
The Arbitration of Financial Disputes: The *Commercial Arbitration Act 1985* (WA)

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Abstract

The *Commercial Arbitration Act 1985* (WA) provides a rapid and cost effective method for the resolution of commercial disputes. Although essentially adversarial, the flexibility of the process allows the procedures to be modified to suit the particular dispute. The act states that the arbitrator is not bound by the rules of evidence, and pleadings normally required in litigation need not apply. At the same time there is certainty in the outcome in that there are limited grounds for the appeal of an arbitrator's determination. The ambit of an arbitrator's jurisdiction is relevant to the finance industry as it can extend to resolution of disputes arising from contractual breaches, negligence, trade practices and breaches of the consumer protection provisions of the *Australian Securities and Investment Commission Act 2001* (Cth). Hearings are held in private and the specialist expertise of the arbitrator greatly assists in the speedy resolution of the dispute. This article discusses the provisions and application of the *Commercial Arbitration Act* to commercial disputes.

Introduction

Commercial arbitration is a process where the parties agree, usually at the time of entering into a commercial agreement, that in the event of a dispute arising out of the agreement, that the issues in dispute will be heard and determined by a neutral third party (the arbitrator) after hearing evidence from the parties. It differs from the alternate dispute resolution (ADR) processes such as negotiation or mediation where the parties are in 'control' of the process and the final result is one of mutual agreement, in that the arbitrator will determine the issues according to law or if the parties agree on the basis of general justice and fairness.

The first commercial arbitration act was the English *Arbitration Act 1698*. The creation of this legislation reflected the growth of mercantile power in England and its colonies and the recognition of parliament that the enactment of a statute to provide a quick, cost effective resolution of commercial disputes was in the best interests of the furtherance of trade. In Western

Australia the first act was the *Arbitration Act 1895*. Subsequently between 1984 and 1990 each of the Australian states amended the provisions of the acts in order to unify the provisions and additionally to include provisions which would allow an applicant to have an arbitrator's award endorsed as a judgement of the Supreme Court where an unsuccessful party refused to abide by the arbitrators award. In Western Australia the relevant legislation is the *Commercial Arbitration Act 1985* (WA) (the 'CCA').

In a commercial arbitration, the arbitrator will determine the issues either according to law or on the basis of general justice or fairness¹ and then hand down a binding award,² which can only be appealed in limited circumstances.³ As with litigation the successful party will be able to recover the costs of the arbitration.⁴ There is no prescribed qualification for arbitrators. Most

¹ See s 22.

² See s 28.

³ See s 38.

⁴ See s 34.

are laypersons with a commercial or professional background in a discipline pertinent to the issues in dispute. They must, however, have a good understanding of the CCA and nearly all arbitrators have undergone a training and examination process through a relevant professional or accreditation body.⁵

The scope of arbitration is very broad and of relevance to the finance industry. For example, there are a number of decisions by appellate Supreme Courts in Australia that an arbitrator may determine and grant remedies for breaches of the consumer protection provisions of the *Trade Practices Act 1974* (Cth) (the 'TPA')⁶ and the various state fair trading acts. Prior to these decisions it was considered that trade practices matters could not be determined by arbitration since the provisions in those acts conferred remedial powers to a Supreme Court.⁷

The structure of the *Commercial Arbitration Act 1985* (WA)

The CAA sets out the powers and duties of the arbitrator and the rights of the parties to an arbitration agreement. In general terms the legislation provides that:

- The arbitrator derives his or her jurisdiction from an arbitration agreement between the parties which must be in writing.⁸
- The party submitting the claim is known as the 'Claimant' and the person defending the claim

or counterclaiming is known as the 'Respondent'.

