

EXPLANATORY STATEMENT

ORDINANCE NO. 84,

1986

AUSTRALIAN CAPITAL TERRITORY

COMMERCIAL ARBITRATION ORDINANCE 1986

This Ordinance replaces the existing legislative framework for commercial arbitration proceedings in the Territory with the more detailed and updated provisions of the uniform law developed by the Standing Committee of Attorneys-General. The uniform law was finalised in 1984 at the conclusion of ten years' work by the Committee. It has already been enacted in Victoria, New South Wales, Northern Territory and Western Australia.

The use of arbitrators to settle disputes in the commercial field has long history. The settling of a commercial dispute by arbitration enables the parties to put their case before a tribunal of their own choosing, with arbitrators who have expertise in the particular area which is the subject matter of the dispute. The major advantages to the parties of an arbitration in preference to a court hearing are, generally, savings in time and cost, flexibility, and the availability of special expertise.

Commercial enterprises in the Australian Capital Territory should greatly appreciate the availability of a uniform system of arbitration. Where commercial contracts include a reference to arbitration in the event of a dispute, the parties to those agreements will be assured that the law will be consistently applied throughout Australia.

A brief outline of some of the more significant points is given below, followed by details of the Ordinance.

JURISDICTION

The Supreme Court will have primary jurisdiction in matters related to commercial arbitration, although it is provided in clause 4 for the parties, when agreeing to arbitrate, to nominate the Magistrates Court as having jurisdiction in relation to disputes arising out of that agreement.

APPOINTMENT OF ARBITRATORS

The Ordinance makes provision for the Court to appoint an arbitrator or arbitrators, where an arbitration agreement is silent as to who should arbitrate, or where a person appointed dies or otherwise ceases or fails to act. The Court may replace an arbitrator. Apart from this role, the possibility for Court intervention is kept to a minimum.

CONDUCT OF PROCEEDINGS

The Ordinance gives the arbitral tribunal a wide discretion as to the manner in which it conducts arbitration and as to its powers in doing so. However, the arbitrator must determine all questions arising according to law, unless the parties have agreed that they may be determined by reference to considerations of general justice and fairness.

On application to the Court, a party to an arbitration will be able to obtain a writ or summons requiring any person to appear or produce documents. Subject to an agreement to the contrary, parties to an arbitration shall appear in person, and may only be legally represented with the leave of the arbitrator. Leave is to be given where the arbitrator is satisfied that a party would otherwise be unfairly

disadvantaged or that the granting of leave is likely to shorten the length of the arbitration proceedings and reduce the costs of the arbitration.

An arbitrator will have power to make interim awards. This is frequently necessary in order to preserve the status quo, to safeguard property or to protect the interests of a party pending a full hearing. An arbitrator will have the power to order specific performance of an agreement in circumstances in which such a remedy would be available from a Court.

A conference with the aim of achieving a settlement may be ordered by the arbitrator. The parties cannot object to the conduct by the arbitrator of the subsequent arbitration proceedings solely on the ground that the arbitrator had previously conducted such a conference.

To limit the practice of not giving reasons or incorporating them in a document separate from the award, the Ordinance requires the arbitrator to include in the award a statement of the reasons, unless the parties have otherwise agreed in writing.

Awards made in arbitration proceedings will be final and binding. Unless the arbitration agreement makes specific provisions as to costs, the arbitrator will have a discretion to order who will pass costs. There is also provision for interest to be paid on any sum ordered to be paid by a party, so that the aggrieved party can receive interest on any sum owed from the date on which the dispute arose until payment is made.

Appeals lie to the Supreme Court on any question of law arising out of an award, but only with the consent of all the other parties to the arbitration agreement or, subject to certain limitations, with the leave of the Supreme Court. The

jurisdiction of the Supreme Court to determine any question of law arising in the course of the arbitration is similarly limited.

In addition, the Court may set aside an award on the ground of misconduct of the arbitrator and remove an arbitrator on such grounds as misconduct and incompetence.

Details of the Ordinance are as follows:

PART I - PRELIMINARY

Clause 1 cites the short title of the Ordinance.

Clause 2 provides for commencement on a date to be fixed by notice in the Gazette.

Clause 3 contains repeal, transitional and application provisions.

Sub-clause 1 provides that Parts II and IV of the Arbitration Act 1902 (NSW) shall cease to be in force in the Territory.

Sub-clause 2 provides that for the purposes of the application of section 17 (Part III) of the Arbitration Act 1902, the abovementioned Parts II and IV of that Act are deemed to have effect in the Territory as laws of the Territory.

