —
17 (a) an arbitrator who has entered on the reference; or
18 (b) all the other parties,
19 and with the leave of the Court.

20 Note: There is no equivalent to this section in the Model Law.

1 **Part 6 — Making of award and termination**
2 **of proceedings**

3 **28. Rules applicable to substance of dispute (cf. Model Law**
4 **Art 28)**

5 (1) The arbitral tribunal must decide the dispute in accordance with
6 such rules of law as are chosen by the parties as applicable to
7 the substance of the dispute.

8 (2) Any designation of the law or legal system of a given State or
9 Territory must be construed, unless otherwise expressed, as
10 directly referring to the substantive law of that State or Territory
11 and not to its conflict of laws rules.

12 (3) Failing any designation by the parties, the arbitral tribunal must
13 apply the law determined by the conflict of laws rules which it
14 considers applicable.

15 (4) The arbitral tribunal must decide the dispute, if the parties so
16 agree, in accordance with such other considerations as are
17 agreed to by the parties.

18 (5) In all cases, the arbitral tribunal must decide in accordance with
19 the terms of the contract and must take into account the usages
20 of the trade applicable to the transaction.

21 Note: This section (other than subsection (4)) is substantially the same as
22 Art 28 of the Model Law.

23 **29. Decision-making by panel of arbitrators (cf. Model Law**
24 **Art 29)**

25 (1) In arbitral proceedings with more than one arbitrator, any
26 decision of the arbitral tribunal must be made, unless otherwise
27 agreed by the parties, by a majority of all its members.

28 (2) However, questions of procedure may be decided by a presiding
29 arbitrator, if so authorised by the parties or all members of the
30 arbitral tribunal.

1 **30. Settlement (cf. Model Law Art 30)**

- 2 (1) If, during arbitral proceedings, the parties settle the dispute, the
3 arbitral tribunal must terminate the proceedings and, if
4 requested by the parties and not objected to by the arbitral
5 tribunal, record the settlement in the form of an arbitral award
6 on agreed terms.
- 7 (2) An award on agreed terms is to be made in accordance with
8 section 31 and must state that it is an award.
- 9 (3) Such an award has the same status and effect as any other award
10 on the merits of the case.

11 **31. Form and contents of award (cf. Model Law Art 31)**

- 12 (1) The award must be made in writing and must be signed by the
13 arbitrator or arbitrators.
- 14 (2) In arbitral proceedings with more than one arbitrator, the
15 signatures of the majority of all members of the arbitral tribunal
16 suffices, provided that the reason for any omitted signature is
17 stated.
- 18 (3) The award must state the reasons upon which it is based, unless
19 the parties have agreed that no reasons are to be given or the
20 award is an award on agreed terms under section 30.
- 21 (4) The award must state its date and the place of arbitration as
22 determined in accordance with section 20.
- 23 (5) The award is taken to have been made at the place stated in the
24 award in accordance with subsection (4).
- 25 (6) After the award is made, a copy signed by the arbitrators in
26 accordance with subsection (1) must be delivered to each party.

27 **32. Termination of proceedings (cf. Model Law Art 32)**

- 28 (1) The arbitral proceedings are terminated by the final award or by
29 an order of the arbitral tribunal in accordance with
30 subsection (2).

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- 1 (2) The arbitral tribunal is to issue an order for the termination of
2 the arbitral proceedings when —
- 3 (a) the claimant withdraws his or her claim, unless the
4 respondent objects and the arbitral tribunal recognises a
5 legitimate interest on the respondent's part in obtaining
6 a final settlement of the dispute; or
- 7 (b) the parties agree on the termination of the proceedings;
8 or
- 9 (c) the arbitral tribunal finds that the continuation of the
10 proceedings has for any other reason become
11 unnecessary or impossible; or
- 12 (d) the arbitral tribunal makes an award under
13 section 25(2)(a) dismissing the claim.
- 14 (3) The mandate of the arbitral tribunal terminates with the
15 termination of the arbitral proceedings, subject to sections 33
16 and 34(4).

