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ARBITRATION

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Proc. 75, 1959,
Law 30, 1962,
L.N. 84, 1966.

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

[Date of Commencement: 27th November, 1959]

Part:I Preliminary (ss 1-2)

1. Short title

This Act may be cited as the Arbitration Act.

2. Interpretation

In this Act, unless the context otherwise requires-

"arbitration" means any proceedings held pursuant to a submission;

"arbitrator" means any person acting as such pursuant to a submission;

"Court" means the High Court;

"official referee" means any referee appointed by the Court in terms of any general rule of Court without reference to any particular matter;

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

"submission" means a written agreement, wherever made, to submit present or future differences to arbitration, whether an arbitrator is named therein or not;

"umpire" means any person acting as such pursuant to a submission.

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Part:II References by Consent out of Court (ss 3-21)

3. Authority of arbitrators and umpires to be irrevocable

The authority of an arbitrator or umpire appointed by or by virtue of a submission shall, unless a contrary intention is expressed in the submission, be irrevocable except by leave of the Court or a judge thereof.

4. Submission to include provisions in Schedule

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

5. Reference to an official referee

Where 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.

6. Staying of legal proceedings

(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 to any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings subject to such terms and conditions as may be just.

(2) The provisions of subsection (1) shall, in the case of the death or insolvency of any party to which it might apply, apply mutatis mutandis to the executor or trustee in the insolvency of such party.

(3) The death or insolvency of a party to a submission shall not be deemed to revoke such submission.

7. Matters not to be submitted to arbitration

Criminal cases, so far as the prosecution or punishment thereof is concerned, shall not be submitted to arbitration, nor, without special leave of the Court, shall any of the following matters be submitted to arbitration-

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

8. Power of parties in certain cases to supply vacancy

Where a submission provides that the reference shall be to two arbitrators, one to be appointed by each party, then, unless a contrary intention is expressed therein-

- (a) if either of the appointed arbitrators refuses to act, or is incapable of acting, or dies, the party who appointed him may appoint a new arbitrator in his place;
- (b) if, on such reference, one party fails to appoint an arbitrator, either originally, or by way of substitution as aforesaid, for seven clear days after the other

party, having appointed his arbitrator, has served the party making default with notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference and his award shall be binding on both parties as if he had been appointed by consent:

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

9. Umpires

(1) Unless a contrary intention is expressed therein, every submission shall, where the reference is to two arbitrators, be deemed to include a provision that the two arbitrators shall appoint an umpire immediately after they are themselves appointed.

(2) Unless a contrary intention is expressed therein, every submission shall, where such a provision is applicable to the reference, be deemed to include a provision that if the arbitrators 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 lieu of the arbitrators.

(3) At any time after the appointment of an umpire, however appointed, the Court may, on the application of any party to the reference and notwithstanding anything to the contrary in the submission, order that the umpire shall enter upon the reference in lieu of the arbitrators and as if he were a sole arbitrator.

10. Reference to three arbitrators

(1) Where a submission provides that the reference shall be to three arbitrators, one to be appointed by each party and the third to be appointed by the two appointed by the parties, the submission shall have effect as if it provided for the appointment of an umpire, and not for the appointment of a third arbitrator, by the two arbitrators appointed by the parties.

(2) Where a submission provides that the reference shall be to three arbitrators to be appointed otherwise than as mentioned in subsection (1), the award of any two of the arbitrators shall be binding.

11. Power of Court in certain cases to appoint an arbitrator or umpire

In any of the following cases-

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

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

(c) where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator and do not appoint him, or where two arbitrators are required to appoint an umpire and do not appoint him;

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

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint or, as the case may be, concur in appointing an arbitrator, umpire or third arbitrator, and if the appointment is not made within seven clear days after the service of the notice, the Court or a judge thereof may, on application by the party who gave the notice, appoint an arbitrator, umpire or third arbitrator who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties.

12. Arbitrators and umpires to be disinterested parties

Every arbitrator and umpire must be and continue throughout the reference to be disinterested with reference to the matters referred and the parties to the 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 arbitrator or umpire, that he has no interest (direct or indirect) in the matter referred or the parties to the reference, and knows of nothing disqualifying him from being impartial and disinterested in the discharge of such duties:

Provided that any party may expressly waive any right to object to any arbitrator or umpire on the ground of interest or the like.

13. Court's powers to remove arbitrator or umpire, to set award aside and to award costs

(1) 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 misconducted the proceedings in connection with the arbitration.

