

1991
THE LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

(As presented)

(Attorney-General)

**Commercial Arbitration (Amendment) Bill
1991**

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Commercial Arbitration (Amendment) Bill 1991

A BILL

FOR

An Act to amend the *Commercial Arbitration Act 1986*

The Legislative Assembly for the Australian Capital Territory enacts
as follows:

Short title

- 5 1. This Act may be cited as the *Commercial Arbitration (Amendment)
Act 1991*.

Principal Act

2. In this Act, "Principal Act" means the *Commercial Arbitration
Act 1986*.¹

Application and saving

- 10 3. (1) Subject to this section, the amendments made by this Act
apply in relation to an arbitration agreement (whenever made) and an
arbitration under such an agreement.

(2) The amendment made by section 13 does not apply in relation to arbitration proceedings that were commenced before the commencement of the amendment.

(3) Section 26 of the Principal Act as in force immediately before the commencement of section 18 of this Act continues to apply in relation to— 5

(a) an order made under section 26 of the Principal Act before that commencement; or

(b) an application pending under section 26 of the Principal Act immediately before that commencement. 10

Interpretation

4. Section 4 of the Principal Act is amended by adding at the end the following subsection:

“(2) A reference in this Act to an arbitrator includes, in a case where there are 2 or more arbitrators, a reference to the arbitrators.”. 15

Substitution

5. Section 6 of the Principal Act is repealed and the following section substituted:

Presumption of single arbitrator

“6. An arbitration agreement shall be taken to provide for the appointment of a single arbitrator unless— 20

(a) the agreement otherwise provides; or

(b) the parties otherwise agree in writing.”.

Presumption as to joint appointment of arbitrator

6. Section 7 of the Principal Act is amended— 25

(a) by omitting “an arbitration agreement” and substituting “the arbitration agreement”; and

(b) by omitting “the arbitration agreement” and substituting “an arbitration agreement”.

Appointment of umpire

7. Section 12 of the Principal Act is amended— 30

(a) by omitting “an arbitration agreement” and substituting “the arbitration agreement”; and

(b) by omitting “the arbitration agreement” and substituting “an arbitration agreement”. 35

Substitution

8. Section 15 of the Principal Act is repealed and the following section substituted:

Manner in which decisions are made

“15. Unless a contrary intention is expressed in the arbitration agreement, where an arbitration agreement provides for the appointment of 3 or more arbitrators—

- 5 (a) the arbitrators may, by a majority, appoint one of their number to preside;
- (b) any decision to be made in the course of the proceedings may be made by a majority; and
- 10 (c) if the arbitrators are equally divided in opinion, and one of the arbitrators has been appointed to preside (whether under this section or the agreement), the decision of the presiding arbitrator shall prevail.”

Circumstances in which umpires may enter on the arbitration

15 9. Section 16 of the Principal Act is amended by omitting from subsections (1) and (2) “an arbitration agreement” and substituting “the arbitration agreement”.

Refusal or failure to attend before arbitrator or umpire etc.

10. Section 18 of the Principal Act is amended—

- 20 (a) by omitting from subsection (1) “an arbitration agreement” and substituting “the arbitration agreement”; and
- (b) by omitting from paragraphs (2) (a), (b) and (c) “an order under sub-section (1)” and substituting “the order”.

Evidence before arbitrator or umpire

11. Section 19 of the Principal Act is amended—

- 25 (a) by omitting from subsections (2) and (3) “an arbitration agreement” and substituting “the arbitration agreement”; and
- (b) by omitting from subsection (3) “the arbitration agreement” and substituting “an arbitration agreement”.

Substitution

30 12. Section 20 of the Principal Act is repealed and the following section substituted:

Representation

35 “20. (1) A party to an arbitration agreement may be represented in proceedings before the arbitrator or umpire by a legal practitioner, but only in the following cases:

- (a) where a party to the proceedings is, or is represented by, a legally qualified person;
- (b) where all the parties agree;
- 40 (c) where the amount or value of the claim subject to the proceedings exceeds \$20,000 or such other amount as is prescribed instead by regulation;

(d) where the arbitrator or umpire gives leave for such representation.

