



# COMMERCIAL ARBITRATION (UNIFORM PROVISIONS) AMENDMENT ACT 1992

No. 64 of 1992

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# ELIZABETHAE II REGINAE

A.D. 1992

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No. 64 of 1992

**An Act to amend the Commercial Arbitration Act 1986.**

[Assented to 12 November 1992]

The Parliament of South Australia enacts as follows:

## Short title

1. This Act may be cited as the *Commercial Arbitration (Uniform Provisions) Amendment Act 1992*.

(1) The *Commercial Arbitration Act 1986* is referred to in this Act as “the principal Act”.

## Commencement

2. This Act will come into operation on a day to be fixed by proclamation.

## Amendment of s. 4 — Interpretation

3. Section 4 of the principal Act is amended—

- (a) by striking out the definition of “**domestic arbitration agreement**”;
- (b) by striking out the definition of “**international arbitration agreement**”;
- (c) by striking out the definition of “**prescribed arbitration agreement**”;

and

(d) by inserting after its present contents as amended by this section (now to be designated as subsection (1)) the following subsection:

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

## Substitution of s. 6

4. Section 6 of the principal Act is repealed and the following section is substituted:

### Presumption of single arbitrator

6. 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.

#### **Substitution of s. 11**

5. Section 11 of the principal Act is repealed and the following section is substituted:

##### **Power of the Court where arbitrator or umpire removed**

11. (1) 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) subject to subsection (2), order that the arbitration agreement shall cease to have effect with respect to the dispute to which the arbitration relates.

(2) Subsection (1)(b) does not apply unless all the parties to the arbitration agreement are domiciled or ordinarily resident in Australia at the time the arbitration agreement is entered into.

(3) Subsection (2) does not apply to an arbitration agreement that is treated as an arbitration agreement for the purposes of this Act by virtue only of the operation of section 3(4)(a).

#### **Amendment of s. 17 — Party may obtain summons**

6. Section 17 of the principal Act is amended by striking out subsection (1) and substituting the following subsection:

(1) The Court may, on the application of any party to an arbitration agreement, and subject to and in accordance with rules of court, issue a summons requiring a person to attend for examination before the arbitrator or umpire or requiring a person to attend for examination before the arbitrator or umpire and to produce to the arbitrator or umpire the document or documents specified in the summons.

#### **Amendment of s. 18 — Refusal or failure to attend before arbitrator or umpire, etc.**

7. Section 18 of the principal Act is amended by striking out from paragraphs (a), (b) and (c) of subsection (2) “an order under subsection (1)” and substituting, in each case, “the order”.

#### **Amendment of s. 19 — Evidence before arbitrators or umpire**

8. Section 19 of the principal Act is amended by striking out from subsection (3) “parties to an arbitration agreement” and substituting “parties to the arbitration agreement”.

#### **Substitution of s. 20**

9. Section 20 of the principal Act is repealed and the following section is substituted:

##### **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:

- (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 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.

(5) A person not admitted to practise in South Australia shall not be taken to have committed an offence under or breached the provisions of the *Legal Practitioners Act 1982* or any other Act merely by representing a party in arbitration proceedings in South Australia.

(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 South Australia 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 South Australia 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.

**Amendment of s. 21 — Effect of appointment of new arbitrator or umpire on evidence previously given and awards and determinations previously made**

10. Section 21 of the principal Act is amended by inserting “in the same manner in all respects” after “the earlier proceedings” in paragraph (a).

**Substitution of ss. 26 and 27**

11. Sections 26 and 27 of the principal Act are repealed and the following sections are substituted:

**Consolidation of arbitration proceedings**

26. (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;
- (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—

- (a) that some common question of law or fact arises in all of the arbitration 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 two or more arbitration proceedings from agreeing to consolidate those proceedings and taking such steps as are necessary to effect that consolidation.

#### **Settlement of disputes otherwise than by arbitration**

27. (1) Parties to an arbitration agreement—

- (a) may seek settlement of a dispute between them by conciliation or similar means;

or

- (b) may authorize an arbitrator or umpire to act as a mediator, conciliator or 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.

(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.

#### **Amendment of s. 31 — Interest up to making of award**

**12.** Section 31 of the principal Act is amended—

- (a) by inserting “but subject to subsection (4),” after “the arbitration agreement” in subsection (1);

- (b) by striking out from subsection (1) “, subject to subsection (2),”;

and

- (c) by striking out subsection (2) and substituting the following subsections:

(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

- (b) payment of the whole or 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) This section does not—

- (a) authorize the awarding of interest upon interest;
- (b) apply in relation to any amount upon 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.

#### **Amendment of s. 32 — Interest on debt under award**

13. Section 32 of the principal Act is amended by inserting “on and” after “shall be payable” in subsection (1).

#### **Amendment of s. 34 — Costs**

14. Section 34 of the principal Act is amended—

(a) by striking out subsection (3) and substituting the following subsection:

(3) A provision in an arbitration agreement (being an arbitration agreement that provides for the reference of future disputes to arbitration) is void if—

- (a) it is to the effect that a particular party, or the parties, to the agreement shall in any event pay their own costs of the arbitration or any part of those costs;

or

- (b) except insofar as it relates to a right of indemnity or a right of subrogation—it is to the effect that 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 striking out from subsection (5) “rules made under this Act” and substituting “rules of court”;

and

(c) by striking out subsection (6) and substituting the following subsection:

(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 the discretion as to costs conferred on the arbitrator or umpire by subsection (1), take into account both the fact that the offer was made and the terms of the offer.

