

## LEGISLATION

# QUEENSLAND COMMERCIAL ARBITRATION ACT 1990

by FRANK SHELTON

THIS Act was assented to on 2 November last. It came into operation on 1 December last. Its importance is twofold. Firstly, uniform commercial arbitration is now in force in all states and territories of the Commonwealth. Secondly, the Queensland Act contains some amendments to the uniform legislation based largely upon the recommendations of a Working Group comprised of representatives of the Commonwealth and State Attorneys-General. It is anticipated that the amendments to the uniform legislation contained in the Queensland Act will shortly be incorporated in the legislation in the other states and territories.

The main amendments to the uniform legislation contained in the Queensland Act are:—

### 1. S. 20 Representation.

The Queensland Act adopts the recommendations of the Working Group and is fairly similar to the existing South Australian provision on representation. It reads:

- (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;

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- (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.
- (5) A person not admitted to practise in Queensland shall not be taken to have committed an offence under or breached the provisions of any Act or Rules relating to the admission of legal practitioners in Queensland merely by representing a party in arbitration proceedings in Queensland.
- (6) . . . . .

## 2. S. 26 Consolidation of Arbitration Proceedings.

In *Melville Homes Pty Ltd v Prime Ceramics Services Pty Ltd & Ors.* (Unreported, Supreme Court of Victoria, 12 July, 1990—see case note on page 174 of this Journal) Southwell J. held that the present section 26 in the uniform legislation requires an application for consolidation to be made by all the parties to the arbitration proceedings. This obviously severely restricts the effect of section 26. Section 26 in the Queensland Act follows the recommendations of the Working Group.

It distinguishes between arbitration proceedings where the arbitrator is the same and arbitration proceedings where the arbitrators are different. In the first case, the arbitrator, on the application of a party, may consolidate the proceedings and if he fails to do so, application can be made to the Court for the appropriate orders.

Where there are different arbitrators, application can be made to the arbitrator in one of the proceedings who may make a provisional order. Similar applications for provisional orders are made to the other arbitrator or arbitrators. Where consistent provisional orders are made, the proceedings are consolidated in accordance with the provisional orders made. The arbitrators are allowed to confer with each other. If a provisional order has been made with respect to an arbitration proceeding but not with respect to one or more other arbitration proceedings in respect to which consolidation orders have been sought, application can be made to the Court. Similarly, application can be made to the Court if there are inconsistent provisional orders. Application can also be made to the Court if there is no agreement as to who the arbitrator of consolidated proceedings should be.

**3. S. 27—Settlement of Disputes Otherwise Than By Arbitration.**

The Working Group recommended that section 27 be amended so that the parties could “contract in” to consolidation or mediation. Section 27 of the Queensland Act provides:—

- (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), 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);
  - (b) and
  - (c) 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) . . . .
- (6) . . . .

**4. S. 38—Judicial Review of Awards.**

Readers will be well aware of the different approach taken by the New South Wales Court of Appeal and several single judges in Victoria as to the manner in which the Court should exercise its discretion to grant leave to appeal from an arbitrator’s award. (See, for example the decision of Southwell J. in *Leighton Contractors Pty. Ltd. v Kilpatrick Green Pty Ltd* (Unreported, Victorian Supreme Court, 11 April, 1990, noted in *The Arbitrator* Volume 9, p. 24).

The Queensland Act provides in S. 38 (5) that the Supreme Court shall not grant leave to appeal from an arbitrator’s award unless it considers that:—

- (a) having regard to all the circumstances, the determination of the question of law concerned should substantially affect the rights of one or more parties to the arbitration agreement;  
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.

**5. Recognition and Enforcement of Foreign Awards and Agreements.**

In *Bralie v. Hyundai Corporation* 15 NSW LR 734 Rogers C.J. CommD expressed the view that Part 7 of the existing uniform legislation, being inconsistent with the Commonwealth International Arbitration Act 1974, was invalid and of no effect. A similar view has been expressed by the Australian Solicitor General in an opinion dated 27 March, 1987 which appears as an appendix to the report of the Working Group. Part 7 appearing in the existing uniform legislation has been deleted from the Queensland Act.

## Institute Publications

<b>Practice Note 1.</b>	The Arbitration process by R. D. Fitch, M. ARCH, F.I. ArbA (August 1988)
<b>Practice Note 2.</b>	Contract Law for Arbitrators by L. E. James, LL.B. A.I. ArbA (August 1988)
<b>Practice No. 3A</b>	The Preliminary Conference by John A. Morrissey, F.I. ArbA (September 1990)
<b>Practice Note 4.</b>	The Expert Witness by E. E. Morris, A.M. F.I. ArbA (August 1986)
<b>Practice Note 5.</b>	Costs by H. C. Ambrose FCIS, A.I. ArbA (June 1988)
<b>Practice Note 6.</b>	Professional Conduct (May 1989)

**Rules for the Conduct of Commercial Conciliations and Notes to the Rules. (February 1988)**

**Rules for the Conduct of Commercial Arbitrations and Notes to the Rules—1981.**

**Expedited Commercial Arbitration Rules. (August 1988)**

**List of Conciliators and Mediators. (November 1988)**

**Lists of Graded Arbitrators—Parts 1 and 2. (January 1990)**

**Policy Statement on the Registrar of Practising Arbitrators.**

And the following information brochures:—

—Information Pamphlet—January 1988

—Commercial Arbitration Guide for Lawyers—September 1987.

Copies of all the above publications are freely available on request.