

THE ARBITRATION ACT

Date of commencement: 28th July, 1904.

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An Act to provide for the settlement of differences by arbitration.

PART I

PRELIMINARY

Short title.

1. This Act may be cited as the Arbitration Act, 1904.

Interpretation.

2. In this Act, unless the context otherwise requires —
“Court” means the High Court;
“judge” means a judge of the High Court;

“magistrate’s court” means a court established under the Subordinate Courts Proclamation (*Cap. 20*);

“official referee” means a referee appointed by the Court or a judge;

“special referee” means any particular person appointed to be a referee in any particular matter;

“submission” means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not.

PART II

REFERENCES BY CONSENT OUT OF COURT

Effect of a submission.

3. Unless a contrary intention is expressed therein, a submission shall be irrevocable except by leave of the Court, or a judge, or by consent of all parties thereto and shall have the same effect in all respects as if it had been an order of Court.

Submission to include provisions in Schedule.

4. A submission shall unless a contrary intention is expressed therein, be deemed to include the provisions of the Schedule so far as they are applicable to the reference under the submission.

Official referee.

5. If a submission provides that the reference shall be to an official referee, any official referee to whom application is made shall, subject to any order of court or a judge, hear and determine the matters agreed to be referred.

Staying of legal proceedings.

6. (1) If any party to a submission or any person claiming through or under him commences any legal proceedings in any court against any other party to the submission or any person claiming through or under him in respect of any matter agreed to be referred to arbitration, any party to such legal proceedings may at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings apply to such court to stay proceedings.

(2) Such court or a judge may, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, make an order staying the proceedings.

Provision excluding arbitration on certain matters.

7. (1) No criminal matter shall, in so far as the prosecution or punishment thereof is concerned, be submitted to arbitration.

(2) Without special leave of the court the following shall not be submitted to arbitration —

- (a) matters relating to status;
- (b) matrimonial causes; or
- (c) matters in which minors or other persons under legal disability may be interested.

In what cases written notice to appoint an arbitrator may be served.

8. (1) Any party may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint or, if agreement be necessary, to agree in the appointment of, an arbitrator or umpire or third arbitrator if —

- (a) a submission provides that the reference shall be to a single arbitrator and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator;
- (b) an appointed arbitrator fails or refuses to act or is incapable of acting or dies and the submission does not show that it was intended that the vacancy should not be supplied and the parties do not supply the vacancy;
- (c) the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator and do not appoint him in any case where such appointment is requisite for the decision of the matters in dispute or the due conduct of the arbitration;
- (d) an appointed umpire or third arbitrator fails or refuses to act or is incapable of acting or dies and the submission does not show that it was intended that the vacancy should not be supplied and the parties or arbitrators do not supply the vacancy.

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

Supply of vacancy in case the submission provides for two arbitrators.

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

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

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

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

Arbitrators and umpires to be disinterested parties.

10. (1) Every arbitrator and umpire shall, be and continue throughout the reference to be disinterested with reference to the matters referred.

(2) The parties to any reference and any party to a reference may require any arbitrator or umpire to make a sworn declaration before beginning or continuing his duties as such that he has no interest direct or indirect in the matters referred or in the parties to the reference and knows of nothing disqualifying him from being impartial and disinterested in the discharge of such duties.

(3) Any party may expressly waive any right to object to any arbitrator or umpire on the grounds of interest or the like.

Court may remove arbitrator or umpire.

11. The Court may at any time upon motion remove any arbitrator or umpire against whom a just ground of recusation is found to exist or who has misbehaved himself in connection with the matters referred to him for arbitration.

Powers of umpire or arbitrator.

12. The arbitrator or umpire acting under a submission may unless the submission expresses a contrary intention —

- (a) administer oaths or take the affirmations of the parties and witnesses appearing;
- (b) on the application of either party, appoint a commissioner to take the evidence of a person residing outside Swaziland and forward it to arbitrators in the same way as if he were a commissioner appointed by the Court;
- (c) state an award as to the whole or part thereof in the form of a special case for the opinion of the Court; and
- (d) correct any clerical mistake or error in any award arising from an accidental slip or omission.

Party to submission may take out process of Court for witnesses.

13. Any party to a submission may take out process of the Court for the attendance of witnesses, but no person shall be compelled under any such process to produce any document which he could not be compelled to produce at the trial of any action.

Time of making award.