17 **33. Correction and interpretation of award; additional award**
18 **(cf. Model Law Art 33)**

- 19 (1) Within 30 days of receipt of the award, unless another period of
20 time has been agreed on by the parties —
- 21 (a) a party, with notice to the other party, may request the
22 arbitral tribunal to correct in the award any errors in
23 computation, any clerical or typographical errors or any
24 errors of similar nature; and
- 25 (b) if so agreed by the parties, a party, with notice to the
26 other party, may request the arbitral tribunal to give an
27 interpretation of a specific point or part of the award.
- 28 (2) If the arbitral tribunal considers a request under subsection (1)
29 to be justified, it must make the correction or give the
30 interpretation within 30 days of receipt of the request.
- 31 (3) The interpretation forms part of the award.

- 1 (4) The arbitral tribunal may correct any error of the type referred
2 to in subsection (1)(a) on its own initiative within 30 days of the
3 date of the award.
- 4 (5) Unless otherwise agreed by the parties, a party, with notice to
5 the other party, may request, within 30 days of receipt of the
6 award, the arbitral tribunal to make an additional award as to
7 claims presented in the arbitral proceedings but omitted from
8 the award.
- 9 (6) If the arbitral tribunal considers the request to be justified, it
10 must make the additional award within 60 days.
- 11 (7) The arbitral tribunal may extend, if necessary, the period of time
12 within which it may make a correction, interpretation or an
13 additional award under subsection (2) or (5).
- 14 (8) Section 31 applies to a correction or interpretation of the award
15 or to an additional award.

16 **33A. Specific performance**

17 Unless otherwise agreed by the parties, the arbitrator has the
18 power to make an award ordering specific performance of any
19 contract if the Court would have power to order specific
20 performance of that contract.

21 Note: There is no equivalent to this section in the Model Law.

22 **33B. Costs**

- 23 (1) Unless otherwise agreed by the parties, the costs of an
24 arbitration (including the fees and expenses of the arbitrator or
25 arbitrators) are to be in the discretion of the arbitral tribunal.
- 26 (2) Unless otherwise agreed by the parties, the arbitral tribunal may
27 direct that the costs of an arbitration, or of any part of the
28 arbitral proceedings, are to be limited to a specified amount.
- 29 (3) A direction under subsection (2) may be varied at any stage, but
30 this must be done sufficiently in advance of the incurring of
31 costs to which it relates, or the taking of any steps in the

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- 1 proceedings which may be affected by it, for the limit to be
2 taken into account.
- 3 (4) The arbitral tribunal may, in making an award —
- 4 (a) direct to whom, by whom, and in what manner, the
5 whole or any part of the costs that it awards are to be
6 paid; and
- 7 (b) tax or settle the amount of costs to be paid or any part of
8 those costs; and
- 9 (c) award costs to be taxed or settled as between party and
10 party or as between legal practitioner and client.
- 11 (5) Any costs of an arbitration (other than the fees or expenses of an
12 arbitrator) that are directed to be paid by an award are, to the
13 extent that they have not been taxed or settled by the arbitral
14 tribunal, to be assessed in the Court having jurisdiction under
15 section 34 to hear applications setting aside the award.
- 16 (6) If no provision is made by an award with respect to the costs of
17 the arbitration, a party may, within 14 days after receiving the
18 award, apply to the arbitral tribunal for directions as to the
19 payment of those costs.
- 20 (7) The arbitral tribunal must, after hearing any party who wishes to
21 be heard, amend the award by adding to it such directions as the
22 arbitral tribunal thinks proper with respect to the payment of the
23 costs of the arbitration.

24 Note: There is no equivalent to this section in the Model Law.

25 **33C. Application of *Legal Profession Act 2008***

26 For the purposes of section 33B(5), the *Legal Profession*
27 *Act 2008* Part 10 Division 8 applies with any necessary
28 modifications.

