Amendments Proposed To The Uniform Commercial Arbitration Acts - Commercial Arbitration (Amendment) Bill 1990 (NSW)

- John Tyrril

A Bill has been introduced in the New South Wales Parliament to amend the Commercial Arbitration Act 1984 (NSW). The amendments deal with:

- **the conduct of arbitration proceedings;**
- **the representation of the parties;**
- **the consolidation of proceedings;**
- **the use of mediation, conciliation or similar means of settlement;**
- **the awarding of costs;**
- **the judicial review of awards;**
- **the prevention of delay in prosecuting claims;**
- **the repeal of provisions dealing with the recognition and enforcement of foreign awards and agreements;**
- **the rule making powers of certain courts; and**
- **a series of minor amendments to the Act to achieve uniformity with the corresponding legislation of the other States and Territories.**

The substance of the Bill has been approved by the Standing Committee of Attorneys General and corresponding legislation is expected to be enacted in the other States and Territories to similarly amend the uniform Commercial Arbitration Acts, which have been in place now since 1984/1985.

The Bill addresses several significant problems in what is otherwise exceptionally good arbitration legislation. The fact that the proposed amendments are being dealt with in a controlled way to preserve national uniformity is commendable.

Representation

Presently, the Act provides that, unless otherwise agreed in writing, a party shall appear before the arbitrator personally (or in the case of a body corporate or unincorporate, by an officer, employee or agent) and a party may be legally represented if the arbitrator gives leave. In *The Commissioner for Main Roads v Leighton Contractors Pty Ltd* (1986) 7 BCLRS 81, Mr Justice Smart stated:

> "... It is a mistake to suggest that there is a presumption against legal representation in s20. In each case to which s20(1) and (2) apply the arbitrator must grant leave if satisfied that the conditions in s20(2)(a) or (b) exist. If not so satisfied then he must consider whether leave should be granted. This involves deciding whether in all the relevant circumstances the interests of the parties and justice would be best served by granting or refusing leave."

Mr Justice Smart also stated:

> "... The question whether the applicant would be unfairly disadvantaged if legal representation were not granted is not to be answered simply by saying that as one side does not wish to have such representation the other side should not have it."

For further comment and detail, including the factors which Mr Justice Smart considered arbitrators should take into account in making a determination on legal representation, see the article "Arbitration - Legal Representation" at page 5 in Issue #2 of the Australian Construction Law Newsletter.

The proposal in the Bill extends the existing section to deal with representation in a more comprehensive manner. The proposal is as follows:

> **Representation**
>
> 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:
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> (a) where a party to the proceedings is, or is represented by, a legally qualified person;
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> (b) where all the parties agree;
>
> (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; or
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> (d) where the arbitrator or umpire gives leave for such representation.
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> (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:
>
> (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; or
>
> (c) where the arbitrator or umpire gives leave for such representation.
>
> (3) If a party applies for leave permitting represen-

tation 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

(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."

Clause 20(6) of the Bill defines "legal practitioner" and "legally qualified person".

A legal practitioner from outside the State is protected by clause 20(5) of the Bill from committing an offence under the Legal Profession Act 1987 (NSW). See *Minister for Works v Australian Dredging and General Works Pty Ltd* (1985) 6 BCLRS 69 and 1985 WAR 235 for an example of a case where the use in an arbitration of a legal practitioner who was not admitted in the particular State caused problems. In that case, Victorian solicitors conducting a case in Western Australia were not "certified practitioners" within the meaning of the W.A. Legal Practitioners Act. As a consequence, there was no power to allow taxation on any part of the Victorian solicitors' costs or of the fees of the Victorian counsel.

Consolidation of Proceedings

The present provisions of the Act are inadequate to facilitate the consolidation of identical or related disputes, for example, in the construction industry, of related disputes under the head contract and a subcontract, e.g. disputes relating to directions, documents or events under the head contract which flow down to the subcontract.