- The arbitrator is jointly appointed by the parties subject to the provisions in the arbitration agreement.
- The arbitrator is not bound by the rules of evidence and has a wide discretion as to the way in which the arbitration proceedings are conducted, but this is always subject to the requirement that the parties must be afforded natural justice.⁹
- The proceedings are private.¹⁰
- The arbitrator may give leave for the parties to be legally represented where he or she considers that this will assist the resolution of the dispute.¹¹
- Within the arbitration process the CAA allows, on the application of the parties, for the arbitrator to hold a mediation conference to resolve the dispute.¹²
- The process is usually by way of a hearing, however it is not unusual for a determination to be made by the arbitrator from a consideration of written submissions from the parties.
- Awards made by the arbitrator are normally final and binding on the parties and there are limited grounds to appeal an arbitrator's decision.¹³
- The arbitrator has discretion under the CAA to award interest and costs arising from the arbitration. The usual award is that the 'winner' is entitled to the reasonable costs incurred in prosecuting or defending the claim.¹⁴

⁵ The Institute of Arbitrators and Mediators Australia (IAMA) conducts annual training courses for prospective arbitrators.

⁶ In particular s 52: 'A corporation shall not engage in conduct that is misleading or deceptive or likely to mislead or deceive'. See also s 10 of the *Fair Trading Act 1987* (WA).

⁷ *IBM Australia Ltd v National Distribution Services Ltd* (1991) 100 ALR 361; *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160; *Savcor Pty Ltd v State of New South Wales* [2001] 52 NSWLR 587. While not subject to determination by arbitration, an example of an action arising from a breach of s 52 of the TPA resulting from a representation by a financial planning consultant can be found in *Wheeler Grace and Pierucci Pty Ltd v Wright & Anor* (1989) 85 ALR 442. See also *Marks v GIO Australia Holdings Ltd* (1988) 158 ALR 333, a case involving a breach of s 52 of the TPA resulting from a representation by a lender regarding interest rates.

⁸ See s 4.

⁹ See s 14.

¹⁰ While arbitrations are held private there is no implied condition that the proceedings are confidential (see *Esso Australia Resources Ltd. v. Plowman* (1995) 128 ALR 391). If the parties require the proceedings to be confidential there should be an express term in the arbitration agreement.

¹¹ See s 20.

¹² See s 27.

¹³ See s 38.

¹⁴ See ss 31, 32 and 33.

- The Supreme Court may determine any question of law arising in the course of the arbitration on the application by any of the parties to the arbitration.¹⁵
- The Supreme Court has the power to deal with delays by a party¹⁶ or ‘misconduct’ by the arbitrator.¹⁷
- An arbitrator is not liable for negligence in respect of the arbitration.¹⁸

The arbitration agreement

As indicated above, arbitration is only possible where the parties to a dispute have agreed to submit their dispute to the arbitration process. In the majority of cases, this agreement is entered into prior to the particular dispute arising and is commonly found in the contract document executed by the parties. There can however also be a valid agreement to arbitrate after the dispute has occurred. The parties simply enter into a written agreement to refer the dispute to arbitration.

The CAA requires this agreement to be in writing, as specified in s 4 which defines an arbitration agreement to be ‘an agreement in writing to refer present or future disputes to arbitration’. It is from this agreement that the arbitrator derives his or her jurisdiction.

Arbitrability

From time to time there will be differences between the parties as to the jurisdiction of the arbitrator to consider the particular matter in dispute. To determine the subject matter over which the arbitrator may exercise his or her powers it is necessary to consider the particular words of the arbitration agreement between the parties. Generally in the absence of any statutory prohibition, any type of commercial dispute may be arbitrated. These include claims in negligence,¹⁹

contract,²⁰ intellectual property,²¹ corporations matters,²² and trade practices consumer issues as discussed above.

There are some limitations on arbitrability. The arbitrator may only determine civil matters as distinct from criminal matters and some matters not permitted by statute. The *Insurance Contracts Act 1984* (Cth), for example, provides that unless the agreement to arbitrate is made after the dispute arises, arbitration clauses are void, where they require parties to an insurance contract to refer disputes to arbitration.²³

Validity of the contract

No matter how widely drawn an arbitration agreement is, it cannot give the arbitrator jurisdiction to decide upon issues which call into question the validity of the contract; for example, whether there had ever been a contract. The reasoning behind this is that if there is a dispute as to the validity of the contract, the validity of the arbitration clause in the contract will also be in doubt, as will the jurisdiction of the arbitrator.

