

Commercial Arbitration (Amendment) Bill

No.

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By Authority L. V. North, Government Printer Melbourne

LEGISLATIVE ASSEMBLY

Read 1° 10 March 1993

(Brought in by Mrs Wade and Mr Gude)

A BILL

to amend the **Commercial Arbitration Act 1984** and for other purposes.

Commercial Arbitration (Amendment) Act 1993

The Parliament of Victoria enacts as follows:

1. Purpose

The purpose of this Act is to amend the **Commercial Arbitration Act 1984** with respect to arbitration proceedings, international arbitrations, settlement of disputes otherwise than by arbitration and the judicial review of arbitral awards and to make other amendments to the Act for the purpose of promoting uniformity of Australian arbitration law and for other purposes.

2. Commencement

This Act comes into operation on a day or days to be proclaimed.

Section headings appear in bold italics and are not part of the Act.
(See **Interpretation of Legislation Act 1984**.)

No. 10167 as
amend d by
Nos 110/1986,
19/1989 and
64/1990.

3. *Principal Act*

In this Act, the **Commercial Arbitration Act 1984** is called the Principal Act.

4. *Application of Act*

In section 3 of the Principal Act, for sub-section (6) **substitute—**

“(6) Nothing in this Act applies to—

- (a) an arbitration under the **Supreme Court Act 1986** or the **County Court Act 1958** (except to the extent that those Acts expressly provide for the application of this Act); or
- (b) an arbitration or class of arbitrations prescribed as an arbitration or class of arbitrations to which this Act does not apply.”.

5. *Definitions*

After section 4 (2) of the Principal Act **insert—**

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

6. *Crown to be bound*

In section 5 of the Principal Act, for “shall be” **substitute “is”.**

7. *New section 6 substituted*

For section 6 of the Principal Act **substitute—**

“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.”.

8. New section 15 substituted

For section 15 of the Principal Act **substitute**—

“15. Manner in which decisions are 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.”.

9. Parties may obtain orders

In section 17 (1) of the Principal Act **omit** “or requiring a person to attend for examination before the arbitrator or umpire.”.

10. Amendment of sections 18 and 19

(1) In section 18 (1) of the Principal Act—

- (a) for “expressed in an arbitration agreement” **substitute** “expressed in the arbitration agreement”;
- (b) in paragraph (a) for “a writ” **substitute** “an order”;

- (c) in paragraph (b) (iii) for “a writ” **substitute** “an order”.
- (2) In section 18 (2) of the Principal Act, for paragraphs (a), (b) and (c) **substitute**—
 - “(a) a record of any evidence given pursuant to the order; 5
 - (b) any document produced pursuant to the order or a copy of any such document; or
 - (c) particulars of anything done pursuant to the order—”. 10
- (3) In section 18 (3) (a) of the Principal Act, for “a writ” **substitute** “an order”.
- (4) In section 19 (3) of the Principal Act, for “an arbitration agreement” (where first occurring) **substitute** “the arbitration agreement”. 15

11. New section 20 substituted

For section 20 of the Principal Act **substitute**—

“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: 20
 - (a) where a party to the proceedings is, or is represented by, a legally qualified person; 25
 - (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 30
 - (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; or

(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 sub-section (3), notwithstanding any agreement to the contrary between the parties.

(5) A person not admitted to practise in Victoria shall not be taken to have committed an offence under or breached the provisions of the **Legal Profession Practice Act 1958** or any other Act merely by representing a party in arbitration proceedings in Victoria.

(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 Victoria 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 Victoria 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.”.

12. Amendment of sections 21 to 24

- The Principal Act is amended as follows:
- (a) In section 21, for “parties to an arbitration agreement” **substitute** “parties to the arbitration agreement”;
 - (b) In section 22 (1) and (2), for “parties to an arbitration agreement” **substitute** “parties to the arbitration agreement”;
 - (c) In section 23, for “an arbitration agreement” **substitute** “the arbitration agreement”;
 - (d) In section 24, for “an arbitration agreement” **substitute** “the arbitration agreement”.

13. New sections 26 and 27 substituted

For sections 26 and 27 of the Principal Act **substitute**—

“26. Consolidation of arbitration proceedings

(1) The following provisions of this sub-section 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 sub-section 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 5
 - (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; 10
- (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 sub-section and of deciding on the terms of any such order; 15
- (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 sub-section; 20 25 30
- (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. 35

(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 sub-section (1) or (2) and notwithstanding that a provisional order has been made in relation to them under sub-section (2).