Sub-clause 3 provides that, subject to sub-clauses 4 and 5, the Ordinance shall apply to an arbitration agreement made before or after the commencement of the Ordinance, and to arbitration under such an agreement. It further provides

that a reference in an arbitration agreement to the Arbitration Act 1902 shall be construed as a reference to the Ordinance.

Sub-clause 4 provides that, where an arbitration has been commenced before the commencement of the Ordinance, the previous law in force shall apply to that arbitration.

Sub-clause 5 provides that clause 20 does not apply to an arbitration commenced after the commencement of the Ordinance.

Sub-clause 6 provides that the Ordinance shall apply to arbitrations provided for in any other Ordinance.

Sub-clause 7 states the circumstances in which an arbitration shall be deemed to have been commenced.

Sub-clause 8 removes from the operation of the Ordinance arbitrations or any class of arbitrations that may be prescribed as an arbitration or class of arbitration to which this Ordinance does not apply.

Sub-clause 9 removes from the effect of the Ordinance section 130 of the Credit Ordinance 1985.

Clause 4 contains definitions of "arbitration agreement", "award", "misconduct", "party" and "power of appointment".

The definition of "Court" provides that an arbitration agreement may specifically confer jurisdiction on the Magistrates Court.

Clause 5 provides that where the Crown is a party to an arbitration agreement it shall be bound by the Ordinance.

PART II - APPOINTMENT OF ARBITRATORS AND UMPIRES

Clause 6 provides that, unless the parties agree to the contrary, where an agreement is silent as to the number of arbitrators to be appointed, then it shall be deemed to provide for appointment of a single arbitrator.

Clause 7 provides that an arbitrator shall be jointly appointed by the parties unless otherwise agreed in writing.

Clause 8 sets forth a procedure to be adopted where a person who has a power to appoint an arbitrator defaults in the exercise of that power.

Clause 9 provides that a power to appoint an arbitrator or umpire extends to the appointment of a new arbitrator or umpire in place of an arbitrator or umpire who dies or ceases to hold office.

Clause 10 empowers the Court to fill a vacancy in the office of arbitrator or umpire.

Clause 11 provides that, where an arbitrator or umpire is removed by the Court, the Court may on the application of a party to the arbitration agreement appoint a replacement or order that the arbitration agreement ceases to have effect in relation to the relevant dispute.

Sub-clause 2 provides that the Court shall not order that the arbitration agreement shall cease to have effect unless all parties to the agreement were domiciled or ordinarily resident in Australia when the agreement was made.

Sub-clause 3 provides that the residency restriction contained in sub-clause 2 does not apply to an arbitration agreement treated as such because the Ordinance applies to arbitrations provided for in any other Ordinance.

Clause 12 provides that, where an arbitration agreement provides for appointment of an even number of arbitrators, the arbitrators may appoint an umpire who is not required to sit while the arbitration is being conducted.

Clause 13 deems an arbitrator or umpire appointed pursuant to Part II of the Ordinance to have been appointed pursuant to the provisions of the arbitration agreement.

PART III - CONDUCT OF ARBITRATION PROCEEDINGS

Clause 14 provides that, subject to the Ordinance and to the arbitration agreement, the arbitrator or umpire may conduct proceedings as the arbitrator or umpire thinks fit.

Clause 15 provides that unless a contrary intention is expressed in the agreement a majority decision may be made where three or more arbitrators are appointed.

Clause 16 establishes the circumstances in which an umpire may enter on the arbitration in place of the arbitrators as if the umpire were the sole arbitrator.

Clause 17 permits any party to an arbitration agreement to obtain a subpoena or summons, as appropriate, requiring a person to attend the arbitration for examination or to produce documents.

Sub-clause 2 provides that a person shall not be compelled to answer or produce any document which that person could not be compelled to answer or produce on the trial of an action.

Clause 18 provides that, unless the agreement expresses a contrary intention, on application to the Court by a party or the arbitrator or umpire the Court may order a person in

default to comply with a subpoena or summons to attend or with a requirement of the arbitrator or umpire and may make consequential orders as to the transmission of evidence or documents to the arbitrator or umpire.

Sub-clause 3 provides that an arbitration may proceed in default of appearance or compliance with a requirement of the arbitrator or umpire if in similar proceedings before the Supreme Court the Court could also proceed.

Clause 19 prescribes the manner in which evidence may be given in arbitration proceedings.