Section 26 of the Act provides that the Court may consolidate proceedings in certain circumstances "upon the application of **all** the parties to those proceedings" (emphasis added). Yet, such agreement is often not forthcoming, with the result that separate arbitrations are required (furthermore, if agreement is forthcoming, the intervention of the Court is not required). For a more fullsome discussion of this construction industry problem see the article entitled "Consolidation of Arbitration Proceedings" in Issue #6 of the Australian Construction Law Newsletter at page 3. See also *Melville Homes Pty Ltd v Prime Ceramics Services Pty Ltd and 500 Collins Street Pty Ltd*, Supreme Court of Victoria, 12 July 1990, Issue #15 of the Australian Construction Law Newsletter at page 52; for additional reference to the meaning of Section 26 see also *K.B. Hutcherson Pty Ltd v Janango Ltd*, Supreme Court of NSW, 25 May 1988, Issue #12 of the Australian Construction Law Newsletter at page 48.

The new Clause 26 in the Bill contains separate procedures for situations where all of the arbitration proceedings have the same arbitrator and for those situations where there are different arbitrators involved.

Where the same arbitrator is involved in all the proceedings, upon the application of a party in each of the proceedings, the arbitrator may order:

- consolidation on such terms as the arbitrator thinks fit;
- those proceedings be heard at the same time, or one immediately after the other; or
- any of the proceedings be stayed until after the determination of any of them.

If the arbitrator refuses or fails to make such an order, upon the application of a party in each of the proceedings, the Court may make such an order.

Where not all the proceedings have the same arbitrator, the arbitrator for any one of the proceedings, upon the application of a party to the proceeding, may provisionally make such an order as may an arbitrator who is involved in all the proceedings. An order will cease to be provisional when consistent provisional orders are made for all the arbitration proceedings concerned. The arbitrators are empowered to communicate with each other about the desirability of making such orders and as to their terms.

If a provisional order is made for at least one of the proceedings but the arbitrator for another of the proceedings refuses or fails to make such an order (upon application by one of the parties) then, upon application by a party, the Court may make such an order or orders.

If inconsistent orders are made by the arbitrators, upon application by a party in any of the proceedings, the Court may alter the orders to make them consistent.

An order or provisional order may not be made under clause 26 of the Bill unless it appears:

- that some question of law or fact arises in all of the arbitration proceedings;
- 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
- that for some other reason it is desirable to make the order or provisional order.

When arbitration proceedings are to be consolidated under the clause 26 of the Bill, the arbitrator for the consolidated proceedings shall be the person agreed upon by all the parties to the individual proceedings. Failing such agreement, the Court may appoint an arbitrator for the consolidated proceedings.

Nothing in the proposal prevents the parties from reaching their own consolidation agreement.

Settlement of Disputes Other Than By Arbitration

Unless otherwise agreed in writing, section 27 of the Act enables the arbitrator to order the parties to take such steps as the arbitrator thinks fit to achieve a settlement of the dispute, including attendance at a conference to be conducted by the arbitrator. Whilst the Act does not refer specifically to conciliation or mediation, it is generally understood that such a conference is of that nature. The Act provides further that, should such a conference fail to produce a settlement, no objection shall be taken to the conduct by the arbitrator of the arbitration solely on the

ground that the arbitrator previously conducted the conference.

Despite this protection, section 27 is potentially problematic. Section 44 of the Act provides that the Court may remove an arbitrator for misconduct. Section 4 defines misconduct to include corruption, fraud, partiality, bias and a breach of the rules of natural justice. Consequently, in conducting a section 27 conference, learned writers and commentators have pointed out the potential the arbitrator opens up for challenge to any subsequent arbitration. Particularly so, since ADR processes are often pro-active in nature. There is the potential for the arbitrator to descend into the arena. An arbitrator who expressed views on the relative merits of the dispute and an appropriate basis for settlement might have some difficulty persuading an objective bystander (let alone the aggrieved party) that any subsequent arbitral proceedings were conducted impartially and without bias.

Consequently, many arbitrators have simply avoided the use of section 27, rather than expose themselves and the arbitration to challenge. Others have convened such conferences, but "taken a hike" to avoid any potential that they might prejudice themselves, leaving it to the parties to conduct negotiations.