29 Note: There is no equivalent to this section in the Model Law.

1 **33D. Costs of abortive arbitration**

- 2 (1) Unless otherwise agreed in writing by the parties, if an
3 arbitration is commenced but for any reason fails, the Court
4 may, on the application of a party or the arbitral tribunal made
5 within 6 months after the failure of the arbitration, make such
6 orders in relation to the costs of the arbitration as it thinks just.
- 7 (2) For the purposes of this section, an arbitration is taken to have
8 failed if —
- 9 (a) a final award is not made by the arbitral tribunal before
10 the arbitration terminates; or
- 11 (b) an award made is wholly set aside by the Court.
- 12 (3) If the failed arbitration is a related proceedings (within the
13 meaning of section 27C), the Court may stay proceedings on the
14 application under subsection (1) pending the determination of
15 the other arbitration proceedings to which the failed arbitration
16 is related.

17 Note: There is no equivalent to this section in the Model Law.

18 **33E. Interest up to making of award**

- 19 (1) Unless otherwise agreed by the parties, where an arbitral
20 tribunal makes an award for the payment of money (whether on
21 a claim for a liquidated or an unliquidated amount), the arbitral
22 tribunal may include in the sum for which the award is made
23 interest, at such reasonable rate as the arbitral tribunal
24 determines —
- 25 (a) on the whole or any part of the money; and
- 26 (b) for the whole or any part of the period between the date
27 on which the cause of action arose and the date on
28 which the award is made.
- 29 (2) Subsection (1) does not —
- 30 (a) authorise the awarding of interest on interest awarded
31 under this section; or

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- 1 (b) apply in relation to any amount on which interest is
2 payable as of right whether because of an agreement or
3 otherwise; or
4 (c) affect the damages recoverable for the dishonour of a
5 bill of exchange.

6 Note: There is no equivalent to this section in the Model Law.

7 **33F. Interest on debt under award**

- 8 (1) This section applies if —
9 (a) an arbitral tribunal makes an award for the payment of
10 an amount of money; and
11 (b) under the award, the amount is to be paid by a particular
12 day (the *due date*),
13 unless otherwise agreed by the parties.
14 (2) The arbitral tribunal may direct that interest, including
15 compound interest, is payable if the amount is not paid on or
16 before the due date.
17 (3) The arbitral tribunal may set a reasonable rate of interest.
18 (4) The interest is payable —
19 (a) from the day immediately following the due date; and
20 (b) on so much of the money as remains unpaid.
21 (5) The direction is taken to form part of the award.

22 Note: There is no equivalent to this section in the Model Law.

1 **Part 7 — Recourse against award**

2 **34. Application for setting aside as exclusive recourse against**
3 **arbitral award (cf. Model Law Art 34)**

- 4 (1) Recourse to the Court against an arbitral award may be made
5 only by an application for setting aside in accordance with
6 subsections (2) and (3) or by an appeal under section 34A.

7 Note: The Model Law does not provide for appeals as under section 34A.

- 8 (2) An arbitral award may be set aside by the Court only if —

9 (a) the party making the application furnishes proof that —

10 (i) a party to the arbitration agreement referred to in
11 section 7 was under some incapacity, or the
12 arbitration agreement is not valid under the law
13 to which the parties have subjected it or, failing
14 any indication in it, under the law of this State;
15 or

16 (ii) the party making the application was not given
17 proper notice of the appointment of an arbitral
18 tribunal or of the arbitral proceedings or was
19 otherwise unable to present the party's case; or

20 (iii) the award deals with a dispute not contemplated
21 by or not falling within the terms of the
22 submission to arbitration, or contains decisions
23 on matters beyond the scope of the submission to
24 arbitration, provided that, if the decisions on
25 matters submitted to arbitration can be separated
26 from those not so submitted, only that part of the
27 award which contains decisions on matters not
28 submitted to arbitration may be set aside; or

29 (iv) the composition of the arbitral tribunal or the
30 arbitral procedure was not in accordance with the
31 agreement of the parties, unless such agreement
32 was in conflict with a provision of this Act from
33 which the parties cannot derogate, or, failing