Arising out of the contract

The arbitrator is nevertheless permitted to consider disputes not only of a contractual nature, but as noted above, concerning issues of negligence and breaches of the consumer protection provisions of the *Trade Practices Act 1974* (Cth) (the ‘TPA’) or the state equivalent, the *Fair Trading Act 1987* (WA). For example it will now be implied in arbitration clauses that are in sufficiently broad terms, that the arbitrator will have authority to decide matters arising between parties under s 52 of the TPA.²⁴ This was held to be the position in *QH Tours Ltd and Sazalo Pty Ltd v Ship*

¹⁵ See s 39.

¹⁶ See s 46.

¹⁷ See ss 42 and 44.

¹⁸ See s 51.

¹⁹ *Woolf v Collis Removal Service* [1948] 1 KB 11.

²⁰ *Government of Gibraltar v Kenny* [1956] 2 QB 410.

²¹ *Saturday Evening Post v Rumbleseat Press Inc* F 2d 1191 (7th Circuit, 1987).

²² *ACD Tridon v Tridon Australia* [2002] NSWSC 896.

²³ See s 43 of the *Insurance Contracts Act 1984* (Cth).

²⁴ Section 52 of the TPA states: ‘A corporation in trade or commerce shall not engage in conduct which is misleading or deceptive or likely to mislead or deceive.’

*Design & Management (Aust) Pty Ltd and Gibbons.*²⁵

The disputes resolution clause provided for arbitration as follows:

16.1 Notice

(a) If any dispute or difference arises between the Purchaser and SDMA at any time as to the construction of this agreement or as to any matter or thing of whatsoever nature arising thereunder or in connection therewith then either party shall give to the other notice in writing adequately identifying the matters the subject of that dispute or difference and the giving of such notice shall be a condition precedent to the commencement by either party of arbitration with regard to the matters the subject of that dispute or difference as identified in the notice.²⁶

The Federal Court decided that this wording was broad enough for the arbitrator to consider an application for a remedy under s 52 of the TPA, the issue being that QH Tours entered into a contract because of the misleading or deceptive conduct on the part of Ship Design and suffered loss and damage. QH Tours sought an order that the contract was void *ab initio* (from the beginning).

The Federal Court held that the arbitration clause was severable from the main contract and the arbitrator could declare the main contract void *ab initio* without destroying the basis of the arbitrator's power to do so. This proposition that an arbitration clause is severable or separate from the contract in which it is found is now orthodox doctrine in common law.

Consumer protection in regard to the provision of financial services has been regulated from 1998 by the Australian Securities and Investment Commission under the provisions of the *Australian Securities and Investment Commission Act 2001* (Cth) (the 'ASIC Act'). These provisions, however, essentially mirror the provisions of the TPA as shown in Appendix A of this paper.

²⁵ (1991) 105 ALR 371.

²⁶ (1991) 105 ALR 371, 373.

Financial service is defined in s 4(1) of the TPA and has the same meaning as given in the ASIC Act. Under the ASIC Act a financial service results from a person providing a financial product or providing financial advice.²⁷ The conduct which would fall under this definition would not only include contractual breaches but also issues arising from misleading or deceptive conduct²⁸ or conduct in connection with guarantees²⁹ or unconscionable conduct.³⁰

There are a number of cases in which the misleading and deceptive conduct provisions of the TPA or the ASIC Act are relevant to issues arising out of the financial industry. In particular a representation or statement which is a forecast or prediction may be subject to misleading or deceptive conduct,³¹ as might the provision of information on the availability of finance;³² takings of a business³³ and the turnover of a business.³⁴ There have also been a number of actions commenced against banks under s 52 of the TPA arising out of a failure of banks to advise clients that the fluctuating nature of the Australian dollar against foreign currencies indicated the need for hedging.³⁵ While s 52 actions have progressively ceased since the introduction of the ASIC Act to apply to financial services, the cases cited provide examples of the

²⁷ See ss 12BAB(a) and (b).