14. The time for making an award may from time to time be extended by order of the Court or a judge, whether the time for making the award has expired or not.

Remission of case to arbitrator or umpire.

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

(2) If a matter is remitted under subsection (1) the arbitrators or umpire shall, unless the order of remittal otherwise directs, make their award within three months of the date of such order.

Misconduct of arbitrator or umpire.

16. (1) The Court may remove an arbitrator or umpire who has misbehaved himself.

(2) If an arbitrator or umpire has misbehaved himself or an arbitration or award has been improperly procured, the Court may set such award aside and may award costs against any such arbitrator or umpire personally.

Award; how to be enforced.

17. An award which has been made an order of Court may be enforced in the same manner as a judgment or order to the same effect.

Arbitrators or umpire may appoint place for arbitration.

18. If the submission does not provide in what place the arbitration shall be held the arbitrators or umpire may decide upon such place as may be reasonably accessible to the parties and convenient for the purposes of the reference.

PART III

REFERENCES UNDER ORDER OF COURT

Official and special referees and officers of Court.

19. (1) Subject to rules of Court, the Court or judge may refer any question arising in any cause or matter (other than a criminal proceeding) for enquiry or report to any official or special referee or officer of the Court.

(2) The report of an official or special referee or officer of the Court may be adopted wholly or partly by the Court or a judge and with or without such amendments as the Court or judge may deem fit, and if so adopted may be enforced as a judgment or order to the same effect, or the Court or a judge may remit the report for further consideration or make such other order thereon as may be just.

Matters which may be referred to referees for trial.

20. The Court or judge may at any time order the whole of any cause or matter (other than a criminal proceeding) or any question or issue of fact arising therein to be tried before an official or special referee or arbitrator agreed on by the parties or, failing agreement, before any official referee or officer of the Court appointed by it if —

- (a) all the parties interested who are not under disability consent; or
- (b) the cause or matter requires any prolonged examination of documents or any scientific technical or local investigation which cannot in the opinion of a Court or judge conveniently be conducted by the Court through its ordinary officers; or
- (c) the question in dispute consists wholly or in part of matters of account.

Duty of referee and effect of his report or award.

21. (1) In all cases of reference to an officer of the Court or to an official or special referee or arbitrator under an order of Court or a judge in any cause or matter, the official or special referee or arbitrator shall be deemed to be an officer of the Court and shall have such authority and shall conduct the reference in such manner as may be prescribed by rules of Court and subject thereto as the Court or a judge may direct.

(2) The report or award of any official or special referee or arbitrator or officer of the Court on any such reference shall unless set aside by the Court or a judge be equivalent to a finding of fact by the Court.

(3) The remuneration to be paid to any official or special referee or arbitrator or officer of the Court to whom any matter is referred by order of the Court or a judge shall be determined by the Court or a judge or by the rules of Court.

Award may be made a rule of Court.

22. The report or award of any officer of the Court or official or special referee or arbitrator may upon motion by any party after due notice to the other parties be made an order of Court.

Powers of Court or judge as to references.

23. The Court or a judge shall as to references under an order of the Court or a judge have all the powers conferred by this Act on the Court or a judge as to references by consent out of Court.

PART IV

GENERAL

Subpoena or summons.

24. The issue of a subpoena or summons on a witness to compel his attendance and the production of things or documents before an arbitrator, umpire, officer of the court, official or special referee, as the case may be, may be procured in the same way and subject to the same conditions as if the matter were an action pending in the Court by —

- (a) any party to a submission or any arbitrator or umpire thereunder;
- (b) the parties to any reference under any order of Court; or
- (c) any officer of the Court, official or special referee hearing any reference under an order of Court:

Provided that —

- (i) no person shall be compelled on such subpoena to produce any document or thing the production of which would not be compellable on the trial of an action;
- (ii) the Clerk of any magistrate's court may issue such subpoena in the name and on behalf of the registrar of the Court upon payment of the same fees as are chargeable for the issue of a subpoena in the magistrate's court.

General powers of Court or judge.

25. The Court or a judge may order the issue of process of the Court to compel the attendance before a special or official referee or officer of the Court or before an arbitrator or umpire of a witness wherever he may be within the jurisdiction of the Court or may order any prisoner to be brought up for examination before such officer, referee, arbitrator or umpire.

Special case stated by umpire, referee, arbitrator or officer.

