

AUSTRALIAN CAPITAL TERRITORY

Commercial Arbitration Ordinance 1986

No. 84 of 1986

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AUSTRALIAN CAPITAL TERRITORY

Commercial Arbitration Ordinance 1986

No. 84 of 1986

I, THE GOVERNOR-GENERAL of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, hereby make the following Ordinance under the *Seat of Government (Administrative) Act 1910*.

Dated 18 December 1986.

N. M. STEPHEN
Governor-General

By His Excellency's Command,

LIONEL BOWEN
Attorney-General

An Ordinance to make provision with respect to the arbitration of certain disputes and for other purposes

PART I—PRELIMINARY

Short title

1. This Ordinance may be cited as the *Commercial Arbitration Ordinance 1986*.¹

Commencement

2. This Ordinance shall come into operation on such date as is fixed by the Minister of State for Territories by notice in the *Gazette*.

Repeal, transitional and application provisions

3. (1) Parts II and IV of the Arbitration Act 1902 of the State of New South Wales shall cease to be in force in the Territory.

(2) Notwithstanding sub-section (1), for the purposes of the application in the Territory of section 17 of the Arbitration Act 1902 of the State of New South Wales, Parts II and IV of that Act shall be deemed to have effect in the Territory as laws of the Territory.

(3) Subject to sub-sections (4) and (5)—

- (a) this Ordinance applies to an arbitration agreement (whether made before or after the commencement of this Ordinance) and to an arbitration under such an agreement; and
- (b) a reference in an arbitration agreement to the Arbitration Act 1902 of the State of New South Wales in its application in the Territory, or a provision of that Act, shall be construed as a reference to this Ordinance or to the corresponding provision (if any) of this Ordinance.

(4) Where an arbitration was commenced before the commencement of this Ordinance, the law governing the arbitration and the arbitration agreement shall be that which would have been applicable if this Ordinance had not been made.

(5) Section 20 does not apply to an arbitration commenced after the commencement of this Ordinance, being an arbitration under an arbitration agreement made before the commencement of this Ordinance.

(6) Subject to this section, this Ordinance shall apply to arbitrations provided for in any other law of the Territory as if—

- (a) the other law were an arbitration agreement;
- (b) the arbitration were pursuant to an arbitration agreement; and
- (c) the parties to the dispute which, by virtue of the other law, is referred to arbitration were the parties to the arbitration agreement,

except in so far as the other Ordinance otherwise indicates or requires.

(7) For the purposes of this section, an arbitration shall be deemed to have been commenced if—

- (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 the appointment of an arbitrator in relation to the dispute;

- (ii) has served on another party to the agreement a notice requiring that 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.

(8) Notwithstanding anything in sub-section (6), nothing in this Ordinance shall apply to an arbitration, or class of arbitrations, under any other law of the Territory that is prescribed as an arbitration to which, or class of arbitrations to which, this Ordinance does not apply.

(9) Nothing in this Ordinance shall affect the operation of section 130 of the *Credit Ordinance 1985*.

Interpretation

4. In this Ordinance, unless the contrary intention appears—

“arbitration agreement” means an agreement in writing to refer present or future disputes to arbitration;

“award” means final or interim award;

“Court” means—

- (a) the Supreme Court; or
- (b) in relation to—
 - (i) an arbitration agreement providing that the Magistrates Court shall have jurisdiction under this Ordinance; or
 - (ii) an arbitration agreement the parties to which have agreed in writing that the Magistrates Court shall have jurisdiction under this Ordinance (the last-mentioned agreement being in force),

the Magistrates Court;

“misconduct” includes corruption, fraud, partiality, bias and a breach of the rules of natural justice;

“party”, in relation to an arbitration agreement, includes any person claiming through or under a party to the arbitration agreement;

“power of appointment” or “power to appoint”, in relation to an arbitrator or umpire, means a power to appoint an arbitrator or umpire, to join in the appointment of an arbitrator or umpire, to concur in or approve of the appointment of an arbitrator or umpire or to take any other step in or towards the appointment of an arbitrator or umpire.

Crown to be bound

5. Where the Crown (whether in right of the Commonwealth or in any other capacity) is a party to an arbitration agreement, the Crown shall be bound by this Ordinance.

PART II—APPOINTMENT OF ARBITRATORS AND UMPIRES

Presumption of single arbitrator

6. Unless otherwise agreed in writing by the parties to an arbitration agreement, the arbitration agreement shall, if it does not provide for the number of arbitrators to be appointed for the purposes of an arbitration to be conducted under that agreement, be deemed to provide for the appointment of a single arbitrator.

Presumption as to joint appointment of arbitrator

7. Unless otherwise agreed in writing by the parties to an arbitration agreement, an arbitrator who is to be appointed for the purposes of an arbitration to be conducted under the arbitration agreement shall be jointly appointed by the parties to the agreement.

Default in the exercise of power to appoint arbitrator

8. (1) Where a person who has a power to appoint an arbitrator defaults in the exercise of that power, a party to the relevant arbitration agreement may, by notice in writing—

- (a) require the person in default to exercise the power within such period (not being a period of less than 7 days after service of the notice) as is specified in the notice; and
- (b) propose that in default of that person so doing—
 - (i) a person named in the notice (“a default nominee”) should be appointed to the office in respect of which the power is exercisable; or

- (ii) specified arbitrators (being the arbitrators who have prior to the date of the notice been appointed in relation to the arbitration) should be the sole arbitrators in relation to the arbitration.