²⁸ Section 12DA of the ASIC Act states: 'A person must not, in trade or commerce, engage in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive.'

²⁹ See s 12BAB(1)(b).

³⁰ See s 12CA(1). 'A corporation must not in trade or commerce engage in conduct in relation to financial services if the conduct is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories.' The definition essentially mirrors s 51AA of the TPA.

³¹ See *James v ANZ Banking Corporation Group Ltd* (1985) 64 ALR 347; *Wheeler Grace and Pierucci Pty Ltd v Wright & Anor* (1989) 85 ALR 442.

³² *Henderson v Pioneer Homes (No 2)* (1980) ATPR 40-159.

³³ *McDonald v Esanda Finance Corp Ltd* (FCA, Davies J. G 747/91, 27 May 1993 Unreported).

³⁴ *Park v Allied Mortgage Corp Ltd* (1993) ATPR 46-1005.

³⁵ See *Westpac Banking Corporation v Eltran Pty Ltd* (1987) 14 FCR 541; *Rahme v Commonwealth Bank of Australia* (1991) ATPR 41-026; *Dorfler v ANZ Banking Group Pty Ltd* (1991) 103 ALR 699.

applicable misleading or deceptive conduct principles which would apply in an action under the equivalent provisions of the ASIC Act.³⁶

Consequently there is no impediment to commercial arbitration providing determination on issues arising out of the misleading and deceptive or unconscionable conduct provisions of the ASIC Act dealing with financial services.³⁷

Commencement of arbitration

Before an arbitration can take place there must be a dispute. Section 3(5) of the CAA provides that an arbitration is deemed to have commenced if:

- (a) a dispute has arisen; and
- (b) there is an arbitration agreement; and
- (c) a party to the arbitration agreement has served an appropriate notice referring the dispute to arbitration or has taken some other effective step to refer the dispute to arbitration.

The dispute

There is often substantial disagreement between the parties as to whether a dispute has in fact arisen so as to activate the dispute resolution mechanism provided for in any agreement between them. The Supreme Courts will approach the issue on the basis of the decision in *Commonwealth of Australia v Jennings Constructions Pty Ltd*³⁸ where it was held that ‘A dispute arises when one party claims something and another notifies the other that he rejects the claim.’

Note also that a dispute for the purposes of the CAA may arise if a particular claim is neither admitted or

disputed, simply ignored by the other party as held in *Tradax Internacional SA v Cerrahogullari*.³⁹

The agreement

As noted above, s 4 of the CAA defines an arbitration agreement as ‘an agreement in writing to refer present or future disputes to arbitration’. The agreement will usually be contained as a consequence of a dispute resolution clause in a commercial contract. However the jurisdiction of the CAA can also be triggered by the parties agreeing, in the absence of an operative dispute resolution clause in the contract, after the dispute has arisen to refer the dispute to arbitration by simply agreeing in writing to do so.

The notice requirement

The contract between the parties will usually contain a procedure, once a dispute arises, for the matters at issue to be referred to arbitration. For example:⁴⁰

if a dispute between the Contractor and the Principal arises out of or in connection with the Contract, including a dispute concerning a direction given by the Superintendent, then either party shall deliver by hand or send by certified mail to the other party and to the Superintendent a notice of dispute in writing adequately identifying and providing details of the dispute.

The clause will then generally set out further steps to be taken (eg the parties to confer) before the matter can proceed to an arbitration hearing. Other standard form contracts have different provisions and it is important to read the particular contract provisions carefully as they invariably contain time limits, which must be complied with.

Appointment of arbitrators

The arbitration agreement or the appropriate clause in the contract will normally require the nomination of the

³⁶ See *Australian Competition and Consumer Commission v Commonwealth Bank of Australia* (2003) FCA 1397.