26. Any such officer, referee, arbitrator or umpire may at any stage of the proceedings under a reference and, if so directed by the Court or a judge shall, state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference.

Costs.

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

False evidence.

28. Any person who wilfully or corruptly gives false evidence before any such officer, referee, arbitrator or umpire shall be guilty of perjury in the same way as if the evidence had been given in open Court and may be dealt with, prosecuted and punished accordingly.

Not to affect arbitration under Acquisition of Property Act, No. 10 of 1961, except by consent.

29. This Act shall not apply to any arbitration under the Acquisition of Property Act, No. 10 of 1961 unless all the parties to the arbitration otherwise agree in writing, in which case both Acts shall be read together.

SCHEDULE

(Under section 4 of the Act)

PROVISIONS TO BE IMPLIED IN SUBMISSION IN TERMS OF SECTION 4.

1. If no other mode of reference is provided the reference shall be to a single arbitrator.
2. If the reference is to two arbitrators, agreement by both of them is required for decision on any question, but if the reference is to more than two arbitrators the decision of the majority of them shall determine any question.
3. If the reference is to two arbitrators, they may appoint an umpire at any time within the period during which they have power to make an award.
4. The arbitrators shall make their award in writing within three months after entering on the reference or after having been called on to act by notice in writing from any party to the submission, whichever is the earlier date, or on or before any later day to which the arbitrators may by any writing signed by them from time to time extend the time for making the award:

Provided that such further period shall not exceed four months.

5. If the arbitrators have allowed their time or extended time to expire without making an award or have delivered to any party to the submission or to the umpire a notice in writing stating that they cannot agree, the umpire may forthwith enter on the reference in their place.
6. The umpire shall make his award within one month after the original or extended time appointed for making the award of the arbitrators has expired or on or before any later day to which the umpire by any writing signed by him may from time to time extend the time for making his award:

Provided that such further time shall not exceed three months.

7. The parties to the reference and all persons claiming through them respectively shall, subject to any legal objection, submit all books, deeds, accounts, papers, writings and documents within their possession or power respectively which may be required or called for

examination by the arbitrators or umpire on oath or affirmation in relation to the matters in dispute and produce them before the arbitrators or umpire and do all other things which during the proceedings on the reference the arbitrators or umpire may require.

8. The witnesses on the reference shall, if the arbitrators or umpire think fit, be examined on oath or affirmation.

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

10. The cost of the reference and award shall be in the discretion of the arbitrators or umpire who may direct to and by whom, and in what manner, those costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof and may award costs to be so paid as between attorney and client:

Provided always that if no direction be given as to the scale on which such costs are to be taxed they shall be taxed on the tariff allowed in magistrate's courts from time to time if the award is such as a magistrate might have pronounced as a judgment in his court, but otherwise such costs shall be taxed on the tariff in force from time to time in the Court.

11. The oral evidence of any witness shall be recorded by the arbitrator or umpire before whom it is given, and if not recorded by him personally it shall be recorded in such manner as he may from time to time direct.

12. The umpire may act upon the evidence recorded before the arbitrators and make his award without hearing any witnesses or receiving any fresh evidence:

Provided that he shall be entitled, if he thinks fit, to re-hear any witnesses or to call for further evidence.

13. The umpire may sit together with the arbitrators and hear the evidence given from time to time, and may then and there decide on any interlocutory matter upon which the arbitrators disagree:

Provided that the umpire shall not, unless called upon to give an award or unless the parties have requested him so to sit, be entitled to any remuneration from the parties in respect of his attendance on the reference with the arbitrators.

14. If the arbitrators or a majority of them cannot agree as to any matter of procedure or on any interlocutory question they may forthwith refer it to the umpire for decision and he shall give his decision thereon forthwith.

15. Any arbitrator or umpire may proceed *ex parte* in case any party after reasonable notice neglects or refuses to attend on the reference without having previously shown good and sufficient cause for his non-attendance.

16. If any party to the arbitration dies —

- (a) the arbitration shall be stayed, subject to any order the Court may make, until the appointment of an executor or other proper representative of such deceased party;
- (b) the time for making an award shall be extended for the same period as may elapse between the death of the party and the appointment of an executor or other proper representative; and
- (c) such executor or other proper representative shall, when called upon by the other party to the submission to proceed with the arbitration, be subject to the same rules, provisions and conditions as the deceased was.