Where two or more arbitrators are appointed, some arbitrators have used a clever tactic to avoid difficulties by obtaining the parties' agreement that they should convene the section 27 conference on the basis that it be conducted by one only of the arbitrators, with the other taking no part. Further, that in the event that the conference does not succeed, the person who conducted the conference will drop out, taking no further part in the arbitration, with the remaining arbitrator conducting the subsequent arbitration proceedings as a sole arbitrator. The parties' agreement to such a process would be necessary where the arbitration agreement provides for two (or more) arbitrators to hear the dispute.

Others have convened a section 27 conference with the parties' agreement that some person other than the arbitrator will conduct the conference.

Given these concerns and efforts to avoid challenge to the arbitrator or the conduct of the arbitral proceedings, it is appropriate that the problematic and arguably inadequate provisions of section 27 should be amended.

The Bill proposes the omission of section 27 in its entirety and the substitution of the following:

> "Settlement of disputes otherwise than by arbitration
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> 27. (1) Parties to an arbitration agreement:
>
> (a) may seek settlement of a dispute between them by mediation, conciliation or similar means; or
>
> (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),
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> whether before or after proceeding to arbitration, and whether or not continuing with the arbitration.
>
> (2) Where:
>
> (a) an arbitrator or umpire acts as a mediator, conciliator or intermediary (with or without a conference) under subsection (1); and
>
> (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.
>
> (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.
>
> (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)
>
> (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."

This proposal places greater powers in the hands of the parties, including to seek settlement by mediation, conciliation or other similar means. The proposal also overcomes any uncertainty as to the nature of the section 27 process.

The arbitrator's current powers (unless the parties have written out the application of section 27) to take such steps as the arbitrator thinks fit to achieve settlement and to require attendance at a conference have been deleted. These matters are now in the hands of the parties. Given the problematic nature of the current section 27 and the necessary consensual nature of ADR processes, that is appropriate.

It is also significant that the arbitrator is bound by the rules of natural justice when conducting a dispute resolution process under clause 27 of the Bill (unless the parties otherwise agree).

Costs

Where in accordance the rules of court an offer of compromise has been made, the proposed substitute section 34(6) requires the arbitrator or umpire, when exercising the discretion as to costs under section 34(1), to take into account both the fact that the offer was made and the terms of the offer. The lack of such requirement in the current Act has been a problem in some arbitrations.

Since the proposed changes to section 27 will take away from the arbitrator the power to order attendance at

a section 27 conference, the Bill proposes the deletion of the provision requiring the arbitrator, when exercising the discretion as to costs, to take into account refusal or failure to attend such a conference.

Judicial Review of Awards

The Act presently provides that the Court shall not grant leave to appeal on a question of law unless a determination of the question could substantially affect the rights of a party.

In addition, clause 38 of the Bill proposes that the Court must not grant leave to appeal on a question of law unless satisfied that there is a manifest error of law on the face of the award, or 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.

Delay in prosecuting claims

Under the clause 46 proposals, each party will be subject to a duty to exercise due diligence in the conduct of the arbitral proceedings, not just the claimant - as is the case at present.

Before exercising its powers following a delay, the Court must be satisfied that the delay is inordinate and inexcusable and will present a real risk to a fair trial or to the interests of other parties.

Recognition and enforcement of foreign awards and agreements

The Bill proposes repeal of the provisions of the Act which deal with the recognition of foreign awards and agreements and Schedule 2 of the Act which sets out the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This is because the International Arbitration Act 1974 (Clth) covers these matters and the State provisions are inconsistent with section 109 of the Commonwealth Constitution.

Amendments for the purposes of uniformity

The Bill proposes a number amendments for the purposes of achieving uniformity of expression with the corresponding legislation of the other States and Territories.

Interestingly, the Bill proposes the substitution of the english "by reference to considerations of general justice and fairness" for "as amiable compositeur or ex aequo et bono" in section 22 of the NSW Act. This english expression must be preferable, given the push in recent years to pain english drafting and the benefits to the industry of de-mystification.