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

14. Taxation of fees

The fees made payable to any arbitrator or umpire by an award, notwithstanding that such fees may have already been paid by the parties, shall be subject to taxation at the expense of the parties desiring taxation by the taxing officer of the Court, with the right of appeal to the Court:

Provided that-

(i) no taxation or reduction of such fees shall be allowed if they are in accordance with any agreement between the arbitrator or umpire concerned and the party applying for taxation, and

(ii) the party applying for taxation and the arbitrator or umpire, taxation of whose fees is thus applied for, shall be entitled to appear before and be heard by the Court in the matter of such taxation.

15. Powers of arbitrator or umpire

The arbitrator or umpire acting under a submission shall, unless the submission expresses a contrary intention, have power-

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

(b) to correct in any award any clerical mistake or error arising from any accidental slip or omission; and

(c) on the application of either party to appoint a commissioner to take the evidence of a person residing outside Botswana and forward the same to arbitrators in the same way as if he were a commissioner appointed by the Court.

16. Interlocutory powers of Court

(1) 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 on the trial of any action.

(2) Any party to a submission is entitled, subject to the law relating to procedure of the Court, to obtain from the Court an order-

(a) for the examination of a witness or witnesses before a special examiner either in Botswana or elsewhere;

(b) for the discovery of documents and interrogatories;

(c) for evidence to be given by affidavit in the same circumstances as in litigation;

(d) for another party to give security for costs in the same way as a litigant;

(e) for the inspection, or the interim preservation, or the sale of goods or property, the subject matter of the arbitration;

(f) for an interim injunction or similar relief;

(g) for directing an issue by way of interpleader between two parties to a submission for the relief of a third party desiring so to interplead;

(h) for substituted service of notices required by this Act, including service upon an agent in Botswana of a party resident elsewhere.

17. Time for making award

(1) Subject to the provisions of section 19(2), and anything to the contrary in the submission, an arbitrator or umpire shall have power to make an award at any time.

(2) The time, if any, limited for making an award, whether under this Act or otherwise, may from time to time be enlarged by order of the Court or a judge thereof, whether that time has expired or not.

(3) The Court may, on the application of any party to a reference, remove an arbitrator or umpire who fails to use all reasonable dispatch in entering on and proceeding with the reference and making an award, and an arbitrator or umpire who is removed by the Court under this subsection shall not be entitled to receive any remuneration in respect of his services.

(4) For the purposes of subsection (3), the expression "proceeding with the reference" includes, in a case where two arbitrators are unable to agree, giving notice of that fact to the parties and to the umpire.

18. Interim awards

Unless a contrary intention is expressed therein, every submission shall, where such a provision is applicable to the reference, be deemed to contain a provision that the arbitrator or umpire may, if he thinks fit, make an interim award,

and any reference in this Part of this Act to an award includes a reference to an interim award.

19. Remission of case by Court

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

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

20. Enforcement of award

An award on a submission may, by leave of the Court or a judge thereof, be enforced in the same manner as a judgment or order to the same effect, and where leave is so given, judgment may be entered in terms of the award.

21. Procedure when place of arbitration not provided for in submission

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

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Part:III References under Order of Court (ss 22-27)

22. Reference for report on questions arising in a cause

Subject to rules of Court, the Court may refer any questions arising in any case or matter for inquiry or report to any official or special referee or officer of the Court.

23. Procedure on receipt of report by Court

The report of any official or special referee or officer of the Court may be adopted wholly or partially by the Court, and with or without such amendments as to the Court may seem meet, and when so adopted may be enforced as a judgment to the same effect; or the Court may remit the report for further consideration, or make such other order thereon as to it may seem just.

24. Reference of certain matters for trial before referee or arbitrator

In any cause or matter-

- (a) if all the parties interested who are not under disability consent;

(b) if the cause or matter requires any prolonged examination of documents or any scientific, technical or local investigation which cannot, in the opinion of the Court, conveniently be made or conducted by the Court; or

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

the Court may at any time order the whole cause or matter, or any question or issue of fact arising therein, to be tried before a special referee or arbitrator agreed on by the parties, or, failing agreement, appointed by the Court, or before any official referee or officer of the Court appointed by the Court.