**Amendment of s. 38 — Judicial review of awards**

15. Section 38 of the principal Act is amended—

(a) by striking out from subsection (4) “the arbitration agreement” first occurring and substituting “an arbitration agreement”;

and

(b) by striking out subsections (5), (6), (7) and (8) and substituting the following subsections:

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

(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.

(7) 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.

**Amendment of s. 39 — Determination of preliminary point of law by Supreme Court**

16. Section 39 of the principal Act is amended by striking out subsections (3) and (4).

**Amendment of s. 40 — Exclusion agreements affecting rights under sections 38 and 39**

17. Section 40 of the principal Act is amended—

(a) by striking out from subsection (1) “the following provisions of”;

and

(b) by striking out subsection (6) and substituting the following subsections:

(6) An exclusion agreement shall be of no effect in relation to an award made on, or a question of law arising in the course of, an arbitration under an arbitration agreement which is a domestic arbitration agreement unless the exclusion agreement is entered into after the commencement of the arbitration in which the award is made or, as the case requires, in which the question of law arises.

(7) In this section, “domestic arbitration agreement” means an arbitration agreement which does not provide, expressly or by implication, for arbitration in a country other than Australia and to which neither—

(a) an individual who is a national of, or habitually resident in, any country other than Australia;

nor

(b) a body corporate which is incorporated in, or whose central management and control is exercised in, any country other than Australia,

is a party at the time the arbitration agreement is entered into.

**Amendment of s. 46 — Delay in prosecuting claims**

18. Section 46 of the principal Act is amended—

(a) by striking out from subsection (1) “the arbitration proceedings” and substituting “arbitration proceedings”;

and

(b) by striking out subsection (3) and substituting the following subsection:

(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.

**Amendment of s. 53 — Relationship between judicial and arbitral powers**

19. Section 53 of the principal Act is amended—

(a) by striking out from subsection (1)(a) “(not being a prescribed arbitration agreement)”;

(b) by striking out from subsection (1)(d)(ii) “the applicant” and substituting “that the applicant”;

(c) by striking out from subsection (2)(a) “(not being a prescribed arbitration agreement)”;

and

(d) by striking out subsections (3) and (4) and substituting the following subsection:

(3) Notwithstanding any rule of law to the contrary, a party to an arbitration agreement shall not be entitled to recover damages in any court from another party to the agreement by reason that that other party takes proceedings in a court in respect of the matter agreed to be referred to arbitration by the arbitration agreement.

#### Substitution of s. 54

20. Section 54 of the principal Act is repealed and the following section is substituted:

##### Interpleader

54. Where relief by way of interpleader is granted in any court and it appears to that court that the claims in question are matters to which an arbitration agreement (to which the claimants are parties) applies, the court may, unless it is satisfied that there is sufficient reason why the matters should not be referred to arbitration in accordance with the agreement, make an order directing the issue between the claimants to be determined in accordance with the agreement.

#### Substitution of s. 55

21. Section 55 of the principal Act is repealed and the following section is substituted:

##### Effect of Scott v Avery clauses

55. (1) Where it is provided (whether in an arbitration agreement or some other agreement, whether oral or written) that arbitration or an award pursuant to arbitration proceedings or the happening of some other event in or in relation to arbitration is a condition precedent to the bringing or maintenance of legal proceedings in respect of a matter or the establishing of a defence to legal proceedings brought in respect of a matter, that provision, notwithstanding that the condition contained in it has not been satisfied—

(a) shall not operate to prevent—

(i) legal proceedings being brought or maintained in respect of that matter;

or

(ii) a defence being established to legal proceedings brought in respect of that matter;

and

(b) shall, where no arbitration agreement relating to that matter is subsisting between the parties to the provision, be construed as an agreement to refer that matter to arbitration.

(2) Subsection (1) does not apply to an arbitration agreement unless all the parties to the agreement are domiciled or ordinarily resident in Australia at the time the arbitration agreement is entered into.

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(3) Subsection (2) does not apply to an arbitration agreement that is treated as an arbitration agreement for the purposes of this Act by virtue only of the operation of section 3(4)(a).

**Transitional provisions**

22. (1) Subject to this section, the amendments made by this Act apply in relation to an arbitration agreement (whenever made) and an arbitration under such an agreement.

(2) The amendment made by section 9 of this Act does not apply in relation to arbitration proceedings that were commenced before the commencement of the amendment.

(3) Section 26 of the principal Act as in force before the commencement of this Act continues to apply in relation to—

(a) an order made under that section before that commencement;

or

(b) an application pending under that section immediately before that commencement.

In the name and on behalf of Her Majesty, I hereby assent to this Bill.

ROMA MITCHELL Governor