(7) Sub-sections (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 sub-section (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. 5

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 10
 (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)— 15
whether before or after proceeding to arbitration, and whether or not continuing with the arbitration. 20

(2) Where—
 (a) an arbitrator or umpire acts as a mediator, conciliator or intermediary (with or without a conference) under sub-section (1); and 25
 (b) that action fails to produce a settlement of the dispute acceptable to the parties to the dispute— 30
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 35

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 sub-section (1).

(4) Nothing in sub-section (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 sub-section (1).

(6) Nothing in sub-section (5) shall be construed as preventing the making of an application to the Court for the making of an order under section 48.”.

14. Awards

(1) The Principal Act is amended as follows:

(a) in section 28, for “an arbitration agreement” **substitute** “the arbitration agreement”;

(b) in section 29 (1), for “an arbitration agreement” **substitute** “the arbitration agreement”;

(c) in section 31 (1)—

(i) for “an arbitration agreement” **substitute** “the arbitration agreement”;

(ii) for “sub-section (2)” **substitute** “sub-section (4)”.

(2) After section 31 (1) of the Principal Act **insert—**

“(2) Unless a contrary intention is expressed in the arbitration agreement, but subject to sub-section (4), where—

(a) arbitration proceedings have been commenced for the recovery of a debt or liquidated damages; and 5

(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— 10

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. 15 20

(3) Without limiting sub-section (2), arbitration proceedings shall, for the purposes of that sub-section, be deemed to have commenced if—

(a) a dispute to which the relevant arbitration agreement applies has arisen; and 25

(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; 30

(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 35

(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.”

- (3) In section 31 of the Principal Act, for “(2) Sub-section (1)” **substitute** “(4) Sub-section (1)”.
- (4) In section 32 of the Principal Act—
 - (a) after “32.” **insert** “(1)”; and
 - (b) for “an arbitration agreement” **substitute** “the arbitration agreement”.
- (5) At the end of section 32 of the Principal Act **insert**—

“(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.”.
- (6) In section 33 of the Principal Act—
 - (a) **omit** “(1)”; and
 - (b) sub-section (2) is **repealed**.

15. Costs

- (1) In section 34 of the Principal Act, for sub-section (3) **substitute**—

“(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 in so far 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.”

- (2) In section 34 of the Principal Act—
 - (a) sub-section (6) is **repealed**;
 - (b) for “(5A)” **substitute** “(6)”.

16. Judicial review of awards

- (1) In section 38 (4) of the Principal Act, for “the arbitration agreement” (where first occurring) **substitute** “an arbitration agreement”. 5
- (2) In section 38 of the Principal Act, for sub-sections (5), (6) and (7) **substitute**—
 - “(5) The Supreme Court shall not grant leave under sub-section (4) (b) unless it considers that— 10
 - (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 15
 - (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. 20 25
 - (6) The Supreme Court may make any leave which it grants under sub-section (4) (b) subject to the applicant complying with any conditions it considers appropriate.”
- (3) In section 38 of the Principal Act, for “(8) Where” **substitute** “(7) Where”. 30

17. New section 38A inserted

After section 38 of the Principal Act **insert—**

“38A. Supreme Court—limitation of jurisdiction

It is the intention of this section to alter or vary section 85 of the **Constitution Act 1975** to the extent necessary to prevent the Supreme Court granting leave for an appeal under section 38 of this Act unless it considers that the circumstances referred to in sub-section (5) (a) and (b) of that section apply.”.

18. Amendment of section 40

In section 40 (1) of the Principal Act **omit** “the following provisions of”.

19. New section 46 substituted

For section 46 of the Principal Act **substitute—**

“46. Delay in prosecuting claims

(1) Unless a contrary intention is expressed in the arbitration agreement, it is an implied term of the agreement that in the event of a dispute arising to which the agreement applies it 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.

(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;

- (b) removing the dispute into Court;
and
 - (c) dealing with any incidental matters.
- (3) The Court shall not make an order under sub-section (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.”

20. Foreign awards and agreements

- (1) Part VII of the Principal Act is **repealed**.
- (2) Schedule 2 of the Principal Act is **repealed**.

21. Minor amendments

The Principal Act is amended as follows:

- (a) In section 3, sub-section (1) is **repealed**;
- (b) Sections 64 and 65 are **repealed**;
- (c) Schedule 1 is **repealed**.

22. Savings and transitional provisions

- (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 12 does not apply in relation to arbitration proceedings that were commenced before the commencement of that section.

- 5
- (3) Section 26 of the Principal Act as in force immediately before the commencement of section 13 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.