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- 1 such agreement, was not in accordance with this
2 Act;
- 3 or
- 4 (b) the Court finds that —
- 5 (i) the subject matter of the dispute is not capable of
6 settlement by arbitration under the law of this
7 State; or
- 8 (ii) the award is in conflict with the public policy of
9 this State.
- 10 (3) An application for setting aside may not be made after 3 months
11 have elapsed from the date on which the party making that
12 application had received the award or, if a request had been
13 made under section 33, from the date on which that request had
14 been disposed of by the arbitral tribunal.
- 15 (4) The Court, when asked to set aside an award, may, where
16 appropriate and so requested by a party, suspend the setting
17 aside of proceedings for a period of time determined by it in
18 order to give the arbitral tribunal an opportunity to resume the
19 arbitral proceedings or to take such other action as in the arbitral
20 tribunal’s opinion will eliminate the grounds for setting aside.
- 21 **34A. Appeals against awards**
- 22 (1) An appeal lies to the Court on a question of law arising out of
23 an award if —
- 24 (a) the parties agree, before the end of the appeal period
25 referred to in subsection (6), that an appeal may be made
26 under this section; and
- 27 (b) the Court grants leave.
- 28 (2) An appeal under this section may be brought by any of the
29 parties to an arbitration agreement.
- 30 (3) The Court must not grant leave unless it is satisfied —
- 31 (a) that the determination of the question will substantially
32 affect the rights of one or more of the parties; and

- 1 (b) that the question is one which the arbitral tribunal was
2 asked to determine; and
- 3 (c) that, on the basis of the findings of fact in the award —
4 (i) the decision of the tribunal on the question is
5 obviously wrong; or
6 (ii) the question is one of general public importance
7 and the decision of the tribunal is at least open to
8 serious doubt;
- 9 and
- 10 (d) that, despite the agreement of the parties to resolve the
11 matter by arbitration, it is just and proper in all the
12 circumstances for the Court to determine the question.
- 13 (4) An application for leave to appeal must identify the question of
14 law to be determined and state the grounds on which it is
15 alleged that leave to appeal should be granted.
- 16 (5) The Court is to determine an application for leave to appeal
17 without a hearing unless it appears to the Court that a hearing is
18 required.
- 19 (6) An appeal may not be made under this section after 3 months
20 have elapsed from the date on which the party making the
21 appeal received the award or, if a request had been made under
22 section 33, from the date on which that request had been
23 disposed of by the arbitral tribunal (in this section referred to as
24 the *appeal period*).
- 25 (7) On the determination of an appeal under this section the Court
26 may by order —
27 (a) confirm the award; or
28 (b) vary the award; or
29 (c) remit the award, together with the Court’s opinion on
30 the question of law which was the subject of the appeal,
31 to the arbitrator for reconsideration or, where a new

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- 1 arbitrator has been appointed, to that arbitrator for
2 consideration; or
- 3 (d) set aside the award in whole or in part.
- 4 (8) The Court must not exercise its power to set aside an award, in
5 whole or in part, unless it is satisfied that it would be
6 inappropriate to remit the matters in question to the arbitral
7 tribunal for reconsideration.
- 8 (9) Where the award is remitted under subsection (7)(c) the
9 arbitrator must, unless the order otherwise directs, make the
10 award within 3 months after the date of the order.
- 11 (10) The Court may make any leave which it grants under
12 subsection (3)(c) subject to the applicant complying with any
13 conditions it considers appropriate.
- 14 (11) Where the award of an arbitrator is varied on an appeal under
15 this section, the award as varied has effect (except for the
16 purposes of this section) as if it were the award of the arbitrator.
- 17 Note: There is no equivalent to this section in the Model Law.

Part 8 — Recognition and enforcement of awards

35. Recognition and enforcement (cf. Model Law Art 35)

(1) An arbitral award, irrespective of the State or Territory in which it was made, is to be recognised in this State as binding and, on application in writing to the Court, is to be enforced subject to the provisions of this section and section 36.

(2) The party relying on an award or applying for its enforcement must supply the original award or a copy of the original award.

(3) If the award is not made in English, the Court may request the party to supply a translation of it into English.

Note: So much of Art 35(2) of the Model Law as provides for the translation of an award that is not in the official language of the enforcing State has been modified.