“(2) A party to an arbitration agreement may be represented in proceedings before the arbitrator or umpire by a representative who is not a legal practitioner, but only in the following cases: 5

(a) where the party is an incorporated or unincorporated body and the representative is an officer, employee or agent of the body;

(b) where all the parties agree;

(c) where the arbitrator or umpire gives leave for such representation. 10

“(3) If a party applies for leave permitting representation by a legal practitioner or other representative, it shall be granted if the arbitrator or umpire is satisfied—

(a) that the granting of leave is likely to shorten the proceedings or reduce costs; or 15

(b) that the applicant would, if leave were not granted, be unfairly disadvantaged.

“(4) A party is entitled to be represented by a legal practitioner or other representative on leave granted under subsection (3), notwithstanding any agreement to the contrary between the parties. 20

“(5) A person not admitted to practise in the Territory shall not be taken to have committed an offence under or breached the provisions of the *Legal Practitioners Act 1970* or any other law of the Territory merely by representing a party in arbitration proceedings in the Territory. 25

“(6) A reference in this section to—

(a) a legal practitioner shall be read as a reference to a person who is admitted or entitled to practise as a barrister, solicitor or legal practitioner in the Territory or in any other place, whether within or outside Australia; and 30

(b) a legally qualified person shall be read as a reference to—

(i) such a legal practitioner; or

(ii) a person who, though not such a legal practitioner, has such qualifications or experience in law (whether acquired in the Territory or in any other place, whether within or outside Australia) as, in the opinion of the arbitrator or umpire, would be likely to afford an advantage in the proceedings.” 35

Effect of appointment of new arbitrator or umpire on evidence previously given and awards and determinations previously made 40

13. Section 21 of the Principal Act is amended by omitting “an arbitration agreement” and substituting “the arbitration agreement”.

Determinations to be made according to law or as *amiable compositeur* or *ex aequo et bono* (see UNCITRAL Arbitration Rules Article 33, paragraph 2)

5 14. Section 22 of the Principal Act is amended by omitting from subsection (1) "an arbitration agreement" and substituting "the arbitration agreement".

Interim awards

15 15. Section 23 of the Principal Act is amended by omitting "an arbitration agreement" and substituting "the arbitration agreement".

10 **Specific performance**

16. Section 24 of the Principal Act is amended by omitting "an arbitration agreement" and substituting "the arbitration agreement".

Substitution

15 17. Sections 26 and 27 of the Principal Act are repealed and the following sections substituted:

Consolidation of arbitration proceedings

"26. (1) The following provisions of this subsection apply to arbitration proceedings all of which have the same arbitrator or umpire:

- 20 (a) the arbitrator or umpire may, on the application of a party in each of the arbitration proceedings, order—
- (i) those proceedings to be consolidated on such terms as the arbitrator or umpire thinks just;
 - (ii) those proceedings to be heard at the same time, or one immediately after the other; or
 - 25 (iii) any of those proceedings to be stayed until after the determination of any of them;
- (b) if the arbitrator or umpire refuses or fails to make such an order, the Court may, on application by a party in any of the proceedings, make such an order as could have been made by
- 30 the arbitrator or umpire.