(2) A notice under sub-section (1) (or, where appropriate, a copy of the notice) shall be served on—

- (a) each party to the arbitration agreement (except the party by whom the notice is given); and
- (b) each other person (not being a party to the arbitration agreement) who is in default in the exercise of a power of appointment in relation to the office in question,

and the notice shall be deemed to have been served when service is last effected under this sub-section.

(3) Where a person who is in default in the exercise of a power of appointment fails to exercise the power as required by a notice under sub-section (1), then—

- (a) where the notice named a default nominee—that nominee shall be deemed to have been duly appointed to the office in respect of which the power was exercisable; or
- (b) where the notice proposed that specified arbitrators should be the sole arbitrators in relation to the arbitration—
 - (i) the power to which the notice relates shall lapse;
 - (ii) the arbitrators specified in the notice may enter on the arbitration as if they were the sole arbitrators to be appointed in relation to the arbitration; and
 - (iii) the arbitration agreement shall be construed subject to such modifications (if any) as are necessary to enable those arbitrators effectively to enter on and conduct the arbitration.

(4) The Court may, on the application of a party to an arbitration agreement, set aside an appointment or any other consequence of non-compliance with a notice under this section that takes effect by operation of sub-section (3), and may itself make an appointment to the office in respect of which the relevant power of appointment was exercisable.

(5) For the purposes of this section, a person defaults in the exercise of a power of appointment if, after an occasion for the exercise of the power has

arisen, that person does not exercise the power within the time fixed by the relevant arbitration agreement or, if no time is so fixed, within a reasonable time.

Power to appoint new arbitrator or umpire

9. Unless otherwise agreed in writing by the parties to the arbitration agreement, where a person has a power to appoint an arbitrator or umpire, that power extends to the appointment of a new arbitrator or umpire in place of an arbitrator or umpire who dies or otherwise ceases to hold office.

General power of Court to fill vacancy

10. Where there is a vacancy in the office of arbitrator or umpire (whether or not an appointment has previously been made to that office) and—

- (a) neither the provisions of the arbitration agreement nor the provisions of this Ordinance (other than this section) provide a method for filling the vacancy;
- (b) the method provided by the arbitration agreement or this Ordinance (other than this section) for filling the vacancy fails or for any reason cannot reasonably be followed; or
- (c) the parties to the arbitration agreement agree that, notwithstanding that the provisions of the arbitration agreement or of this Ordinance (other than this section) provide a method for filling the vacancy, the vacancy should be filled by the Court,

the Court may, on the application of a party to the arbitration agreement, make an appointment to fill the vacancy.

Power of Court where arbitrator or umpire is removed

11. (1) Where an arbitrator or umpire is removed by the Court, the Court may, on the application of a party to the arbitration agreement—

- (a) appoint a person as arbitrator or umpire in place of the person removed; or
- (b) subject to sub-section (2), order that the arbitration agreement shall cease to have effect with respect to the dispute to which the arbitration relates.

(2) Paragraph (1) (b) does not apply unless all the parties to the arbitration agreement are domiciled or ordinarily resident in Australia at the time the arbitration agreement is entered into.

(3) Sub-section (2) does not apply to a law of the Territory that is treated as an arbitration agreement for the purposes of this Ordinance by virtue only of the operation of paragraph 3 (6) (a).

Appointment of umpire

12. (1) Unless otherwise agreed in writing by the parties to an arbitration agreement, where the arbitration agreement provides for the appointment of an even number of arbitrators, the arbitrators may appoint an umpire at any time after they are themselves appointed and shall do so forthwith if they fail to determine a matter arising for determination.

(2) An umpire appointed in relation to an arbitration is not required to sit with the arbitrators while the arbitrators are conducting proceedings under the arbitration agreement.

Position of person appointed by Court, &c.

13. An arbitrator or umpire appointed pursuant to a power conferred by this Part shall be deemed to have been appointed pursuant to the provisions of the arbitration agreement.

PART III—CONDUCT OF ARBITRATION PROCEEDINGS

Procedure of arbitrator or umpire

14. Subject to this Ordinance and to the arbitration agreement, the arbitrator or umpire may conduct proceedings under that agreement in such manner as the arbitrator or umpire thinks fit.

Manner in which decisions are made

15. Unless a contrary intention is expressed in an arbitration agreement, where the arbitration agreement provides for the appointment of 3 or more arbitrators, any decision to be made in the course of proceedings under that agreement may be made by a majority of the arbitrators and, failing a majority, the decision of the arbitrator appointed by the arbitrators to be chairperson shall be binding.

Circumstances in which umpires may enter on arbitration

16. (1) Unless otherwise agreed in writing by the parties to an arbitration agreement, an umpire appointed in relation to an arbitration may forthwith enter on the arbitration in place of the arbitrators and as if the umpire were the sole arbitrator in any case where—

- (a) the arbitration agreement fixes a time within which an award is to be made and the arbitrators fail to make the award within that time or any extension of that time granted by the Court under section 48; or
- (b) the arbitrators fail to determine a matter arising for determination and by reason of that failure the dispute cannot be resolved pursuant to the arbitration agreement and at least one of the arbitrators has served on a party to the dispute or the umpire a notice in writing to that effect.