³⁷ In addition it is considered that the other relevant causes of action as shown in Appendix A of this paper could also be determined by commercial arbitration.

³⁸ [1985] VR 586.

³⁹ (1981) 3 A11 ER 344.

⁴⁰ See AS 2124-1992 General Conditions of Contract at clause 47.1.

prospective arbitrator by an independent body such as the Institute of Arbitrators and Mediators Australia (IAMA), or a professional association. The nominating body will, when requested to do so, nominate a person believed to be suitable for the particular arbitration and will let that person know of his or her nomination. That person is at this stage a 'nominee' and not the arbitrator. The nominating body will send the nominee a copy of the arbitration agreement and notice of dispute. Should the nominee wish to proceed, he or she will contact the parties and arrange to meet with them together in a preliminary conference.

Preliminary conference

The preliminary conference is an extremely important part of the arbitration process. In part, the purpose of the conference is to:

- enable the nominee arbitrator to satisfy himself or herself that there is indeed an agreement to arbitrate and that he or she has jurisdiction to accept the position of arbitrator;
- explain to the parties, especially when they are not legally represented, the nature of the process and the obligations of the parties;
- ensure that there has been no prior association with the parties which would give rise to a conflict of interest or rise to a claim of technical misconduct;⁴¹
- ensure that any prior association is disclosed and discussed with the parties;
- allow the nominee arbitrator to formally accept his or her appointment as arbitrator;

- decide on the nature of the determination, for example, a hearing on the documents, formal pleadings, possibility of a s 27 conference;⁴²
- set a timetable for the progress of the arbitration;
- discuss other procedural matters such as whether the parties will be legally represented, whether they wish the arbitrator to make his or her decision on a basis other than according to law, whether they wish the arbitrator to hand down an interim or final award;
- agree to the arbitrator's fees and expenses.

The flexibility of the arbitration process enables the parties to vary the means by which the arbitration will proceed, but always subject to the provisions of the CAA.

Interlocutory proceedings

Before the actual hearing or the final submission of documents for consideration by the arbitrator, issues often arise of an interlocutory or interim nature. These usually relate to the delivery of pleadings, discovery, particulars, and the timing and venue of the hearing. Often there are delays and the arbitrator before the hearing may be required to meet with the parties in a 'directions hearing' where the arbitrator will hear from the parties on the particular issue and make directions for the progress of the matter.

Issues of natural justice

The neutrality and independence of the arbitrator is an essential aspect of commercial arbitration. Copies of all letters to the arbitrator should be sent to the other party. Likewise the arbitrator sends any correspondence to both parties. It is critical that the arbitrator is never alone in the company of one party only. This would give rise to a claim of technical misconduct, and the

⁴¹ An arbitrator, however, should show a degree of robustness and should only step aside if convinced there is a significant association with one of the parties which could give rise to a reasonable apprehension that the arbitrator could not hand down an independent award.

⁴² A s 27 conference allows the parties to suggest to the arbitrator that the matter be determined by mediation rather than arbitration.

Supreme Court could remove the arbitrator under s 44 of the CAA.

Powers of the arbitrator

The powers of the arbitrator are set out in the CAA. At first sight it appears as though the arbitrator's powers are very wide. Section 14 of the CAA states: 'Subject to this Act and to the arbitration agreement, the arbitrator or umpire may conduct proceedings under that agreement in such manner as the arbitrator or umpire thinks fit'.

In fact they are somewhat limited. The arbitrator has power to order the delivery of pleadings, order discovery, request an inspection or review and determine the place and time of the hearing. He or she can also take into account the behaviour of the parties when finally determining the costs of the arbitration. The arbitrator cannot subpoena witnesses.

At all times the overriding consideration imposed on the arbitrator is to afford the parties natural justice. That is, the arbitrator must allow each party ample opportunity to present their case and there should be no association or issue which could give rise to the reasonable apprehension of the possibility of bias on the part of the arbitrator.