Clause 20 specifies the circumstances in which a party may be represented at an arbitration:

Sub-clause 1 provides that, unless the parties agree to the contrary, a party shall appear personally or, where the party is a body of persons, by an officer, employee or agent but may, with the leave of the arbitrator or umpire, be represented by a duly qualified legal practitioner or other representative.

Sub-clause 2 provides that, where the arbitrator or umpire is satisfied that the granting of leave to be represented is likely to reduce the length and cost of the arbitration, then leave shall be granted.

Sub-clause 3 provides that the arbitrator or umpire may grant leave to a party to be represented where satisfied that the granting of leave is likely to reduce the length and cost of the arbitration notwithstanding any contrary agreement between the parties.

Clause 21 provides that, unless the parties agree to the contrary, there shall be continuity of proceedings when an umpire enters on the arbitration or when a new arbitrator or umpire is appointed.

Clause 22 provides that, unless the parties agree to the contrary, any question arising for determination in the course of proceedings shall be determined according to law.

Clause 23 provides that an arbitrator or umpire may make an interim award, unless the agreement expresses a contrary intention.

Clause 24 provides that unless the agreement expresses a contrary intention an arbitrator or umpire may order specific performance of any contract if the Supreme Court would have power to do so.

Clause 25 provides that arbitration proceedings may be extended to include a further dispute between the same parties arising under the same agreement.

Clause 26 provides for the consolidation of two or more arbitration proceedings:

Sub-clause 1 provides for consolidation by the court;

Sub-clause 2 empowers the court to appoint an arbitrator or umpire for consolidated proceedings in the absence of agreement between the parties; and

Sub-clause 3 provides for consolidation of proceedings by consent without application to the court.

Clause 27 provides that, unless the parties agree to the contrary, the arbitrator or umpire shall have power to order the parties to take steps to settle the dispute.

Sub-clause 2 provides that, where an arbitrator or umpire conducts a conference for the purposes of an attempt at settlement, and the conference fails to produce a settlement, then no objection shall be taken to that arbitrator or umpire conducting subsequent arbitration proceedings solely on the ground that the arbitrator had previously conducted the conference.

Sub-clause 3 provides that, where a conference is conducted in accordance with sub-clause 1, any time limits arising under the Ordinance or fixed by agreement or by an order of the Court shall continue in effect.

PART IV - AWARDS AND COSTS

Clause 28 provides that the award of the arbitrator or umpire shall be final and binding on the parties to the agreement, unless the agreement expresses a contrary intention.

Clause 29 provides that, unless the parties agree to the contrary, the arbitrator shall make the award in writing and shall include therein a statement of the reasons for making the award.

Sub-clause 2 provides that where an award is made otherwise than in writing the arbitrator or umpire shall give a written statement of the terms of the award and the reasons for making the award to a party requesting same.

Clause 30 provides for corrections of an error in an award.

Clause 31 provides that an interest component may be included in an award, unless the agreement expresses a contrary intention.

Clause 32 empowers the arbitrator or umpire to direct that interest at the rate fixed for the purposes of section 54 of the Australian Capital Territory Supreme Court Act 1933 be paid on any sum ordered to be paid unless the agreement expresses a contrary intention.

Clause 33 provides for enforcement of the award, by leave of the Court, in the same manner as a judgment or order of the Court.

Clause 34 provides that the costs of the arbitration shall be in the discretion of the arbitrator or umpire, unless the agreement expresses a contrary intention and may be taxed or settled by the arbitrator or umpire, or be taxable in the Court.

Sub-clause 3 declares certain provisions in relation to costs in an agreement to be void.

Sub-clause 4 provides that, where an award is silent as to costs, a party may apply to the arbitrator for a direction as to payment of costs.

Sub-clause 5 directs that an arbitrator or umpire shall take into account, in exercising the discretion as to costs, the fact that any money was paid into Court and the amount of that payment.

Sub-clause 6 directs an arbitrator or umpire, in exercising discretion as to costs arising under sub-clause 1, to take into account any refusal or failure by a party to attend a conference in accordance with the provisions of Clause 27(1).

Sub-clause 7 directs an arbitrator or umpire, in exercising discretion as to costs arising under sub-clause 1, to take into account any refusal or failure by a party to comply with the provisions of Clause 37.

Clause 35 provides for taxation of the arbitrator's or umpire's fees and expenses.