(2) At any time after the appointment of an umpire, the Court may, on the application of a party to an arbitration agreement and notwithstanding anything to the contrary in that agreement or any other agreement (whether oral or written) made between the parties to the arbitration agreement, order that the umpire shall enter on the arbitration in place of the arbitrators and as if the umpire were the sole arbitrator.

Subpoenas and summonses to attend, &c.

17. (1) On the application of a party to an arbitration agreement, the Court may, in accordance with the Rules of the Supreme Court of the Australian Capital Territory or the *Magistrates Court (Civil Jurisdiction) Ordinance 1982*, as the case requires, issue a subpoena or a summons, as the case requires, requiring a person to attend for examination before the arbitrator or umpire or requiring a person to attend for such an examination and to produce to the arbitrator or umpire the document or documents specified in the subpoena or summons.

(2) A person shall not be compelled under any subpoena or summons issued in accordance with sub-section (1) to answer any question or produce any document which that person could not be compelled to answer or produce on the trial of an action.

Refusal or failure to attend before arbitrator or umpire, &c.

18. (1) Unless a contrary intention is expressed in an arbitration agreement, where any person (whether or not a party to the agreement)—

- (a) refuses or fails to attend before the arbitrator or umpire for examination when required under a subpoena or summons or by the arbitrator or umpire to do so;
- (b) appearing as a witness before the arbitrator or umpire—
 - (i) refuses or fails to take an oath or to make an affirmation or affidavit when required by the arbitrator or umpire to do so;

- (ii) refuses or fails to answer a question that the witness is required by the arbitrator or umpire to answer; or
 - (iii) refuses or fails to produce a document that the witness is required under a subpoena or summons or by the arbitrator or umpire to produce; or
- (c) refuses or fails to do any other thing which the arbitrator or umpire requires,

the Court may, on the application of a party to the arbitration agreement or the arbitrator or umpire, order the person so in default to attend before the Court for examination, to produce to the Court the relevant document or to do the relevant thing.

(2) Where the Court makes an order under sub-section (1), it may in addition make orders for the transmission to the arbitrator or umpire of—

- (a) a record of any evidence given pursuant to an order under sub-section (1);
- (b) any document produced pursuant to an order under sub-section (1) or a copy of any such document; or
- (c) particulars of any thing done pursuant to an order under sub-section (1),

and any such evidence, document or thing shall be deemed to have been given, produced or done (as the case requires) in the course of the arbitration proceedings.

(3) If a party to an arbitration agreement—

- (a) refuses or fails to attend before the arbitrator or umpire for examination when required under a subpoena or summons or by the arbitrator or umpire to do so; or
- (b) fails within the time specified by the arbitrator or umpire or, if no time is so specified, within a reasonable time to comply with a requirement of the arbitrator or umpire,

the arbitrator or umpire may continue with the arbitration proceedings in default of appearance or of any other act by the party if in similar proceedings before the Supreme Court that Court could in the event of such a default continue with the proceedings.

Evidence before arbitrator or umpire

19. (1) Unless a contrary intention is expressed in the arbitration agreement, evidence before the arbitrator or umpire—

- (a) may be given orally or in writing; and
- (b) shall, if the arbitrator or umpire so requires, be given on oath or affirmation or by affidavit.

(2) Unless a contrary intention is expressed in an arbitration agreement, an arbitrator or umpire may administer an oath or affirmation or take an affidavit for the purposes of proceedings under that agreement.

(3) Unless otherwise agreed in writing by the parties to an arbitration agreement, an arbitrator or umpire in conducting proceedings under the arbitration agreement is not bound by rules of evidence but may inform himself or herself in relation to any matter in such manner as the arbitrator or umpire thinks fit.

Representation

20. (1) Unless otherwise agreed in writing by the parties to an arbitration agreement, a party to the arbitration agreement—

- (a) shall appear before the arbitrator or umpire personally or, where the party is a body of persons, whether corporate or unincorporate, by an officer, employee or agent of the body; and
- (b) may, with the leave of the arbitrator or umpire, be represented by a duly qualified legal practitioner or other representative.

(2) Where by virtue of paragraph (1) (b) an arbitrator or umpire has power to grant leave for a party to an arbitration agreement to be represented by a duly qualified legal practitioner or other representative, then, without limiting the power of the arbitrator or umpire to grant such leave in any circumstances, the arbitrator or umpire shall grant such leave where the arbitrator or umpire is satisfied—

- (a) that the granting of leave is likely to shorten the length of the arbitration proceedings and reduce the costs of the arbitration; or
- (b) that the applicant would otherwise be unfairly disadvantaged.

(3) Where, but for this sub-section, an arbitrator or umpire would not have power to grant leave for a party to an arbitration agreement to be represented by a duly qualified legal practitioner or other representative, the arbitrator or

umpire may, on the application of that party, grant such leave where the arbitrator or umpire is satisfied—

- (a) that the granting of leave is likely to shorten the length of the arbitration proceedings and reduce the costs of the arbitration; or
- (b) that the applicant would otherwise be unfairly disadvantaged,

and, where such leave is granted to a party, that party is entitled, notwithstanding any contrary agreement between the parties to the arbitration agreement, to be represented before the arbitrator or umpire by a duly qualified legal practitioner or other representative.

