

NORTHERN TERRITORY OF AUSTRALIA
SUPREME COURT AMENDMENT (COMMERCIAL ARBITRATION)
RULES 2013

Subordinate Legislation No. 34 of 2013

Table of provisions

1	Citation	2
2	Rules amended	2
3	Order 91 replaced.....	2
	Order 91	Commercial arbitration
	Part 1	General matters
	91.01	Definitions
	91.02	Application of Chapter 1
	91.03	Commencement of proceedings
	91.04	Jurisdiction of the Master
	91.05	Court assistance in taking evidence
	91.06	Subpoenas
	91.07	Application to determine a question of law
	91.08	Application to set aside an arbitral award
	91.09	Appeal on a question of law
	91.10	Enforcement of award
	Part 2	Offers of compromise
	91.11	Application of Part
	91.12	Offer of compromise
	91.13	Time for making or accepting an offer
	91.14	Offer without prejudice
	91.15	Time for payment
	91.16	Withdrawal of acceptance
	91.17	Disclosure of offer to arbitrator
	91.18	Failure to comply with accepted offer
	91.19	Costs if the offer is not accepted
	Part 3	Transitional matters for Supreme Court Amendment (Commercial Arbitration) Rules 2013
	91.20	Transitional matters



NORTHERN TERRITORY OF AUSTRALIA

Subordinate Legislation No. 34 of 2013

Supreme Court Amendment (Commercial Arbitration) Rules 2013

We, the undersigned Judges of the Supreme Court of the Northern Territory of Australia, under section 86 of the *Supreme Court Act*, make the following Rules of Court.

Dated 11 July 2013

T. J. RILEY CJ

S. R. SOUTHWOOD J

J. BLOKLAND J

J. KELLY J

P. BARR J

G. HILEY J

Judges of the Supreme Court
of the Northern Territory of Australia

1 Citation

These Rules may be cited as the *Supreme Court Amendment (Commercial Arbitration) Rules 2013*.

2 Rules amended

These Rules amend the *Supreme Court Rules*.

3 Order 91 replaced

Order 91

repeal, insert

Order 91 Commercial arbitration

Part 1 General matters

91.01 Definitions

In this Order:

Act means the *Commercial Arbitration (National Uniform Legislation) Act*.

arbitral tribunal, see section 2(1) of the Act.

arbitration, see section 2(1) of the Act.

proceeding means a proceeding in the Court under the Act.

91.02 Application of Chapter 1

Chapter 1, with the necessary changes, applies in relation to a proceeding.

91.03 Commencement of proceedings

A proceeding, including an application for leave to appeal made under section 34A(1)(b) of the Act and an appeal following the grant of leave, must be commenced by originating motion.

91.04 Jurisdiction of the Master

The Master has jurisdiction under the Act except under sections 14, 27J, 34 and 34A.

91.05 Court assistance in taking evidence

- (1) This rule applies if a request for assistance from the Court is made under section 27 of the Act.
- (2) For the purpose of executing the request, the Court may, on behalf of the arbitral tribunal, take evidence in any way that the Court could take evidence if the arbitration were a proceeding in the Court.
- (3) For subrule (2), Order 41 applies.
- (4) The Registrar must cause all evidence taken under this rule (including transcripts or recordings of oral evidence) to be given to the arbitral tribunal.

91.06 Subpoenas

- (1) Order 42, other than rules 42.03(6) and (7), 42.06(4)(b), 42.09 and 42.10, applies to the issue of a subpoena under section 27A of the Act.
- (2) A subpoena to produce documents to the arbitral tribunal may, with the leave of the Court or the arbitral tribunal, require production of the documents on any day.
- (3) Unless the Court orders otherwise, a subpoena requiring a person to produce documents to the arbitral tribunal must allow the person to produce them:
 - (a) to a person, and at a place, nominated in writing by the arbitral tribunal and stated in the subpoena; and
 - (b) by hand or by post.
- (4) If the person produces the document in accordance with subrule (3), the person nominated must receive it not later than 2 days before the first date on which production before the arbitral tribunal is required.
- (5) If a document is produced in accordance with subrules (3) and (4), the person nominated:
 - (a) if required to do so – must give a receipt to the person producing the document; and
 - (b) must produce the document as the nature of the case requires or as the arbitral tribunal may direct.