The powers of the Supreme Court

Under the CAA, the Supreme Court of Western Australia (the 'Supreme Court') has a range of powers in respect of arbitration proceedings. Section 4(2) of the CAA allows for the parties to agree that the District Court may have jurisdiction under the CAA, but this is rarely if ever, agreed. The Supreme Court may issue subpoenas by leave.⁴³ Section 47 gives the Supreme Court a general power to make interlocutory orders in connection with arbitrations, although the Supreme Court will generally be reluctant to intervene if the arbitrator has the appropriate powers. As mentioned

⁴³ See s 17.

above, the Supreme Court may remove an arbitrator for misconduct⁴⁴ and the award of an arbitrator may also be set aside if there is evidence of misconduct.⁴⁵

Typically awards will be set aside if the arbitrator has failed to disclose some prior association with one of the parties.⁴⁶ The Supreme Court has shown that it will set aside an arbitrator's award if the arbitrator takes into consideration issues which have not been addressed by the parties.⁴⁷

Legal representation

The usual process of arbitration involves a hearing before the arbitrator with the parties being legally represented. The parties are, as of right, entitled to legal representation unless the claim under the arbitration is less than \$20,000.00.⁴⁸

Evidence

The power of the arbitrator to accept evidence is extremely wide. The arbitrator is not bound by the rules of evidence and is entitled to 'inform himself in relation to any matter in such manner as [he] thinks fit'.⁴⁹ However this is always subject to affording the parties natural justice.

The arbitration process

The process follows that of the Supreme Courts in that there are opening statements, witnesses are sworn, evidence is led, documents are admitted into evidence, the witnesses are cross examined and re-examined, and there are closing submissions by counsel. The arbitrator can take an active part in the proceedings by questioning witnesses, but this is usually in the context of clarifying issues or comments made by the witnesses.

⁴⁴ See s 44.

⁴⁵ See s 42. Misconduct is defined in section 4 of the Act as including 'corruption, fraud, partiality, bias and a breach of the rules of natural justice.'

⁴⁶ See *Giustiniano Nominees Pty Ltd v Minister for Works* (1995) 16 WAR 87; *Du Toit v Vale* (1993) 9 WAR 138.

⁴⁷ See *Shirley Sloan Pty Ltd v Merrill Holdings Pty Ltd* [2000] WASC 99.

⁴⁸ See s 20.

⁴⁹ See s 19.

General justice and fairness

Section 22(2) of the CAA enables the arbitrator, but only with the agreement of the parties, to determine the issues by reference to considerations of 'general justice and fairness'. Otherwise, the arbitrator is bound to determine the issues according to law as per s 22(1).

There is a great deal of uncertainty as to what the arbitrator is authorised to do if he or she is to determine matters according to general justice and fairness. He or she is not free to depart completely from any system of law. It is unlikely that his or her award could ever be the subject of judicial review. Consequently, agreement by the parties to the arbitrator proceeding in this fashion is rare.

The award

Following the hearing, or upon submission of the documents, the arbitrator will consider the issues, apply the facts to the law and hand down his or her decision which is known as the 'award'. The award may be final or interim. It is possible to obtain an interim award from the arbitrator at any stage.⁵⁰ This is useful where the determination of a particular issue in the dispute may assist the parties in reaching a resolution without proceeding to a final award.

Consent awards

In an arbitration, the parties may confer privately at some stage in the proceedings and agree the terms of resolution. In this case the arbitrator can hand down a consent award, which records the wishes of the parties.

Reasons

The arbitrator is required under the CAA (unless the parties otherwise consent, usually for reasons of cost) to publish reasons for his or her decision, but the arbitrator is not required to go to the same lengths as a judge in

giving these reasons. It was stated in *Bremer Handel. v Bunge G.m.b.h.*:⁵¹

All that is necessary is that the Arbitrators should set out what, on their view of the evidence, did or did not happen and should explain succinctly why, in the light of what happened, they have reached the decision and what their decision is. This all that is meant by a 'reasoned order' ... It is not technical, it is not difficult to draw, and above all it is something which can and should be produced promptly and quickly at the conclusion of the hearing.