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

21. Unless otherwise agreed in writing by the parties to an arbitration agreement, where an umpire enters on the arbitration in place of the arbitrators and as if the umpire were the sole arbitrator or a new arbitrator or umpire is appointed in place of an arbitrator or umpire who dies or otherwise ceases to hold office—

- (a) the umpire or arbitrator shall treat any evidence given, document produced or thing done in the course of the earlier proceedings in the same manner in all respects as if it had been given, produced or done in the course of the proceedings conducted by the umpire or arbitrator;
- (b) any interim award made in the course of the earlier proceedings shall be deemed to have been made by the umpire or arbitrator; and
- (c) the umpire or arbitrator may adopt and act on any determination of a matter made in the course of the earlier proceedings without applying his or her own judgment to the matter.

Determinations to be made according to law or as *amiable compositeur* or *ex aequo et bono*

22. (1) Unless otherwise agreed in writing by the parties to an arbitration agreement, any question that arises for determination in the course of proceedings under the agreement shall be determined according to law.

(2) If the parties to an arbitration agreement so agree in writing, the arbitrator or umpire may determine any question that arises for determination in the course of proceedings under the agreement by reference to considerations of general justice and fairness.

Interim awards

23. Unless a contrary intention is expressed in an arbitration agreement, the arbitrator or umpire may make an interim award.

Specific performance

24. Unless a contrary intention is expressed in an arbitration agreement, the arbitrator or umpire shall have power to make an award ordering specific performance of a contract if the Supreme Court would have power to order specific performance of that contract.

Extension of ambit of arbitration proceedings

25. (1) Where—

- (a) pursuant to an arbitration agreement a dispute between the parties to the agreement is referred to arbitration; and
- (b) there is some other dispute between those same parties (whenever the dispute arose), being a dispute to which the same agreement applies,

then, unless the arbitration agreement otherwise provides, the arbitrator or umpire may, upon application being made to the arbitrator or umpire by the parties to the arbitration agreement at any time before a final award is made in relation to the first-mentioned dispute, make an order directing that the arbitration be extended so as to include that other dispute.

(2) An arbitrator or umpire may make an order under sub-section (1) on such terms and conditions (if any) as the arbitrator or umpire thinks fit.

Consolidation of arbitration proceedings

26. (1) Where in relation to 2 or more arbitration proceedings it appears to the Court upon the application of a party to any of those proceedings—

- (a) that some common question of law or fact arises in both or all of them;
- (b) that the rights to relief claimed in both or all of them are in respect of or arise out of the same transaction or series of transactions; or
- (c) that for some other reason it is desirable to make an order under this section,

the Court may order those arbitration proceedings to be consolidated on such terms as it thinks just or may order them to be heard at the same time, or one

immediately after another, or may order any of them to be stayed until after the determination of any other of them.

(2) Where the Court orders arbitration proceedings to be consolidated under sub-section (1) and all the parties to the consolidated arbitration proceedings are in agreement as to the choice of arbitrator or umpire for those proceedings, the arbitrator or umpire shall be appointed by the Court but if all the parties cannot agree the Court shall have power to appoint an arbitrator or umpire for those proceedings.

(3) Nothing in this section shall be construed as preventing 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.

Power to seek settlement of disputes otherwise than by arbitration

27. (1) Unless otherwise agreed in writing by the parties to an arbitration agreement, the arbitrator or umpire shall have power to order the parties to a dispute which has arisen and to which that agreement applies to take such steps as the arbitrator or umpire thinks fit to achieve a settlement of the dispute (including attendance at a conference to be conducted by the arbitrator or umpire) without proceeding to arbitration or (as the case requires) continuing with the arbitration.

(2) Where—

- (a) an arbitrator or umpire conducts a conference pursuant to sub-section (1); and
- (b) the conference 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 conducted a conference in relation to the dispute.

(3) The time appointed by or under this Ordinance 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 shall not be affected by a conference conducted by an arbitrator or umpire pursuant to sub-section (1).

(4) Nothing in sub-section (3) shall be construed as preventing the making of an application to the Court for the making of an order under section 48.

PART IV—AWARDS AND COSTS

Award to be final

28. Unless a contrary intention is expressed in an arbitration agreement, the award made by the arbitrator or umpire shall, subject to this Ordinance, be final and binding on the parties to the agreement.

Form of award

29. (1) Unless otherwise agreed in writing by the parties to an arbitration agreement, the arbitrator or umpire shall—

- (a) make the award in writing;
- (b) sign the award; and
- (c) include in the award a statement of the reasons for making the award.

(2) Where an arbitrator or umpire makes an award otherwise than in writing, the arbitrator or umpire shall, upon request by a party within 7 days after the making of the award, give to the party a statement in writing signed by the arbitrator or umpire of the date and the terms of the award and the reasons for making the award.

Power to correct award

30. Where an award made under an arbitration agreement contains—

- (a) a clerical mistake;
- (b) an error arising from an accidental slip or omission;
- (c) a material miscalculation of figures or a material mistake in the description of any person, thing or matter referred to in the award; or
- (d) a defect of form,

the arbitrator or umpire may correct the award or the Court, on the application of a party to the agreement, may make an order correcting the award.