25. Office and authority of such referee, etc.

In all cases of reference to an officer of the Court or to an official or special referee or arbitrator under an order of the Court in any cause or matter, the official or special referee shall be deemed to be an officer of the Court, and they, or any such officer of the Court, shall have such authority and shall conduct the reference in such manner as may be prescribed by any special order or by rules of Court.

26. Force of report or award

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

27. Powers of Court

The Court shall, as to references under order of the Court, have all the powers which are by this Act conferred on the Court as to references by consent out of Court.

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Part:IV Miscellaneous (ss 28-32)

28. Subpoena or summons

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 and 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-

(a) by any party to a submission, or any arbitrator, or umpire thereunder;

(b) by the parties to any reference under any order of Court; or

(c) by any officer of the Court, official or special referee hearing any reference under 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 trial of an action; and

(ii) the clerk of the court of any magistrate 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.

29. General powers of Court or judge

The Court or a judge may order the process of the Court to issue 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 judge, or may order any prisoner to be brought up for examination before such officer, referee, arbitrator or umpire.

30. Statement of case

(1) An arbitrator or umpire may, and shall if so directed by the Court, state-

(a) any question of law arising in the course of the reference; or

(b) an award or any part of an award,

in the form of a special case for the decision of the Court.

(2) A special case with respect to an interim award or with respect to a question of law arising in the course of a reference may be stated, or may be directed by the Court to be stated, notwithstanding that proceedings under the reference are still pending.

31. Costs

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

32. False evidence

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.

SCHEDULE PROVISIONS TO BE IMPLIED IN SUBMISSION

(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, then for the decision of any question they must both agree, but if to more than two, then, subject to the provisions of section

10, the decision of the majority of the arbitrators shall determine any questions.

3. If the reference is to two or more arbitrators, they may appoint an umpire at any time within the period during which they have power to make an award.

4. If the arbitrator or arbitrators have allowed the time or time as extended by the Court to expire without making an award, or have delivered to any party to the submission or the umpire a written notice stating that they cannot agree, the umpire may forthwith enter on the reference in lieu of the arbitrators.

5. The parties to the reference and all parties claiming through them respectively shall, subject to any legal objection, submit to be examined by the arbitrator or arbitrators or umpire on oath or affirmation in relation to the matters in dispute, and shall produce before the arbitrator, arbitrators or umpire all books, deeds, papers, accounts, writings, documents and things within their possession or power respectively, which may be required or called for and production of which could be compelled on the trial of an action.

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

7. The oral evidence of witnesses shall be recorded by the arbitrator, arbitrators or umpire before whom it may be given in such manner as may be by him from time to time directed, if not recorded by the arbitrator, arbitrators or umpire themselves.

8. The umpire shall be at liberty to act upon the evidence recorded before the arbitrators and to make his award without hearing any witnesses or receiving any fresh evidence:

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

9. The umpire shall be at liberty to sit together with the arbitrators and to hear the evidence given from time to time, and shall be entitled then and there to decide 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 demand remuneration from the parties in respect of his attendance on the reference with the arbitrators.

10. If the arbitrators, where there are more than one, or a majority of them, cannot agree as to any matter of procedure or any interlocutory question, they may refer such matter or question forthwith to the umpire for decision, and he shall give his decision thereon forthwith.

11. The arbitrator, arbitrators or umpire shall be at liberty to proceed *ex parte* in case any party after reasonable notice shall at any time neglect or refuse to attend on the reference without having shown previously to them what they consider good and sufficient cause for omitting to attend.

12. If any party to the **arbitration** dies, the **arbitration** shall be stayed, subject to any order that the Court may make, until the appointment of an executor or other proper representative of such deceased party, and 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 such executor or other proper representative shall, when called upon by the other party or parties to the submission to proceed with the **arbitration**, be subject to the same rules, provisions and conditions as the deceased party.

13. The award to be made by the arbitrator, arbitrators or umpire shall be in writing, and shall, if made in terms of the submission, be final and binding on the parties and the persons claiming under them respectively.

14. The costs of the reference and award shall be in the discretion of the arbitrator,

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

Provided that-

(i) if no direction is given as to the scale on which such costs are to be taxed, they shall be taxed on the tariff allowed in magistrates' courts from time to time if the award is such as a magistrate's court might have pronounced as a judgment in such court, but otherwise such costs shall be taxed on the tariff in force from time to time in the Courts, and

(ii) if the arbitrator, arbitrators or umpire do not forthwith tax such costs, or if the arbitrators cannot agree in their taxation, then the taxing officer of the Court may tax them.