COMMENCEMENT AND SCOPE OF AN ARBITRATION

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Commencement of an arbitration

When does an arbitration commence? The answer is—it depends. It depends on the reason why the question is being asked.

Section 3 of the *Commercial Arbitration Act* (the Act) provides:

(5) 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.

The Act applies in N.S.W. to arbitrations commenced on or after 1 May, 1985 (1 April in Victoria, 1 November, 1985 in N.T. and 1 April, 1986 in W.A.), the date of commencement being established in accordance with this section.

For the purposes of Division 2—Arbitration, of the (NSW) *Limitation Act,* 1969, section 72 of that Act provides:

Commencement.

72. (1) For the purposes of this Division—

(a) where the provisions for arbitration require or permit a party to the arbitration to give notice in writing to another party—

(i) requiring the other party to appoint or concur in appointing an arbitrator; or

(ii) requiring the other party to submit or concur in submitting a difference or matter to a person named or designated in the provisions for arbitration as arbitrator;

or

(b) where, in a case to which paragraph (a) does not apply, a party to the arbitration takes a step required or permitted by the provisions for arbitration for the purpose of bringing a difference or matter before an arbitrator and gives to another party notice in writing of the taking of the step,

the arbitration is commenced, as between the party giving the notice and the party to whom the notice is given, on the date on which the notice is given.

(2) For the purpose of subsection (1), the date on which a notice is given is the date, or the earlier or earliest of the dates, when the party giving the notice—

(a) delivers it to the party to whom it is to be given;

(b) leaves it at the usual or last-known place of business or of abode of the party to whom it is to be given;

(c) posts it by the certified mail service to the party, to whom it is to be given at his usual or last-known place of business or of abode; or

(d) gives the notice in a manner required or permitted by the provisions for arbitration.

It is apparent from these provisions that the arbitration has not, at those stages, commenced in any real sense as nobody has, at those times, entered on the reference.

The date of commencement of an arbitration can be important for other reasons and it may be necessary to refer to the terms of the agreement between the parties in order to determine that date. For example, the parties may have agreed to bar all claims unless a claim is made in writing and an arbitrator appointed within a limited period. Such provisions are referred to as 'Atlantic Shipping' clauses after a 1922 case where it was held that such a clause did not involve an ouster of the jurisdiction of the Court. Note, that in such a case, two acts must be performed within the time-limit: the making of the written claim and the appointment of the arbitrator. Omission of either act bars the claim.

The question arises as to when is an arbitrator "appointed". Three conditions must be fulfilled before an arbitrator is validly appointed:—

1. He must know of his appointment;
2. He must consent to act; and
3. His name and the fact of his appointment must be communicated to the other party or to both parties when the appointment is not made by a party.

(*Tradax-SA v Volkswagenwerk AG* [1969] 2Q.B.599, [1970] 1A11 E.R. 420 (C.A.).

It appears from earlier cases that the effective last date of appointment is the date upon which the three conditions occur.

However, the Court has power under the Act to extend the time fixed by the agreement both before and after the expiration of that time, provided that the Court is satisfied that in the circumstances of the case undue hardship would be caused if time was not extended and that such extension does not contravene the provision of any enactment limiting the time commencement of arbitration proceedings (s.48).

The date of appointment may also be of importance in determining what disputes come within the jurisdiction of the arbitrator. Subject to the content of the Notice of Dispute, disputes referred by an arbitration clause in a contract include all disputes within the purview of the clause up to the date of the appointment of the arbitrator; but

disputes arising after this date must be the subject of separate proceedings unless the parties agree to the contrary (*Cory Bros. & Co. Ltd. v Universe Petroleum Co. Ltd.* (1933) 46 Ll.L. Rep 312).

Where the parties agree to the extension of the ambit of the proceedings, the arbitrator may make an order directing that the arbitration be so extended and he may make that order on such terms and conditions (if any) as he thinks fit (s.25).

The Act provides for agreements between the parties to exclude in certain cases rights of appeal in relation to any question of law arising out of an award and in the course of the arbitration.

Where the arbitration agreement is a 'domestic' agreement such an exclusion agreement is valid only if it is made after the commencement of the arbitration (s.40(6)).

Where the arbitration agreement is not 'domestic', an exclusion agreement is effective whenever made, unless it falls into the 'special case' category, in which case it is effective either if it is made after the commencement of the arbitration or it is expressed to be governed by a law other than the law of New South Wales (or Victoria for the (VIC) Act or N.T. for the (N.T.) Act or W.A. for the (W.A.) Act) (s.41(1)).