Interest up to making of award

31. (1) Unless a contrary intention is expressed in an arbitration agreement, but subject to sub-section (2), where the arbitrator or umpire determines to make an award for the payment of money (whether on a claim for a liquidated or an unliquidated amount), the arbitrator or umpire shall have power to include in the sum for which the award is made interest at such rate as the arbitrator or umpire may direct (being a rate not exceeding the rate fixed for the purposes of section 54 of the *Australian Capital Territory Supreme Court Act 1933*) on the whole or any part of the money for the whole or any part of

the period between the date on which the cause of action arose and the date on which the award is made.

- (2) Sub-section (1) does not—
- (a) authorize 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.

Interest on debt under award

32. Unless a contrary intention is expressed in an arbitration agreement, where the arbitrator or umpire makes an award for the payment of money, the arbitrator or umpire shall have power to direct that interest at the same rate as the rate fixed for the purposes of section 54 of the *Australian Capital Territory Supreme Court Act 1933* shall be payable on and from the date of making of the award or such later date as the arbitrator or umpire specifies on so much of the money as is from time to time unpaid, and any interest that so accrues shall be deemed to form part of the award.

Enforcement of award

33. (1) An award made under an arbitration agreement may, by leave of the Court, be enforced in the same manner as a judgment or order of the Court to the same effect, and where leave is so given, judgment may be entered in terms of the award.

(2) A direction as to the payment of interest by an arbitrator or umpire under section 32 shall cease to have effect on and from the date of the entry of judgment with respect to the award under sub-section (1).

Costs

34. (1) Unless a contrary intention is expressed in an arbitration agreement, the costs of the arbitration (including the fees and expenses of the arbitrator or umpire) shall be in the discretion of the arbitrator or umpire, who may—

- (a) direct to and by whom and in what manner the whole or any part of those costs shall be paid;
- (b) tax or settle the amount of costs to be so paid or any part of those costs; and

- (c) award costs to be taxed or settled as between party and party or as between solicitor and client.

(2) Any costs of the arbitration (other than the fees or expenses of the arbitrator or umpire) that are directed to be paid by an award shall, except so far as taxed or settled by the arbitrator or umpire, be taxable in the Court.

(3) A provision in an arbitration agreement (being an arbitration agreement that provides for the reference of future disputes to arbitration) to the effect that—

- (a) the parties to the agreement shall in any event pay their own costs of the arbitration or any part of those costs; or
- (b) a particular party to the agreement shall in any event pay his or her own costs of the arbitration or the costs of the arbitration of any other party to the agreement or any part of those costs,

shall be void.

(4) If no provision is made by an award with respect to the costs of the arbitration, a party to the arbitration agreement may, within 14 days of the publication of the award, apply to the arbitrator or umpire for directions as to the payment of those costs, and thereupon the arbitrator or umpire shall, after hearing any party who wishes to be heard, amend the award by adding to it such directions as the arbitrator or umpire thinks proper with respect to the payment of the costs of the arbitration.

(5) A sum of money may be paid into the Court in satisfaction of a claim to which an arbitration agreement applies—

- (a) in relation to the Supreme Court—in accordance with rules of court of that Court or, if there are no relevant rules of court, in the same manner as may be done in relation to a civil proceeding in that Court; or
- (b) in relation to the Magistrates Court—in the same manner as may be done in relation to a civil proceeding in that Court,

and where money has been so paid, the arbitrator or umpire shall, in exercising the discretion as to costs conferred on the arbitrator or umpire by sub-section (1), take into account both the fact that money was paid into the Court and the amount of that payment.

(6) Where—

- (a) an arbitrator or umpire has under sub-section 27 (1) ordered the parties to a dispute to attend at a conference to be conducted by the arbitrator or umpire; and
- (b) there is a refusal or failure by one or more of those parties to attend at the conference,

the arbitrator or umpire shall, in exercising the discretion as to costs conferred on the arbitrator or umpire by sub-section (1), take that refusal or failure into account.

(7) An arbitrator or umpire shall, in exercising the discretion as to costs conferred on the arbitrator or umpire by sub-section (1), take into account any refusal or failure by a party to the arbitration agreement to comply with the provisions of section 37.

Taxation of arbitrator's or umpire's fees and expenses

35. (1) If an arbitrator or umpire refuses to deliver an award except on payment of the fees and expenses demanded by the arbitrator or umpire, the Court may, on application made by a party to the arbitration agreement, order that—

- (a) the arbitrator or umpire deliver the award to the applicant on such terms as to the payment of the fees and expenses of the arbitrator or umpire as the Court considers appropriate; and
- (b) the fees and expenses demanded by the arbitrator or umpire be taxed in the Court.

(2) Notwithstanding that the amount of the fees or expenses of an arbitrator or umpire may be fixed by the award, those fees or expenses may, on the application of a party to the arbitration agreement or of the arbitrator or umpire, be taxed in the Court.

(3) An arbitrator or umpire and any party to the arbitration agreement shall be entitled to appear and be heard on any taxation under this section.

(4) Where the fees and expenses of an arbitrator or umpire are taxed in the Court, the arbitrator or umpire shall be entitled to be paid by way of fees and expenses only such sum as is found reasonable on taxation.