Clause 36 provides that, unless the parties agree to the contrary, where an arbitration fails the Court may on the application of a party to the agreement or the arbitrator or umpire make such order in relation to costs as it thinks just.

Clause 37 imposes a duty on the parties not to act in such a manner as to delay or prevent an award being made.

PART V - POWERS OF THE COURT

Clause 38 provides that an appeal shall lie to the Supreme Court on any question of law arising out of an award, but that the Court shall not otherwise have jurisdiction to set aside or remit an award on the ground of error of fact or law on the face of the award.

Sub-clause 4 provides that an appeal may be brought with the consent of all the parties, or by leave of the Court.

Sub-clause 5 provides guidelines to the Court as to whether to grant leave to appeal, and enables the Court to grant leave upon conditions.

Sub-clause 6 provides that an award varied on appeal shall have effect as if it were the award of the arbitrator or umpire.

Clause 39 empowers the Court, in certain circumstances, to determine any question of law arising in the course of the arbitration.

Clause 40 restricts the right of appeal where the parties have entered into an agreement in writing excluding the right of appeal (an "exclusion agreement").

Clause 41 provides that only in certain circumstances shall an exclusion agreement apply to a question or claim falling within the Admiralty jurisdiction of the Supreme Court or a dispute arising out of a contract of insurance.

Sub-clause 2 provides that regulations in relation to the application of exclusion agreements may be made.

Clause 42 empowers the Court to set aside an award where there has been misconduct on the part of an arbitrator or umpire or the award has been improperly procured.

Clause 43 enables the Court to remit matters to the arbitrator or umpire for reconsideration or, where a new arbitrator or umpire has been appointed, for consideration.

Clause 44 enables the Court, on the application of a party to the arbitration agreement, to remove the arbitrator or umpire where it is satisfied that there has been misconduct or undue influence or where the arbitrator or umpire is incompetent or unsuitable to deal with the particular dispute.

Clause 45 provides that a party is not prevented from challenging the impartiality, suitability or competence of an arbitrator where that party appointed the arbitrator.

Clause 46 provides that, unless the agreement expresses a contrary intention, a duty shall be placed on the claimant to prosecute the claim, and that where there has been undue delay on the part of a claimant the Court may make an order terminating the arbitration proceedings and prohibiting the claimant from commencing further proceedings.

Sub-clause 3 provides that the Court shall not make such an order except in specified circumstances.

Clause 47 empowers the Court to make interlocutory orders in relation to arbitration proceedings as it may in relation to proceedings in the Court.

Clause 48 enables the Court to grant an extension of time for doing any act or taking any proceeding in or in relation to an arbitration.

Clause 49 empowers the Court, subject to the Ordinance, to make an order, direction or decision on such terms and conditions as the Court thinks just.

PART VI - GENERAL PROVISIONS AS TO ARBITRATION

Clause 50 provides that, subject to the Ordinance the authority of an arbitrator or umpire is irrevocable unless the agreement expresses a contrary intention, or unless the parties agree to the contrary.

Clause 51 provides that an arbitrator or umpire will not be liable for negligence in respect of the performance of his duties but will be liable for fraud.

Clause 52 provides that after the death of a party the agreement shall be enforced by or against the personal representative of the deceased, unless the agreement expresses a contrary intention.

Sub-clause 2 excludes from the operation of the section a right of action which by law is extinguished by the death of a person.

Clause 53 empowers a Court to stay proceedings commenced in that Court involving parties to an arbitration agreement in respect of a matter agreed to be referred to arbitration and enables that Court to make consequential orders or to give directions on the future conduct of the arbitration.

Clause 54 empowers a Court to refer a matter to arbitration where relief is sought by way of interpleader and it appears to the Court that the claims in question are matters to which an arbitration agreement applies.

Clause 55 overrides a provision in an agreement requiring arbitration or the happening of some other event as a condition precedent to the bringing or defending of legal proceedings.

PART VII - MISCELLANEOUS

Clause 56 vests jurisdiction to hear and determine applications and appeals under the Ordinance in the Supreme Court.

Clause 57 specifies the acceptable methods for service of notices under the Ordinance.

Clause 58 vests in the Attorney-General a power to make regulations under the Ordinance.

Clause 59 makes consequential amendments to the Anglican Church of Australia Trust Property Ordinance 1928.

Clause 60 makes a consequential amendment to the Seat of Government (Administration) Ordinance 1930.

Clause 61 makes a consequential amendment to the Workman's Compensation Ordinance 1951.

Ord 15/85

Authorised by the
Attorney-General