"(2) The following provisions of this subsection apply to arbitration proceedings not all of which have the same arbitrator or umpire:

- 35 (a) the arbitrator or umpire for any one of the arbitration proceedings may, on the application of a party in the proceeding, provisionally order—
- (i) the proceeding to be consolidated with other arbitration proceedings on such terms as the arbitrator or umpire thinks just;
 - 40 (ii) the proceeding to be heard at the same time as other arbitration proceedings, or one immediately after the other; or

- (iii) any of those proceedings to be stayed until after the determination of any of them;
- (b) an order ceases to be provisional when consistent provisional orders have been made for all of the arbitration proceedings concerned; 5
- (c) the arbitrators or umpires for arbitration proceedings may communicate with each other for the purpose of conferring on the desirability of making orders under this subsection and of deciding on the terms of any such order;
- (d) if a provisional order is made for at least one of the arbitration proceedings concerned, but the arbitrator or umpire for another of the proceedings refuses or fails to make such an order (having received an application from a party to make such an order), the Court may, on application by a party in any of the proceedings, make an order or orders that could have been made under this subsection; 10
- (e) if inconsistent provisional orders are made for the arbitration proceedings, the Court may, on application by a party in any of the proceedings, alter the orders to make them consistent. 15
- “(3) An order or a provisional order may not be made under this section unless it appears— 20
- (a) that some common question of law or fact arises in all of the arbitration proceedings;
- (b) that the rights to relief claimed in all of the proceedings are in respect of or arise out of the same transaction or series of transactions; or 25
- (c) that for some other reason it is desirable to make the order or provisional order.
- “(4) When arbitration proceedings are to be consolidated under this section, the arbitrator or umpire for the consolidated proceedings shall be the person agreed on for the purpose by all the parties to the individual proceedings, but, failing any such agreement, the Court may appoint an arbitrator or umpire for the consolidated proceedings. 30
- “(5) Any proceedings before an arbitrator or umpire for the purposes of this section shall be taken to be part of the arbitration proceedings concerned. 35
- “(6) Arbitration proceedings may be commenced or continued, notwithstanding that an application to consolidate them is pending under subsection (1) or (2) and notwithstanding that a provisional order has been made in relation to them under subsection (2). 40
- “(7) Subsections (1) and (2) apply in relation to arbitration proceedings whether or not all or any of the parties are common to some or all of the proceedings.

“(8) Nothing in subsection (1) or (2) prevents the parties to 2 or more arbitration proceedings from agreeing to consolidate those proceedings and taking such steps as are necessary to effect that consolidation.

5 **Settlement of disputes otherwise than by arbitration**

“27. (1) Parties to an arbitration agreement—

(a) may seek settlement of a dispute between them by mediation, conciliation or similar means; or

10 (b) may authorise an arbitrator or umpire to act as a mediator, conciliator or other non-arbitral intermediary between them (whether or not involving a conference to be conducted by the arbitrator or umpire);

whether before or after proceeding to arbitration, and whether or not continuing with the arbitration.

15 “(2) Where—

(a) an arbitrator or umpire acts as a mediator, conciliator or intermediary (with or without a conference) under subsection (1); and

20 (b) that action fails to produce a settlement of the dispute acceptable to the parties to the dispute;

no objection shall be taken to the conduct by the arbitrator or umpire of the subsequent arbitration proceedings solely on the ground that the arbitrator or umpire had previously taken that action in relation to the dispute.

25 “(3) Unless the parties otherwise agree in writing, an arbitrator or umpire is bound by the rules of natural justice when seeking a settlement under subsection (1).

“(4) Nothing in subsection (3) affects the application of the rules of natural justice to an arbitrator or umpire in other circumstances.

30 “(5) The time appointed by or under this Act or fixed by an arbitration agreement or by an order under section 48 for doing any act or taking any proceeding in or in relation to an arbitration is not affected by any action taken by an arbitrator or umpire under subsection (1).

35 “(6) Nothing in subsection (5) shall be construed as preventing the making of an application to the Court for the making of an order under section 48.”.

Award to be final

40 18. Section 28 of the Principal Act is amended by omitting “an arbitration agreement” and substituting “the arbitration agreement”.

Form of award

19. Section 29 of the Principal Act is amended—

- (a) by omitting from subsection (1) “an arbitration agreement” and substituting “the arbitration agreement”; and
- (b) by omitting from subsection (2) “date and” and substituting “date.”