In the award the arbitrator will also make determinations on the damages to which the innocent party is entitled, whether any interest should be payable and who shall pay for the costs of the arbitration.⁵² While the arbitrator has some discretion with respect to the awarding of costs, the usual award with respect to costs is that 'costs follow the event' or the winner is entitled to their costs.

Final and binding

The arbitrator's award is final and binding. If the losing party fails to abide by the decision, the award may be enforced as if it were a judgment of the Supreme Court.⁵³ In other words, the arbitration cannot be used as a dry run to litigation. This is not to say that the award cannot be the subject of a later appeal in certain limited circumstances.⁵⁴

Costs of the arbitration

While the award of costs is at the discretion of the arbitrator who may direct to whom and by whom and in what manner the whole or any part of the costs shall be paid,⁵⁵ the arbitrator is under an obligation to act judicially and at the same time ensure that the costs are

⁵⁰ See s 23.

⁵¹ (1981) Lloyds REP 130 at 132.

⁵² See s 34.

⁵³ See s 33.

⁵⁴ See s 38.

⁵⁵ See s 34(1).

dealt with in a fair and equitable manner.⁵⁶ The starting point is that in the absence of any special circumstances the arbitrator should award the costs to the successful party.⁵⁷

In the context of claims and counterclaims in a commercial dispute, the successful party will generally be the party securing the final flow of money. An arbitrator is not entitled to determine the successful party on the basis of the balance of who has won the most issues.⁵⁸

There are circumstances where an arbitrator can depart from the general rule. Specifically, if an arbitrator is confronted by a set of facts where the issues in dispute are separate and distinct so that one party is clearly identifiable as being the 'winner' in respect of a specific issue, the alternative is to 'apportion costs' between the parties.⁵⁹

Appeals from arbitrators' decisions

As a consequence of the parliament's intention that arbitration decisions should be final on the parties who have selected arbitration as the method of resolution, s 38 of the CAA, which governs appeals from awards, specifies that a party can only appeal an award with leave of the Supreme Court. Once leave to appeal is granted, then the appeal proper is commenced. In practice, it is common for the application for leave to be dealt with at the same time as the appeal. This has the disadvantage of doing away with the two-stage process, which was intended by the CAA.

Section 38(5) sets out the requirements for leave to appeal to be granted by the Supreme Court. Essentially three requirements must be met:

1. Only an error of law can be appealed. No right of appeal lies from an error of fact.
2. 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 agreement.
3. There also must be either:
 - a) a manifest error of law on the face of the award; or
 - b) strong evidence that the arbitrator 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.

The object of these requirements is to introduce finality into the awards of arbitrators.

Manifest error of law

A manifest error of law is one which is obvious on the face of the award without recourse to legal argument. By analogy, so obvious it goes without saying. An example may be found in *Pindan Pty Ltd v Uniseal Pty Ltd*⁶⁰ where McKechnie J set aside an interim award of the arbitrator and remitted the matter back to the same arbitrator for determination. A dispute had arisen between the parties with respect to a number of contractual issues and they referred the matter to arbitration. The parties agreed that the issue of liability should be determined first and the question of quantum determined later.

The arbitrator published his first interim award on liability, making separate determinations on the various claims, in favour of Pindan in some cases and Uniseal in others. In his award, the arbitrator determined the issues

⁵⁶ See *Lloyd del Pacifico v Board of Trade* (1930) 35 Com Cas 325.

⁵⁷ See *Oshlack v Richmond River Council* (1998) 193 CLR 72 per McHugh J at 97.

⁵⁸ *Miles & Anor v Palm Bridge Pty Ltd* [2001] WASC 42.

⁵⁹ See *Triden Contractors Pty Ltd v Belvista Pty Ltd*, Supreme Court NSW (unreported, 26 September 1989); *Re Eligindata* (No 2) [1993] 1 All ER 232. See also M Mustill and S Boyd, *The Law and Practice of Commercial Arbitration* (2nd ed, 1989) 396-397.

