

NORTHERN TERRITORY OF AUSTRALIA

COMMERCIAL ARBITRATION AMENDMENT BILL 1990

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NORTHERN TERRITORY OF AUSTRALIA

A BILL for AN ACT

to amend the *Commercial Arbitration Act*

BE it enacted by the Legislative Assembly of the Northern Territory of Australia, with the assent as provided by the *Northern Territory (Self-Government) Act 1978* of the Commonwealth, as follows:

1. SHORT TITLE

This Act may be cited as the *Commercial Arbitration Amendment Act 1990*.

2. COMMENCEMENT

This Act shall come into operation on a date to be fixed by the Administrator by notice in the *Gazette*

3. PRINCIPAL ACT

The *Commercial Arbitration Act* is in the Act referred to as the Principal Act.

4. DEFINITIONS

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

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

5. REPEAL AND SUBSTITUTION

Section 6 of the Principal Act is repealed and the following substituted:

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"6. PRESUMPTION OF SINGLE ARBITRATOR

"An arbitration agreement shall be taken to provide for the appointment of a single arbitrator unless -

- (a) the agreement otherwise provides; or
- (b) the parties otherwise agree in writing."

6. REPEAL AND SUBSTITUTION

Section 11 of the Principal Act is repealed and the following substituted:

"11. POWER OF COURT WHERE ARBITRATOR OR UMPIRE REMOVED

"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) order that the arbitration agreement shall cease to have effect with respect to the dispute to which the arbitration relates."

7. REPEAL AND SUBSTITUTION

Section 15 of the Principal Act is repealed and the following substituted:

"15. MANNER IN WHICH DECISIONS MADE

"Unless a contrary intention is expressed in the arbitration agreement, where an arbitration agreement provides for the appointment of 3 or more arbitrators -

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

8. EVIDENCE BEFORE ARBITRATOR OR UMPIRE

Section 19(3) of the Principal Act is amended by omitting "an arbitration agreement" (first occurring) and substituting "the arbitration agreement".

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9. REPEAL AND SUBSTITUTION

Section 20 of the Principal Act is repealed and the following substituted:

"20. REPRESENTATION

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

- (a) where a party to the proceedings is, or is represented by, a legally qualified person;
- (b) where all the parties agree;
- (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
- (d) where the arbitrator or umpire gives leave for such representation.

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

- (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 representation by a legal practitioner or other representative, it must 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.

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

"(6) A reference in this section to -

- (a) a legal practitioner shall be read as a reference to a person who is admitted or entitled to practise as a barrister, solicitor or legal practitioner in the Territory or in any other place, whether within or outside Australia; and
- (b) a legally qualified person shall be read as a reference to -
 - (i) such a legal practitioner; or
 - (ii) a person who, though not such a legal practitioner, has such qualifications or experience in law (whether acquired in the Territory or in any other place, whether within or outside Australia) as, in the opinion of the arbitrator or umpire, would be likely to afford an advantage in the proceedings."

10. REPEAL AND SUBSTITUTION

Sections 26 and 27 of the Principal Act are repealed and the following substituted:

"26. CONSOLIDATION OF ARBITRATION PROCEEDINGS

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

- (a) the arbitrator or umpire may, on the application of a party in each of the arbitration proceedings, order -
 - (i) those proceedings to be consolidated on such terms as the arbitrator or umpire thinks just;
 - (ii) those proceedings to be heard at the same time, or one immediately after the other; or
 - (iii) any of those proceedings to be stayed until after the determination of any of them;

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- (b) if the arbitrator or umpire refuses or fails to make such an order, the Court may, on application by a party in any of the proceedings, make such an order as could have been made by the arbitrator or umpire.

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

- (a) the arbitrator or umpire for any one of the arbitration proceedings may, on the application of a party in the proceeding, provisionally order -
 - (i) the proceeding to be consolidated with other arbitration proceedings on such terms as the arbitrator or umpire thinks just;
 - (ii) the proceeding to be heard at the same time as other arbitration proceedings, or one immediately after the other; or
 - (iii) any of those proceedings to be stayed until after the determination of any of them;
- (b) an order ceases to be provisional when consistent provisional orders have been made for all of the arbitration proceedings concerned;
- (c) the arbitrators or umpires for arbitration proceedings may communicate with each other for the purpose of conferring on the desirability of making orders under this subsection and of deciding on the terms of any such order;
- (d) if a provisional order is made for at least one of the arbitration proceedings concerned, but the arbitrator or umpire for another of the proceedings refuses or fails to make such an order (having received an application from a party to make such an order), the Court may, on application by a party in any of the proceedings, make an order or orders that could have been made under this subsection;
- (e) if inconsistent provisional orders are made for the arbitration proceedings, the Court may, on application by a party in any of the proceedings, alter the orders to make them consistent.

"(3) An order or a provisional order may not be made under this section unless it appears -

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- (a) that some common question of law or fact arises in all of the proceedings;
- (b) that the rights to relief claimed in all of the proceedings are in respect of or arise out of the same transaction or series of transactions; or
- (c) that for some other reason it is desirable to make the order or provisional order.