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- (6) Subrules (3) and (4) do not apply to so much of a subpoena as requires a person to attend for examination before the arbitral tribunal.

91.07 Application to determine a question of law

For an application to the Court under section 27J of the Act, the originating motion must be filed and served within 14 days after the date on which the consent of the arbitral tribunal or all the other parties is obtained.

91.08 Application to set aside an arbitral award

For an application to the Court under section 34 of the Act to set aside an arbitral award, the originating motion must include a statement of:

- (a) the date the party received the award; or
- (b) if a request has been made to the arbitral tribunal under section 33 of the Act – the date the request was disposed of by the arbitral tribunal.

91.09 Appeal on a question of law

- (1) For a party seeking leave to appeal under section 34A(1)(b) of the Act, the originating motion must include a statement of the party's case setting out the following:
 - (a) the dates relevant to the calculation of the appeal period mentioned in section 34A(6) of the Act;
 - (b) the nature of the case with sufficient particularity for an understanding of the matters referred to in the originating motion;
 - (c) the question of law;
 - (d) how the determination of the question will substantially affect the rights of one or more of the parties;
 - (e) that the question is one which the arbitral tribunal was asked to determine;
 - (f) the reasons for which it is asserted that, on the basis of the findings of fact in the award:
 - (i) the decision of the arbitral tribunal on the question is obviously wrong; or

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- (ii) the question is one of general public importance and the decision is at least open to serious doubt;
 - (g) the reasons for which, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the Court to determine the question.
- (2) For an appeal to the Court under section 34A(1) of the Act, the originating motion must include a statement setting out the following:
- (a) the date each party agreed under section 34A(1)(a) of the Act;
 - (b) the question of law;
 - (c) the nature of the dispute with sufficient particularity for an understanding as to the context in which the question of law arises under section 34A(3) and (4) of the Act;
 - (d) the respects in which it is asserted that the arbitral tribunal fell into error.

91.10 Enforcement of award

- (1) For an application under section 35 of the Act, section 9 of the *International Arbitration Act 1974* (Cth) applies to proceedings in which a person seeks leave to enforce an award in the same way as it applies to proceedings in which a person seeks enforcement of a foreign award under that Commonwealth Act.
- (2) For an application under section 35 of the Act, the originating motion must be supported by affidavit.
- (3) The affidavit must:
- (a) annex the arbitration agreement and the award or, in either case, a copy; and
 - (b) state the extent to which the award has not been complied with at the date the application is made; and
 - (c) state the usual or last known place of residence or business of the person against whom it is sought to enforce the award or, if the person is a corporation, its last known registered office.
- (4) If the Court grants the application, the party who sought the enforcement of the award may enter judgment in terms of the award.

Part 2 Offers of compromise

91.11 Application of Part

This Part applies in relation to an arbitration under an arbitration agreement unless otherwise agreed in writing by the parties to the agreement.

91.12 Offer of compromise

- (1) A party to an arbitration may make an offer of compromise of a claim the subject of the arbitration on the terms specified in the offer to any other party.
- (2) An offer of compromise must:
 - (a) be in writing; and
 - (b) contain a statement to the effect that the offer is made under this Part; and
 - (c) be served on the other party.

91.13 Time for making or accepting an offer

- (1) An offer of compromise may be served at any time before the time prescribed by subrule (8) for the claim to which it relates.
- (2) A party may serve more than one offer of compromise.
- (3) An offer of compromise may be expressed to be limited as to the time the offer is open to be accepted after service on the party to whom it is made, but the time expressed must not be less than 28 days after service.
- (4) A party on whom an offer of compromise is served must, within 3 days after service, serve a written acknowledgment of service on the party serving the offer.
- (5) A party on whom an offer of compromise is served may accept the offer by serving written notice of acceptance on the party who made the offer before the first of the following occurs:
 - (a) the expiration of the period for which the offer is expressed to be open under subrule (3) or, if no time is specified, the expiration of 28 days after service of the offer; or
 - (b) the time prescribed by subrule (8) in respect of the claim to which the offer relates.