⁶⁰ [2003] WASC 168.

on the basis of the duties of the parties in a generalised sense rather than on the contractual basis which governed the relationship. That is, the arbitrator's reasons and subsequent determination were based on a consideration of the party's duty of care (issues of negligence) rather than a consideration of the terms of the contract, performance, breach and damages to the contractual issues. To determine the outcome on the basis of issues of negligence when all of the arguments pleaded were based on issues of contract was held to be a manifest error of law.

Stays

From time to time a party may not wish the matter to be arbitrated, as required by the contract, and may wish to proceed directly to litigation. Some old arbitration agreements used to contain what is known as a *Scott v Avery* clause, making arbitration a condition precedent to litigation. These are no longer permitted by s 55 of the CAA. However, under s 53 of the CAA, the Supreme Court has the power to stay Supreme Court proceedings where:

- there is no sufficient reason why the matter should not be referred to arbitration in accordance with an arbitration agreement; and
- the applicant for the stay is ready and willing to do all things necessary for the proper conduct of the arbitration.

The rationale is that the Supreme Court will be unwilling to allow one party to an arbitration agreement to prosecute his or her claims in Supreme Court unless there is some good reason for ignoring the party's previous agreement to refer disputes to arbitration.

Arbitration or litigation?

When preparing a contract, the parties are faced with the decision of whether or not to include an arbitration agreement in their contract. If the parties include an arbitration agreement, they will generally be prevented

from initiating Supreme Court proceedings in respect of matters which they have agreed to be referred to arbitration in the event of a dispute. The issues which need to be considered in deciding to include an arbitration clause include:

- The relative cost to the parties of litigation and arbitration. Whilst the arbitrator's fees may be in the vicinity of \$250 to \$300 per hour it may be that arbitration proceedings, being speedier, are more cost effective.
- The arbitration can be commenced relatively quickly depending upon the availability of the parties and witnesses.
- The arbitrator has limited powers where parties are tardy in conforming to timetabling deadlines.
- The benefit of technical expertise in the decision making process is often an important reason for choosing arbitration. Where disputes are essentially factual and involve technical assessments of issues or practices, an arbitrator who has had extensive experience in the relevant area may be better able to comprehend the issues.
- Because of the flexibility of the arbitration process, it is often perceived as a more expeditious means of resolving disputes. It does not become bogged down in the strict application of the rules of evidence. At the same time, complex arbitrations in which lengthy pleadings and substantial discovery are required may in fact be no quicker than litigation.

Conclusion

The CAA provides for a speedy resolution of commercial and financial disputes. The jurisdiction of commercial arbitration encompasses matters of contract, negligence and trade practices issues and consequently issues associated with matters such as misleading or

deceptive conduct arising from the provision of financial services. The relative finality of an arbitrator's award disposes of the issues quickly, with rights of appeal from an arbitrator's award being limited. The

procedures are private and the speed of the resolution may greatly assist in the preservation of the business relationship between the parties.

APPENDIX A

Consumer protection provisions of the *Trade Practices Act 1974 (Cth)* ('TPA') and the *Australian Securities and Investment Commission Act 2001 (Cth)* ('ASIC Act')

Element	TPA	ASIC Act
Unconscionable conduct	Sections 51AAB-51ACAA	Sections 12CA-12CC
Misleading or deceptive conduct	Section 52	Section 12 DA
False or misleading representations	Section 53	Section 12DB
False representations and other misleading or offensive conduct in relation to financial products that involve interests in land	Section 53A	Section 12DC
Misleading or deceptive conduct in relation to financial services	Section 55A	Section 12DF
Accepting payment without intending or being able to supply as ordered	Section 58	Section 12DI
Pyramid selling of financial services	Sections 65AAA-65AAE	Section 12DK
Assertion of right to payment for unsolicited financial services	Section 64	Section 12DM
Warranties in connection with the supply of financial services	Section 74	Section 12ED