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Interest up to making of award

20. Section 31 of the Principal Act is amended—

- (a) by omitting from subsection (1) “an arbitration agreement” and substituting “the arbitration agreement”;
- (b) by omitting from subsection (1) “(2)” and substituting “(4)”;
- (c) by omitting from subsection (1) “fixed for the purposes of section 54 of the *Australian Capital Territory Supreme Court Act 1933* of the Commonwealth” and substituting “at which interest is payable on a judgment debt of the Supreme Court”;
- (d) by omitting subsection (2) and substituting the following subsections:

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“(2) Unless a contrary intention is expressed in the arbitration agreement, but subject to subsection (4), where—

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- (a) arbitration proceedings have been commenced for the recovery of a debt or liquidated damages; and
- (b) payment of the whole or part of the debt or damages is made during the currency of the proceedings and prior to or without an award being made in respect of the debt or damages;

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the arbitrator or umpire may order that interest be paid at such rate as the arbitrator or umpire may direct (being a rate not exceeding the rate at which interest is payable on a judgment debt of the Supreme Court) on the whole or any part of the money paid for the whole or any part of the period between the date when the cause of action arose and the date of the payment.

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“(3) Without limiting subsection (2), arbitration proceedings shall, for the purposes of that subsection, be deemed to have been commenced if—

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- (a) a dispute to which the relevant arbitration agreement applies has arisen; and
- (b) a party to the agreement—

- (i) has served on another party to the agreement a notice requiring that other party to appoint an arbitrator or to join or concur in or approve of

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the appointment of an arbitrator in relation to the dispute;

(ii) has served on another party to the agreement a notice requiring the other party to refer, or to concur in the reference of, the dispute to arbitration; or

(iii) has taken any other step contemplated by the agreement or the law in force at the time the dispute arose, with a view to referring the dispute to arbitration or appointing, or securing the appointment of, an arbitrator in relation to the dispute.

“(4) This section does not—

(a) authorise the awarding of interest upon interest;

(b) apply in relation to any amount upon which interest is payable as of right whether by virtue of an agreement or otherwise; or

(c) affect the damages recoverable for the dishonour of a bill of exchange.”.

20 **Interest on debt under award**

21. Section 32 of the Principal Act is amended—

(a) by omitting “an arbitration agreement” and substituting “the arbitration agreement”;

25 (b) by omitting “the rate fixed for the purposes of section 54 of the *Australian Capital Territory Supreme Court Act 1933* of the Commonwealth” and substituting “that at which interest is payable on a judgment debt of the Supreme Court”; and

(c) by adding at the end the following subsection:

30 “(2) If judgment is entered by the Court in terms of an award, interest shall cease to accrue in pursuance of a direction under this section on the date of the entry of the judgment.”.

Enforcement of award

22. Section 33 of the Principal Act is amended by omitting subsection (2).

35 **Costs**

23. Section 34 of the Principal Act is amended—

(a) by omitting from subsection (1) “an arbitration agreement” and substituting “the arbitration agreement”;

40 (b) by omitting subsection (3) and substituting the following subsection:

“(3) A provision in an arbitration agreement (being an

arbitration agreement that provides for the reference of future disputes to arbitration) is void if—

- (a) it is to the effect that a particular party, or the parties, to the agreement shall in any event pay their own costs of the arbitration or any part of those costs; or 5
- (b) except in so far as it relates to a right of indemnity or a right of subrogation—it is to the effect that a particular party to the agreement shall in any event pay the costs of any other party or any part of those costs.”; and
- (c) by omitting subsections (5) and (6) and substituting the following subsections: 10

“(5) Where a sum of money has been paid into the Court in accordance with rules of court in satisfaction of a claim to which an arbitration agreement applies, the arbitrator or umpire shall, in exercising the discretion as to costs conferred on the arbitrator or umpire by subsection (1), take into account both the fact that money was paid into the Court and the amount of that payment. 15