36. Grounds for refusing recognition or enforcement (cf. Model Law Art 36)

(1) Recognition or enforcement of an arbitral award, irrespective of the State or Territory in which it was made, may be refused only —

(a) at the request of the party against whom it is invoked, if that party furnishes to the Court proof that —

(i) a party to the arbitration agreement was under some incapacity, or the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication in it, under the law of the State or Territory where the award was made; or

(ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present the party's case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the

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- 1 submission to arbitration, or it contains decisions
2 on matters beyond the scope of the submission to
3 arbitration, provided that, if the decisions on
4 matters submitted to arbitration can be separated
5 from those not so submitted, that part of the
6 award which contains decisions on matters
7 submitted to arbitration may be recognised and
8 enforced; or
- 9 (iv) the composition of the arbitral tribunal or the
10 arbitral procedure was not in accordance with the
11 agreement of the parties or, failing such
12 agreement, was not in accordance with the law of
13 the State or Territory where the arbitration took
14 place; or
- 15 (v) the award has not yet become binding on the
16 parties or has been set aside or suspended by a
17 court of the State or Territory in which, or under
18 the law of which, that award was made;
- 19 or
- 20 (b) if the Court finds that —
- 21 (i) the subject matter of the dispute is not capable of
22 settlement by arbitration under the law of this
23 State; or
- 24 (ii) the recognition or enforcement of the award
25 would be contrary to the public policy of this
26 State.
- 27 (2) If an application for setting aside or suspension of an award has
28 been made to a court referred to in subsection (1)(a)(v), the
29 Court may, if it considers it proper, adjourn its decision and may
30 also, on the application of the party claiming recognition or
31 enforcement of the award, order the party to provide appropriate
32 security.

Part 9 — Miscellaneous**37. Death of party**

(1) Unless otherwise agreed by the parties, if a party to an arbitration agreement dies, the agreement is not discharged (either as respects the deceased or any other party) and the authority of an arbitral tribunal is not revoked by the death but that agreement is enforceable by or against the personal representative of the deceased.

(2) Nothing in subsection (1) affects the operation of any enactment or rule of law by virtue of which a right of action is extinguished by the death of a person.

Note: There is no equivalent to this section in the Model Law.

38. Interpleader

Where relief by way of interpleader is granted in any court and it appears to that court that the claims in question are matters to which an arbitration agreement (to which the claimants are parties) applies, the Court must, unless it is satisfied that there is sufficient reason why the matters should not be referred to arbitration in accordance with the agreement, make an order directing the issue between the claimants to be determined in accordance with the agreement.

Note: There is no equivalent to this section in the Model Law.

39. Immunity

(1) An arbitrator is not liable for anything done or omitted to be done in good faith in his or her capacity as arbitrator.

(2) An entity that appoints, or fails to appoint, a person as arbitrator is not liable in relation to the appointment, failure or refusal if done in good faith.

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1 (3) In this section, a reference to an arbitrator includes an arbitrator
2 acting as a mediator, conciliator or other non-arbitral
3 intermediary under section 27D.

4 Note: There is no equivalent to this section in the Model Law.

5 **40. Court rules**

6 (1) Rules of court may be made for carrying the purposes of this
7 Act into effect and, in particular, for or with respect to the
8 following —

9 (a) applications to a court under this Act and the costs of
10 such applications;

11 (b) the payment or bringing of money into and out of a
12 court in satisfaction of claims to which arbitration
13 agreements apply and the investment of that money;

14 (c) the examination of witnesses before a court or before
15 any other person and the issue of commissions or
16 requests for the examination of witnesses outside
17 Western Australia, for the purposes of an arbitration;

18 (d) offers of compromise in relation to claims to which
19 arbitration agreements apply;

20 (e) any other matter or thing for or with respect to which
21 rules are by this Act authorised or required to be made
22 by a court.

23 (2) Subsection (1) does not limit the rule-making powers conferred
24 on a court by any other Act.

25 Note: There is no equivalent to this section in the Model Law.

26 **41. Regulations**

27 The Governor may make regulations prescribing all matters that
28 are required or permitted by this Act to be prescribed, or are
29 necessary or convenient to be prescribed for giving effect to the
30 purposes of this Act.

