

A.C.T. Update

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Set out below are some recent developments in the Australian Capital Territory which affect dispute resolution.

1. Amendment to Commercial Arbitration Act 1986

The Commercial Arbitration (Amendment) Act 1991 (No. 36 of 1991), gazetted on 26 August 1991, made substantial amendments to the Commercial Arbitration Act 1986 (A.C.T.).

The significant changes are:

New s.20, Representation

Amended provisions for legal or other representation including the right to legal representation where the value of the claim exceeds a prescribed amount (presently \$20,000).

New s.26, Consolidation

Gives the arbitrator or arbitrators power to consolidate arbitrations. Where there are different arbitrators in the arbitration proceedings, the proceedings are consolidated when each arbitrator has made a "provisional" order for consolidation. There is limited power for the court to review an arbitrator's refusal to make a provisional order.

s.27, Settlement of Disputes

Permits parties to an arbitration agreement to seek settlement by mediation, conciliation or other similar means or may authorise an arbitrator or umpire to act as mediator or conciliator or other non-arbitral intermediary.

s.31, Interest up to Award

Gives the arbitrator power to award interest as part of the award at the rate interest is payable on a judgment debt in the Supreme Court. (The Australian Capital Territory Supreme Court Act 1933 contains express provision for the award of interest up to the date of judgment. It is curious that the legislators chose to use the post-judgment interest rate rather than the pre-judgment rate. Presently the rates are the same - 15%, although this has not always been the case).

s.38, Judicial Review

The court shall not grant leave to appeal unless the determination of the question of law could substantially affect the rights of one or more of the parties and there is a manifest error of law on the face of the award, or strong

evidence of an error of law the determination of which may add substantially to the certainty of commercial law.

There are a number of other minor amendments. The amendments bring the ACT legislation more into line with the uniform commercial arbitration legislation.

2. Commercial Arbitration Rules

Statutory rules no. 416 of 1991 introduce new Supreme Court Rules for applications under the Commercial Arbitration Act 1986. The Rules came into effect on 1 January 1992 as Order 83. All proceedings are to be commenced by originating summons. The originating summons for an appeal with the leave of the court (s.38(4)(b) Commercial Arbitration Act 1986) must include or be accompanied by a statement of the nature of the case, questions involved and reasons why leave should be given. The Rules introduce a 21 day time limit for applications under s.39(1), 38(4)(a), 38(4)(b), 42(1), 43, 38(4)(b) of the Commercial Arbitration Act 1986.

3. Rules for Court Appointed Referees

By Division 2 of the new Order 83 the Court now has power to refer the whole of proceedings or any question arising in the proceedings to a Court appointed referee. The referee may be appointed to:

- inquire and report (Rule 13.01(c)), or
- hear and determine (Rule 13.01(d)).

Proceedings under a reference to hear and determine (Rule 13.01(d)) "are to be conducted as if the reference were an arbitration agreement within the meaning of the (Commercial) Arbitration Act". Subject to that, and any directions of the Court, the referee may conduct proceedings in such manner as he thinks fit.

Rule 17.01 requires all referees to give the Court a written report. If the referee is appointed to inquire and report (Rule 13.01(c)) the Court may adopt, vary, remit etc the whole or any part of the report. The Rules are silent as to a report of a referee appointed to hear and determine (Rule 13.01(d)). Presumably the report becomes the judgement of the Court without argument as to its adoption.

The question has been asked whether a judgement following the report of a referee appointed to hear and determine can only be appealed pursuant to the Commercial Arbitration Act. This cannot be correct. The reference is part of the Court process and the general appeal provisions must apply.

Editorial Note

It will be an interesting and, probably, important issue for disputants involved in such a reference out process whether Mr Topfer is correct or not in his interpretation.

With due respect for Mr Topfer's view which may well be correct, there does seem room for some uncertainty. Rule 13.01(d) does not say that only some of the provisions of the Commercial Arbitration Act shall apply to the conduct of the "reference", but not others.

Perhaps, in consequence, a view is possible that the arbitrator's award is final and binding upon the parties and may be enforced, by leave of the Court, in the same manner as a judgement or order of the Court as is provided for by sections 28 and 33 of the Commercial Arbitration Act. Further, if all of the provisions of the Commercial Arbitration Act apply, then perhaps any challenge to the referee/arbitrator's award might need to be pursuant to s.38 of the Commercial Arbitration Act.

- JT