“(6) Where in accordance with rules of court an offer of compromise has been made in relation to a claim to which an arbitration agreement applies, the arbitrator or umpire shall, in exercising the discretion as to costs conferred on the arbitrator or umpire by subsection (1), take into account both the fact that the offer was made and the terms of the offer.”. 20

Taxation of arbitrator’s or umpire’s fees or expenses 25

24. Section 35 of the Principal Act is amended by omitting from subsection (3) “An” and substituting “The”.

Costs of abortive arbitration

25. Section 36 of the Principal Act is amended—

- (a) by omitting from subsection (1) “an arbitration agreement” and substituting “the arbitration agreement”; 30
- (b) by omitting from paragraph (2)(a) “an arbitrator” and substituting “the arbitrator”; and
- (c) by omitting from subsection (2) “the arbitration” (last occurring) and substituting “an arbitration”. 35

Judicial review of awards

26. Section 38 of the Principal Act is amended—

- (a) by omitting subsection (5) and substituting the following subsections:

“(5) The Supreme Court shall not grant leave under paragraph (4) (b) unless it considers that— 40

- (a) having regard to all the circumstances, the determination

of the question of law concerned could substantially affect the rights of one or more parties to the arbitration agreement; and

(b) there is—

- 5 (i) a manifest error of law on the face of the award; or
10 (ii) strong evidence that the arbitrator or umpire made an error of law and that the determination of the question may add, or may be likely to add, substantially to the certainty of commercial law.

“(6) The Supreme Court may make any leave which it grants under paragraph (4) (b) subject to the applicant complying with any conditions it considers appropriate.”;

- 15 (b) by omitting from subsection (6) “an award” and substituting “the award”; and
(c) by renumbering existing subsection (6) as subsection (7).

Exclusion agreements not to apply in certain cases

27. Section 41 of the Principal Act is amended by omitting from subsection (1) “sub-section (3)” and substituting “subsection (2)”.

20 **Delay in prosecuting claims**

28. Section 46 of the Principal Act is amended—

- (a) by omitting from subsection (1) “an arbitration agreement” and substituting “the arbitration agreement”;
- 25 (b) by omitting from subsection (1) all the words after “applies” and substituting “it is the duty of each party to the agreement to exercise due diligence in the taking of steps that are necessary to have the dispute referred to arbitration and dealt with in arbitration proceedings”; and
- 30 (c) by omitting subsections (2) and (3) and substituting the following subsections:

“(2) Where there has been undue delay by a party, the Court may, on the application of any other party to the dispute or an arbitrator or umpire, make orders—

- 35 (a) terminating the arbitration proceedings;
(b) removing the dispute into Court; and
(c) dealing with any incidental matters.

“(3) The Court shall not make an order under subsection (2) unless it is satisfied that the delay—

- 40 (a) has been inordinate and inexcusable; and
(b) will give rise to a substantial risk of it not being possible to have a fair trial of the issues in the arbitration proceedings or is such as is likely to cause or to have

caused serious prejudice to other parties to the arbitration proceedings.”

Death of party

29. Section 52 of the Principal Act is amended—

- (a) by omitting from subsection (1) “an arbitration agreement” and substituting “the arbitration agreement”; 5
- (b) by omitting from subsection (1) “the arbitration agreement” and substituting “an arbitration agreement”; and
- (c) by omitting from subsection (2) “rule of law” and substituting “law of the Territory”. 10

Power to stay court proceedings

30. Section 53 of the Principal Act is amended by omitting from subsection (1) “on the application of that other party” and substituting “that other party may, subject to subsection (2), apply to that court to stay the proceedings and”. 15

Effect of *Scott v. Avery* clauses

31. Section 55 of the Principal Act is amended by omitting from subsection (3) “paragraph 3 (4) (a)” and substituting “paragraph 3 (6) (a)”.

NOTE

- 1. Ordinance No. 84, 1986 as amended by No. 17, 1988; Nos. 21 and 38, 1989; Act No. 32, 1990.