31 Note: There is no equivalent to this section in the Model Law.

Part 10 — Transitional

Note: There is no equivalent to this Part in the Model Law.

42. Transitional regulations

- (1) If there is not sufficient provision in this Act for dealing with a transitional matter, regulations under this Act may prescribe all matters that are required or necessary or convenient to be prescribed for dealing with the matter.
- (2) In subsection (1) —
transitional matter —
- (a) means a matter that needs to be dealt with for the purpose of effecting the transition from the provisions of the *Commercial Arbitration Act 1985* to the provisions of this Act; and
 - (b) includes a saving or application matter.
- (3) Regulations made under subsection (1) may provide that
- (a) do not apply to or in relation to any matter; or
 - (b) apply with specified modifications to or in relation to any matter.
- (4) If regulations under subsection (1) provide that a specified state of affairs is taken to have existed, or not to have existed, on and from a day that is earlier than the day on which the regulations are published in the *Gazette* but not earlier than the day this section comes into operation, the regulations have effect according to their terms.
- (5) In subsections (3) and (4) —
specified means specified or described in the regulations.

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- 1 (6) If regulations contain a provision referred to in subsection (4),
2 the provision does not operate so as —
- 3 (a) to affect, in a manner prejudicial to any person (other
4 than the State), the rights of that person existing before
5 the day of publication of those regulations; or
- 6 (b) to impose liabilities on any person (other than the State
7 or an authority of the State) in respect of anything done
8 or omitted to be done before the day of publication of
9 those regulations.
- 10 (7) Regulations made under subsection (1) in relation to a matter
11 referred to in subsection (3) must be made within such period as
12 is reasonably and practicably necessary to deal with a
13 transitional matter that arises as a result of the enactment of this
14 Act.

15 **43. Savings and transitional provisions**

- 16 (1) Subject to subsection (2) —
- 17 (a) this Act applies to an arbitration agreement (whether
18 made before or after the commencement of this section)
19 and to an arbitration under such an agreement; and
- 20 (b) a reference in an arbitration agreement to the
21 *Commercial Arbitration Act 1985*, or a provision of that
22 Act, is to be construed as a reference to this Act or to the
23 corresponding provision (if any) of this Act.
- 24 (2) If an arbitration was commenced before the commencement of
25 this section, the law governing the arbitration and the arbitration
26 agreement is to be that which would have been applicable if this
27 Act had not been enacted.
- 28 (3) For the purposes of this section, an arbitration is taken to have
29 been commenced if —
- 30 (a) a dispute to which the relevant arbitration agreement
31 applies has arisen; and
- 32 (b) the arbitral tribunal has been properly constituted.

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Part 11 — Repeal and amendments

Note: There is no equivalent to this Part in the Model Law.

Division 1 — Repeal

44. *Commercial Arbitration Act 1985* repealed

The *Commercial Arbitration Act 1985* is repealed.

Division 2 — Amendments

45. Acts amended

- (1) This section amends the Acts listed in the Table.
- (2) Amend the provisions listed in the Table as set out in the Table.

Table

Provision	Delete	Insert
1. <i>Agriculture and Related Resources Protection Act 1976</i>		
s. 106(1)(g)	<i>Arbitration Act 1895</i>	<i>Commercial Arbitration Act 2011</i>
2. <i>Anglican Church of Australia Constitution Act 1960</i>		
s. 10	<i>Commercial Arbitration Act 1985</i>	<i>Commercial Arbitration Act 2011</i>
3. <i>Bulk Handling Act 1967</i>		
s. 48(3)	<i>Arbitration Act 1895</i>	<i>Commercial Arbitration Act 2011</i>
4. <i>Companies (Co-operative) Act 1943</i>		
s. 161(1) and (3), 240(6)	<i>Arbitration Act 1895</i>	<i>Commercial Arbitration Act 2011</i>

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Part 11 Repeal and amendments