"(4) When arbitration proceedings are to be consolidated under this section, the arbitrator or umpire for the consolidated proceedings shall be the person agreed on for the purpose by all the parties to the individual proceedings, but, failing any such agreement, the Court may appoint an arbitrator or umpire for the consolidated proceedings.

"(5) Any proceedings before an arbitrator or umpire for the purposes of this section shall be taken to be part of the arbitration proceedings concerned.

"(6) Arbitration proceedings may be commenced or continued, notwithstanding that an application to consolidate them is pending under subsection (1) or (2) and notwithstanding that a provisional order has been made in relation to them under subsection (2).

"(7) Subsections (1) and (2) apply in relation to arbitration proceedings whether or not all or any of the parties are common to some or all of the proceedings.

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

"27. SETTLEMENT OF DISPUTES OTHERWISE THAN BY ARBITRATION

"(1) Parties to an arbitration agreement -

- (a) may seek settlement of a dispute between them by mediation, conciliation or similar means; or
- (b) may authorize an arbitrator or umpire to act as a mediator, conciliator or other non-arbitral intermediary between them (whether or not involving a conference to be conducted by the arbitrator or umpire),

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

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"(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 is bound by the rules or an 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."

11. INTEREST UP TO MAKING OF AWARD

Section 31 of the Principal Act is amended -

- (a) by omitting from subsection (1) "subsection (2)" and substituting "subsection (4)"; and
- (b) by omitting subsection 2 and substituting the following:

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

- (a) arbitration proceedings have been commenced for the recovery of a debt or liquidated damages; and

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- (b) payment of the whole or a part of the debt or damages is made during the currency of the proceedings and prior to or without an award being made in respect of the debt or damages,

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

"(3) Without limiting subsection (2), arbitration proceedings shall, for the purposes of that subsection, 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 the other party to refer, or to concur in the reference of, the dispute to arbitration; or
 - (iii) has taken any other step contemplated by the agreement or the law in force at the time the dispute arose, with a view to referring the dispute to arbitration or appointing, or securing the appointment of, an arbitrator in relation to the dispute.

"(4) Subsection (1) does not -

- (a) authorizing the award of interest on interest;
- (b) apply in relation to an amount on 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."

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12. INTEREST ON DEBT UNDER AWARD

Section 32 of the Principal Act is amended by adding at the end the following:

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

13. ENFORCEMENT OF AWARD

Section 33 of the Principal Act is amended -

- (a) by omitting from subsection (1) "(1) An award" and substituting "An award"; and
- (b) by omitting subsection (2).

14. COSTS

Section 34(3) of the Principal Act is amended -

- (a) by omitting paragraph (b) and substituting the following:

"(b) except insofar as it relates to a right of indemnity or a right of subrogation, a particular party to the agreement shall in any event pay the costs of any other party or any part of those costs,";

- (b) by omitting from subsection (5) "and the amount of that payment" and substituting "and the terms of the offer."; and

- (c) by omitting subsection (6) and substituting the following:

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

15. JUDICIAL REVIEW OF AWARDS

Section 38 of the Principal Act is amended by omitting subsections (5) and (6) and substituting the following:

"(5) The Supreme Court shall not grant leave under subsection (4)(b) unless it considers that -

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- (a) having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more parties to the arbitration agreement; and
- (b) there is -
 - (i) a manifest error of law on the face of the award; or
 - (ii) strong evidence that the arbitrator or umpire made an error of law and that the determination of the question may add, or may be likely to add, substantially to the certainty of commercial law.

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

"(6A) Where the award of an arbitrator or umpire is varied on an appeal under subsection (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."

16. EXCLUSION AGREEMENTS AFFECTING RIGHTS UNDER SECTIONS 38 AND 39

Section 40 of the Principal Act is amended -

- (a) by omitting from subsection (6) "which is a domestic arbitration agreement"; and
- (b) by omitting subsection (7).

17. DELAY IN PROSECUTING CLAIMS

Section 46 of the Principal Act is amended -

- (a) by omitting from subsection (1) "shall be the duty of the claimant to exercise due diligence in the prosecution of the claim" and substituting "is the duty of each party to the agreement to exercise due diligence in the taking of steps that are necessary to have the dispute referred to arbitration and dealt with in arbitration proceedings"; and
- (b) by omitting subsections (2) and (3) and substituting the following:

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

- (a) terminating the arbitration proceedings;

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- (b) removing the dispute into Court; and
- (c) dealing with any incidental matters.

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

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

18. REPEAL OF PART VII

Part VII of the Principal Act is repealed.

19. REPEAL OF SCHEDULE

The Schedule to the Principal Act is repealed.

20. FURTHER AMENDMENTS

The Principal Act is further amended by omitting from sections 18(1), 21, 22(1), 23, 24, 28, 29(1), 31(1), 32 and 46(1) "an arbitration agreement" and substituting "the arbitration agreement".