Costs of abortive arbitration

36. (1) Unless otherwise agreed in writing by the parties to an arbitration agreement, where an arbitration is commenced but for any reason the arbitration fails, the Court may, on the application of a party to the arbitration agreement or the arbitrator or umpire, make such orders in relation to the costs of the arbitration as it thinks just.

(2) For the purposes of this section, where—

- (a) a final award is not made by an arbitrator or umpire before the arbitration terminates; or
- (b) an award made is wholly set aside by the Court,

the arbitration shall be deemed to have failed.

Duties of parties

37. The parties to an arbitration agreement shall at all times do all things which the arbitrator or umpire requires to enable a just award to be made and no party shall wilfully do or cause to be done any act to delay or prevent an award being made.

PART V—POWERS OF THE COURT**Judicial review of awards**

38. (1) Without prejudice to the right of appeal conferred by sub-section (2), the Court shall not have jurisdiction to set aside or remit an award on the ground of error of fact or law on the face of the award.

(2) Subject to sub-section (4), an appeal shall lie to the Supreme Court on any question of law arising out of an award.

(3) On the determination of an appeal under sub-section (2) the Supreme Court may by order—

- (a) confirm, vary or set aside the award; or
- (b) remit the award, together with the Supreme Court's opinion on the question of law which was the subject of the appeal, to the arbitrator or umpire for reconsideration or, where a new arbitrator or umpire has been appointed, to that arbitrator or umpire for consideration,

and where the award is remitted under paragraph (b) the arbitrator or umpire shall, unless the order otherwise directs, make the award within 3 months after the date of the order.

(4) An appeal under sub-section (2) may be brought by any of the parties to an arbitration agreement—

- (a) with the consent of all the other parties to the arbitration agreement; or
- (b) subject to section 40, with the leave of the Supreme Court.

(5) The Supreme Court—

- (a) shall not grant leave under paragraph (4) (b) unless it considers that, having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more of the parties to the arbitration agreement; and
- (b) may make any leave which it grants under paragraph (4) (b) conditional upon the applicant for that leave complying with such conditions as it considers appropriate.

(6) Where an award of an arbitrator or umpire is varied on an appeal under sub-section (2), the award as varied shall have effect (except for the purposes of this section) as if it were the award of the arbitrator or umpire.

Determination of preliminary point of law by Supreme Court

39. (1) Subject to sub-section (2) and section 40, on an application to the Supreme Court made by any of the parties to an arbitration agreement—

- (a) with the consent of an arbitrator who has entered on the reference or, if an umpire has entered on the reference, with the consent of the umpire; or
- (b) with the consent of all the other parties,

the Supreme Court shall have jurisdiction to determine any question of law arising in the course of the arbitration.

(2) The Supreme Court shall not entertain an application under paragraph (1) (a) with respect to any question of law unless it is satisfied that—

- (a) the determination of the application might produce substantial savings in costs to the parties; and
- (b) the question of law is one in respect of which leave to appeal would be likely to be granted under paragraph 38 (4) (b).

Exclusion agreements affecting rights under sections 38 and 39

40. (1) Subject to this section and section 41—

- (a) the Supreme Court shall not, under paragraph 38 (4) (b), grant leave to appeal with respect to a question of law arising out of an award; and
- (b) no application may be made under paragraph 39 (1) (a) with respect to a question of law,

if there is in force an agreement in writing (in this section and section 41 referred to as an “exclusion agreement”) between the parties to the arbitration agreement which excludes the right of appeal under sub-section 38 (2) in relation to the award or, in a case falling within paragraph (b), in relation to an award to which the determination of the question of law is material.

(2) An exclusion agreement may be expressed so as to relate to a particular award, to awards under a particular arbitration agreement or to any other description of awards, whether arising out of the same arbitration agreement or not.

(3) An agreement may be an exclusion agreement of the purposes of this section whether it is entered into before or after the commencement of this Ordinance and whether or not it forms part of an arbitration agreement.

(4) Except as provided by sub-section (1), sections 38 and 39 shall have effect notwithstanding anything in any agreement purporting—

- (a) to prohibit or restrict access to the Supreme Court; or
- (b) to restrict the jurisdiction of the Supreme Court.

(5) An exclusion agreement shall be of no effect in relation to an award made on, or a question of law arising in the course of, an arbitration being an arbitration under any other law of the Territory.

(6) An exclusion agreement shall be of no effect in relation to an award made on, or a question of law arising in the course of, an arbitration under an arbitration agreement which is a domestic arbitration agreement unless the exclusion agreement is entered into after the commencement of the arbitration in which the award is made or, as the case requires, in which the question of law arises.

(7) In this section, “domestic arbitration agreement” means an arbitration agreement which does not provide, expressly or by implication, for arbitration in a country other than Australia and to which neither—

- (a) an individual who is a national of, or habitually resident in, any country other than Australia; nor

- (b) a body corporate which is incorporated in, or whose central management and control is exercised in, any country other than Australia,

is a party at the time the arbitration agreement is entered into.

Exclusion agreements not to apply in certain cases

41. (1) Subject to sub-section (3), if an award or a question of law arising in the course of an arbitration relates, in whole or in part, to—

- (a) a question or claim falling within the Admiralty jurisdiction of the Supreme Court; or
- (b) a dispute arising out of a contract of insurance,

an exclusion agreement shall have no effect in relation to the award or question unless either—

- (c) the exclusion agreement is entered into after the commencement of the arbitration in which the award is made or, as the case requires, in which the question of law arises; or
- (d) the award or question relates to a contract which is expressed to be governed by a law other than the law of the Territory.