Division 2 Amendments s. 45

Provision	Delete	Insert
5. District Court of Western Australia Act 1969		
s. 79(1a)	<i>Commercial Arbitration Act 1985</i>	<i>Commercial Arbitration Act 2011</i>
6. Electricity Act 1945		
s. 11(2)	<i>Commercial Arbitration Act 1985</i>	<i>Commercial Arbitration Act 2011</i>
7. Energy Arbitration and Review Act 1998		
s. 77	<i>Commercial Arbitration Act 1985</i>	<i>Commercial Arbitration Act 2011</i>
8. Fluoridation of Public Water Supplies Act 1966		
s. 13(3)	<i>Arbitration Act 1895</i>	<i>Commercial Arbitration Act 2011</i>
9. Health Act 1911		
s. 64(4) and (5), 96	<i>Commercial Arbitration Act 1985</i>	<i>Commercial Arbitration Act 2011</i>
10. Heritage of Western Australia Act 1990		
s. 75(4)(b)(ii), 76(3)	<i>Commercial Arbitration Act 1985</i>	<i>Commercial Arbitration Act 2011</i>
11. Land Administration Act 1997		
s. 35(5)(a)(ii)	<i>Commercial Arbitration Act 1985</i>	<i>Commercial Arbitration Act 2011</i>

Provision	Delete	Insert
12. Local Government Act 1995		
s. 3.23	<i>Commercial Arbitration Act 1985</i> (each occurrence)	<i>Commercial Arbitration Act 2011</i>
13. Local Government (Miscellaneous Provisions) Act 1960		
s. 684(a)	<i>Commercial Arbitration Act 1985</i>	<i>Commercial Arbitration Act 2011</i>
14. Petroleum Act 1936		
s. 13(4), 14(3), 71(1)	<i>Arbitration Act 1895</i>	<i>Commercial Arbitration Act 2011</i>
15. Petroleum and Geothermal Energy Resources Act 1967		
s. 13(4)	<i>Commercial Arbitration Act 1985</i>	<i>Commercial Arbitration Act 2011</i>
16. Planning and Development Act 2005		
s. 156(2), 176(2), 184(4), 185(3), 188(2)(a), (3)(a) and (4)	<i>Commercial Arbitration Act 1985</i>	<i>Commercial Arbitration Act 2011</i>
17. Private Railways (Level Crossings) Act 1966		
s. 5(3)	<i>Arbitration Act 1895</i>	<i>Commercial Arbitration Act 2011</i>

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Part 11 Repeal and amendments

Division 2 Amendments

s. 45

Provision	Delete	Insert
18. Rights in Water and Irrigation Act 1914		
s. 37, Sch. 1 cl. 17(3)(b)(ii) and 39(8)	<i>Commercial Arbitration Act 1985</i>	<i>Commercial Arbitration Act 2011</i>
19. Supreme Court Act 1935		
s. 53	<i>Commercial Arbitration Act 1985</i>	<i>Commercial Arbitration Act 2011</i>
20. Swan and Canning Rivers Management Act 2006		
s. 89(7)	<i>Commercial Arbitration Act 1985</i>	<i>Commercial Arbitration Act 2011</i>

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Note: The heading to amended section 77 of the *Energy Arbitration and Review Act 1998* is to read:

Commercial Arbitration Act 2011 does not apply

Defined Terms

*[This is a list of terms defined and the provisions where they are defined.
The list is not part of the law.]*

Defined Term	Provision(s)
appeal period.....	34A(6)
arbitral tribunal	2(1)
arbitration	2(1)
arbitration agreement	2(1), 7(1)
confidential information	2(1)
data message	7(6)
disclose	2(1)
domestic.....	1(3)
domestic commercial arbitration	2(1)
due date.....	33F(1)
electronic communication.....	7(6)
exercise	2(1)
interim measure	2(1), 17(2)
mediation proceedings	27D(1)
mediator	27D(8)
Model Law.....	2(1)
party.....	2(1)
peremptory order	25(2)
person in default	27B(1)
related proceedings	27C(2)
relevant law	27F(10)
specified.....	42(5)
stop clock.....	17(3)
the Court.....	2(1)
transitional matter	42(2)