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- (6) An offer of compromise cannot be withdrawn during the time it is open to be accepted.
 - (7) An offer (the **first offer**) is open to be accepted within the period mentioned in subrule (5) even if during that period the party on whom the first offer is served makes an offer (the **second offer**) to the party who made the first offer, whether or not the second offer is made in accordance with this Part.
 - (8) For subrules (1) and (5), the time prescribed is the time when the arbitrator:
 - (a) has made decisions on all questions of liability and the relief to be granted in respect of the claim to which the offer relates; and
 - (b) has communicated the decisions to one or more of the parties.

91.14 Offer without prejudice

An offer of compromise is taken to be made without prejudice, unless the offer otherwise provides.

91.15 Time for payment

An offer of compromise providing for the payment of a sum of money, or for the doing of any other act, is taken to provide for the payment of that sum or the doing of that act within 28 days after acceptance of the offer, unless the offer otherwise provides.

91.16 Withdrawal of acceptance

- (1) A party who accepts an offer may, by serving a written notice of withdrawal on the offeror, withdraw the acceptance if:
 - (a) the offer provides for payment of a sum of money or the doing of any other act; and
 - (b) the sum is not paid to the offeree, or the act is not done, within 28 days after acceptance of the offer or within such other time as the offer provides.
- (2) On withdrawal of an acceptance all steps in the arbitration taken in consequence of the acceptance have effect only as the arbitrator may direct.
- (3) On withdrawal of acceptance the arbitrator:
 - (a) may give directions under subrule (2); and

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- (b) may give directions for restoring the parties as nearly as may be to their positions at the time of the acceptance; and
 - (c) may give directions for the further conduct of the arbitration.

91.17 Disclosure of offer to arbitrator

- (1) No statement of the fact that an offer of compromise has been made may be contained in a document delivered to the arbitrator before the time prescribed by subrule (4).
- (2) If an offer of compromise has not been accepted, no communication with respect to the offer may be made to the arbitrator before the time prescribed by subrule (4).
- (3) Subrules (1) and (2) do not apply if an offer of compromise provides that the offer is not made without prejudice.
- (4) For subrules (1) and (2) the time prescribed is the time when the arbitrator:
 - (a) has made decisions on all questions of liability and the relief to be granted in respect of the claim to which the offer relates; and
 - (b) has communicated the decisions to one or more of the parties.

91.18 Failure to comply with accepted offer

If a party to an accepted offer of compromise fails to comply with the terms of the offer, the other party may apply to the Court for:

- (a) judgment or orders to give effect to the terms of the accepted offer; or
- (b) if the party in default is:
 - (i) the party who commenced the arbitration – an order that the arbitration be stayed; or
 - (ii) the party responding to the arbitration – an order that the accepted offer of compromise is of no effect and that the party who commenced the arbitration is at liberty to proceed with the arbitration.

91.19 Costs if the offer is not accepted

In any exercise of discretion as to costs, the arbitrator must consider whether the party serving an offer of compromise was at all times willing and able to carry out the party's part of what was proposed in the offer.

**Part 3 Transitional matters for Supreme Court
Amendment (Commercial Arbitration)
Rules 2013**

91.20 Transitional matters

- (1) If an arbitration commenced before the commencement of the *Commercial Arbitration (National Uniform Legislation) Act*, Order 91 as in force immediately before the commencement of the *Supreme Court Amendment (Commercial Arbitration) Rules 2013* continues to apply to the arbitration.
- (2) For subrule (1), an arbitration has commenced if:
 - (a) a dispute to which the relevant arbitration agreement applies has arisen; and
 - (b) the arbitral tribunal has been properly constituted.