(2) The regulations may provide that sub-section (1)—

- (a) shall cease to have effect; or
- (b) subject to such conditions as may be specified in the regulations, shall not apply to any exclusion agreement made in relation to an award of a description specified in the regulations,

and regulations made under this sub-section may contain supplementary, incidental and transitional provisions.

Power to set aside award

42. (1) Where—

- (a) there has been misconduct on the part of an arbitrator or umpire or an arbitrator or umpire has misconducted the proceedings; or
- (b) the arbitration or award has been improperly procured,

the Court may, on the application of a party to the arbitration agreement, set the award aside either wholly or in part.

(2) Where the arbitrator or umpire has misconducted the proceedings by making an award partly in respect of a matter not referred to arbitration pursuant to the arbitration agreement, the Court may set aside that part of the award if it can do so without materially affecting the remaining part of the award.

(3) Where an application is made under this section to set aside an award, the Court may order that any money made payable by the award shall be paid into court or otherwise secured pending the determination of the application.

Court may remit matter for reconsideration

43. Subject to sub-section 38 (1), the Court may remit any matter referred to arbitration by an arbitration agreement together with any directions it thinks proper to the arbitrator or umpire for reconsideration or, where a new arbitrator or umpire has been appointed, to that arbitrator or umpire for consideration.

Removal of arbitrator or umpire

44. Where the Court is satisfied that—

- (a) there has been misconduct on the part of an arbitrator or umpire or an arbitrator or umpire has misconducted the proceedings;
- (b) undue influence has been exercised in relation to an arbitrator or umpire; or
- (c) an arbitrator or umpire is incompetent or unsuitable to deal with the particular dispute,

the Court may, on the application of a party to the arbitration agreement, remove the arbitrator or umpire.

Party not prevented from alleging that arbitrator appointed by that party is not impartial, suitable or competent

45. (1) A party to an arbitration agreement is not prevented from alleging in any legal proceedings with respect to the agreement that an arbitrator is not or may not be impartial, suitable or competent by reason of a power of appointment having been exercised by that party in relation to the appointment of that arbitrator or by reason of facts or circumstances that that party knew or ought to have known when exercising that power.

(2) For the purposes of this section, where an arbitrator is named or designated in an arbitration agreement, a party to the agreement shall be deemed—

- (a) to have exercised a power of appointment in relation to the appointment of that arbitrator; and
- (b) to have exercised that power at the time when the party entered into the arbitration agreement.

Delay in prosecuting claims

46. (1) Unless a contrary intention is expressed in an arbitration agreement, it is an implied term of the agreement that in the event of a dispute arising to which the agreement applies it shall be the duty of the claimant to exercise due diligence in the prosecution of the claim.

(2) Where there has been undue delay by a claimant in instituting or prosecuting a claim pursuant to an arbitration agreement, then, on the application of the arbitrator or umpire or of any party to the dispute, the Court may make an order terminating the arbitration proceedings and prohibiting the claimant from commencing further arbitration proceedings in respect of any matter which was the subject of the terminated proceedings.

(3) The Court shall not make an order under sub-section (2) unless it is satisfied—

- (a) that the delay has been intentional and contumelious; or
- (b) that—
 - (i) there has been inordinate and inexcusable delay on the part of the claimant or the claimant's advisers; and
 - (ii) the delay 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 the other parties to the arbitration proceedings either as between themselves and the claimant or between each other or between them and a third party.

General power of Court to make interlocutory orders

47. The Court shall have the same power of making interlocutory orders for the purposes of and in relation to arbitration proceedings as it has for the purposes of and in relation to proceedings in the Court.

Extension of time

48. (1) Subject to sub-section (3), the Court shall have power on the application of a party to an arbitration agreement or an arbitrator or umpire to

extend the time appointed by or under this Ordinance or fixed by the agreement or by an order under this section for doing any act or taking any proceeding in or in relation to an arbitration.

(2) The Court may make an order under this section although an application for the making of the order was not made until after the expiration of the time appointed or fixed for doing the act or taking the proceeding.

(3) An order shall not be made under this section extending the time within which arbitration proceedings might be commenced unless—

- (a) the Court is satisfied that in the circumstances of the case undue hardship would otherwise be caused; and
- (b) the making of the order would not contravene the provision of any law of the Territory limiting the time for the commencement of arbitration proceedings.

Power to impose terms on orders, &c.

49. Subject to this Ordinance, an order, direction or decision made under this Ordinance by the Court may be made on such terms and conditions (including terms and conditions as to costs) as the Court thinks just.

PART VI—GENERAL PROVISIONS AS TO ARBITRATION

Authority of arbitrator or umpire

50. Subject to this Ordinance, the authority of an arbitrator or umpire is, unless a contrary intention is expressed in the arbitration agreement or the parties to the agreement otherwise agree in writing, irrevocable.

Liability of arbitrator or umpire

51. An arbitrator or umpire is not liable for negligence in respect of anything done or omitted to be done by the arbitrator or umpire in the capacity of arbitrator or umpire but is liable for fraud in respect of anything done or omitted to be done in that capacity.