The question arises as to when an arbitration commences for the purpose of these sections. There is nothing express in the Act in this regard. The deeming provision in section 3(5) in regard to commencement is expressed to apply to section 3 only. Sections 40 and 41 are similar to provisions in the (English) *Arbitration Act,* 1979. However, that Act contains provisions similar to those contained in Section 72 of the (NSW) *Limitation Act* as to when an arbitration is deemed to have commenced for the purposes of the exclusion agreement provisions. It seems to me that, for the purposes of sections 40 and 41 of the Act, the arbitration commences when the tribunal is effectively established for a particular arbitration.

Notice of Dispute including scope of the reference

It is desirable that the Notice of Dispute conforms precisely with the provisions of the arbitration agreement. But failure to do so is not necessarily fatal. Generally an invalid Notice is curable by serving a valid one, provided that the time for doing has not expired. A Notice is not necessarily invalid because some machinery provision in the agreement has not been strictly followed. For example, Street, C.J. held that the requirement in an arbitration clause (cl. 32 of E.5b) that evidence of deposit of security at the time of serving the Notice of Dispute was directory only and not mandatory and that the arbitration was validly constituted (*Rodean Constructions Pty. Ltd. and Presbyterian Church (NSW) Property Trust* [1982] 2 N.S.W.L.R. 398.

The Notice of Dispute is primarily the machinery to refer a dispute which has arisen to arbitration. Subject to the provisions of the arbitration agreement, the Notice may be cast in wide or narrow terms. Strictly, the scope of an arbitration is limited to the matters contained in that Notice of Dispute. Assuming the true Claimant served the Notice, the Respondent, where he has a cross-claim falling within the arbitration agreement, is limited to the subject matter in the Notice. Where the Notice is cast in narrow terms, the cross-claim may be reduced to nothing more than a pure defence and the Respondent is then placed in the position of having to serve a Notice of Dispute for a separate

arbitration on his claims. A Notice of Dispute cast in narrow terms can cause further problems. Again, strictly, it limits the party serving the Notice to the subject matter of the Notice and that party cannot have the ambit of the dispute enlarged later. That party also would have to serve another Notice of Dispute for a separate arbitration for those claims which fell outside the scope of the first arbitration. In the absence of agreement of the parties, there is no power in the arbitrator (or in the Court) to extend the ambit of, or to consolidate, arbitration proceedings (ss.25, 26). Thus the arbitrator has no jurisdiction to hear matters falling outside the scope of the arbitration as originally defined. Generally such problems do not arise as the parties expressly or tacitly agree to the extension and/or the consolidation of the proceedings.

However, problems can and do arise from time to time. For example, a Judge of the Supreme Court of N.S.W. had to unravel such a problem recently in *Halinka (Sydney) Pty. Ltd. v Magney & Ors.* (12 July, 1985). There the Plaintiff served a Notice of Dispute which resulted in an arbitration under the *Arbitration Act,* 1902.

After the Points of Claim were delivered, the Defendant contended that much of the Points of Claim was beyond the scope of the arbitration as it was not covered by the Notice of Dispute. By her Points of Defence, the Defendant pleaded that all the contentious matters were not within the reference and that the arbitrators lacked jurisdiction in respect of them. In the same document, she made a cross-claim.

The Plaintiff then served a second Notice of Dispute relating to the same premises and the same agreement. Because of its timing, this second arbitration fell under the (new) Act. As it turned out, the same arbitrators were nominated for this arbitration as were appointed for the first one.

The Plaintiff sought the vacation of the hearing dates set for the first arbitration until such time as the first and second disputes could be heard together by the arbitrators. The Defendant refused to consent to this. Shortly after, on the first day appointed for the hearing of the first arbitration, the Plaintiff applied for the vacation of the hearing dates of the first arbitration. This was opposed by the Defendant and the arbitrators refused the application. The Plaintiff then informed the arbitrators that it was not ready to proceed with the hearing and sought an adjournment, which was opposed by the Defendant.

The arbitrators adjourned the hearing for two days. One arbitrator was reported as saying that, in the absence of a court order, the arbitrators intended to proceed to hear and determine the dispute and that if the Plaintiff did not call evidence, they would enter an award.

The Plaintiff sought . . .

1. leave to revoke a submission to arbitration;
2. an order restraining the arbitrators until further order from proceeding to hear and determine any dispute pursuant to the first Notice of Dispute; or
3. an order whereby the dispute arising from the second Notice of Dispute is heard immediately before, with or immediately after the first dispute.

What would you have done if you had been:

a) the arbitrators;

b) the Judge? ■