Death of party

52. (1) Unless a contrary intention is expressed in an arbitration agreement, where a party to the arbitration agreement dies the agreement shall not be discharged (either as respects the deceased or any other party) and the authority of an arbitrator or umpire shall not be revoked by the death of that party but the agreement shall be enforceable by or against the personal representative of the deceased.

(2) Nothing in sub-section (1) shall be taken to affect the operation of any rule of law by virtue of which a right of action is extinguished by the death of a person.

Power to stay court proceedings

53. (1) If a party to an arbitration agreement commences proceedings in a court against another party to the arbitration agreement in respect of a matter agreed to be referred to arbitration by the agreement, on the application of that other party that court, if satisfied—

- (a) that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the agreement; and
- (b) that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary for the proper conduct of the arbitration,

may make an order staying the proceedings and may further give such directions with respect to the future conduct of the arbitration as it thinks fit.

(2) An application under sub-section (1) shall not, except with the leave of the court in which the proceedings have been commenced, be made after the applicant has delivered pleadings or taken any other step in the proceedings other than the entry of an appearance or the filing of a notice of grounds of defence, as the case requires.

(3) Notwithstanding any rule of law to the contrary, a party to an arbitration agreement shall not be entitled to recover damages in any court from another party to the agreement by reason that that other party takes proceedings in a court in respect of the matter agreed to be referred to arbitration by the arbitration agreement.

Interpleader

54. 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 may, 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.

Effect of *Scott v. Avery* clauses

55. (1) Where it is provided (whether in an arbitration agreement or some other agreement, whether oral or written) that arbitration or an award pursuant to arbitration proceedings or the happening of some other event in or in relation to arbitration is a condition precedent to the bringing or maintenance of legal proceedings in respect of a matter or the establishing of a defence to legal proceedings brought in respect of a matter, that provision, notwithstanding that the condition contained in it has not been satisfied—

- (a) shall not operate to prevent—
 - (i) legal proceedings being brought or maintained in respect of that matter; or
 - (ii) a defence being established to legal proceedings brought in respect of that matter; and
- (b) shall, where no arbitration agreement relating to that matter is subsisting between the parties to the provision, be construed as an agreement to refer that matter to arbitration.

(2) Sub-section (1) does not apply to an arbitration agreement unless all the parties to the agreement are domiciled or ordinarily resident in Australia at the time the arbitration agreement is entered into.

(3) Sub-section (2) does not apply to a law of the Territory that is treated as an arbitration agreement for the purposes of this Ordinance by virtue only of the operation of paragraph 3 (4) (a).

PART VII—MISCELLANEOUS**Jurisdiction of Supreme Court**

56. Jurisdiction to hear and determine applications and appeals under this Ordinance is vested in the Supreme Court.

Service of notices

57. Where under this Ordinance a notice is required or permitted to be served on any person, the notice may be served in or out of the Territory—

- (a) by delivering it personally to the person to be served;
- (b) by leaving it at the usual or last known place of residence or business of the person to be served with a person apparently over the age of 16

years and apparently residing at that place or (in the case of a place of business) apparently in charge of or employed at that place;

- (c) by sending it by post addressed to the person to be served at the usual or last known place of residence or business of that person; or
- (d) by serving it in such other manners as the Court, on application made to it in that behalf, directs.

Regulations

58. The Attorney-General may make regulations, not inconsistent with this Ordinance, prescribing matters—

- (a) required or permitted by this Ordinance to be prescribed; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Ordinance.

Anglican Church of Australia Trust Property Ordinance 1928—amendments

59. (1) Section 3A of the *Anglican Church of Australia Trust Property Ordinance 1928* is amended—

- (a) by adding at the end of paragraph (2) (a) “and”;
- (b) by omitting from paragraph (2) (b) “and” (last occurring); and
- (c) by omitting paragraph (2) (c).

(2) Section 19 of the *Anglican Church of Australia Trust Property Ordinance 1928* is amended—

- (a) by adding at the end of paragraph (4) (a) “and”;
- (b) by omitting from paragraph (4) (b) “and” (last occurring); and
- (c) by omitting paragraph (4) (c).

(3) Schedule 1 to the *Anglican Church of Australia Trust Property Ordinance 1928* is amended by adding at the end—

- | | | |
|------------|-----|--|
| “Section 9 | (a) | Omit ‘Arbitration Act, 1902-1957’,
substitute ‘ <i>Commercial Arbitration Ordinance 1986</i> ’. |
| | (b) | Omit ‘the said Act’, substitute ‘that Ordinance’.”. |

Seat of Government (Administration) Ordinance 1930—amendment

60. The Second Schedule to the Seat of Government (Administration) Ordinance 1930 is amended by inserting in Part I—

“*Commercial Arbitration Ordinance 1986*”

after—

“Child Welfare Ordinance 1957, Part III”.

Workmen’s Compensation Ordinance 1951—amendment

61. The Fourth Schedule to the *Workmen’s Compensation Ordinance 1951* is amended by omitting from clause 3 “Arbitration Act, 1902 of the State of New South Wales in its application to the Territory” and substituting “*Commercial Arbitration Ordinance 1986*”.

NOTE

1. Notified in the *Commonwealth of Australia Gazette* on 22 December 1986.