THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA

Project No 18

Commercial Arbitration and Commercial Causes

REPORT

JANUARY 1974

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TERMS OF REFERENCE

1. The Law Reform Committee was asked -

A. To consider the law relating to the settlement of disputes by commercial arbitration with a view to preparing a revised Arbitration Act.

B. To examine the procedures of the Supreme Court to see whether any alteration is necessary or desirable in the trial of commercial causes.

Part A

2. The Committee issued a working paper on Part A of the terms of reference in October 1971. The Commission now submits this report.

Part B

3. The Committee did not issue a working paper on Part B of the terms of reference, which arose only as a corollary to Part A in considering whether machinery provisions existed enabling disputes which were susceptible of resolution either by an arbitrator or the court to be dealt with expeditiously by the latter.

4. Since the Committee was given the project, the *Rules of the Supreme Court* have been revised, and a number of changes made to expedite the trial of actions. For example, Order 29 gives the court wide powers to order an action to be set down for trial forthwith and to settle the issues to be tried, and obliges parties to give the court the information necessary to enable it to properly exercise this power. Order 20, rule 21 has been amended to empower the court to order an action to be tried without pleadings or further pleadings. Order 30 has been

rewritten to encourage admissions and save expense. All these changes could be used to facilitate trials of commercial causes.

5. The new *Rules of the Supreme Court* came into force in February 1972. The Commission is of the view that further consideration of Part B is not necessary at this time.

WORKING PAPER AND COMMENTS THEREON

6. The working paper contained the recommendations of a sub-committee consisting of the Hon. Mr. Justice Burt, Mr. J.L. Toohey, Q.C. and Mr. B.W. Rowland (who is a member of the Law Reform Commission). A copy of that paper is attached as Appendix A. In the course of its deliberations, the sub-committee met representatives of local business and commercial groups to ascertain their views.

7. The proposals in the working paper are in two categories. The first concerns the circumstances under which a court should be empowered to deal with a dispute, notwithstanding that the parties had agreed to refer it to arbitration, and notwithstanding that the agreement contained what is known as a *Scott v. Avery* clause (see paragraph 30 below). The second category concerns proposals for improving the procedures of the actual arbitration proceedings.

8. Comments on the working paper were received from -

the Australian Institute of Quantity Surveyors (W.A. Chapter)

the Co-ordinator of Development and Decentralisation

Mr. R.J. Davies of Perth, a former President of the Master Builders Association of W.A. who acts as an arbitrator

the Fire & Accident Underwriters Association of W.A.

the General Manager of the State Electricity Commission

Messrs. Kott Wallace & Gunning, solicitors

the Law Society of Western Australia

Mr. F.M. McCardell of Perth, an architect who acts as an arbitrator

the former State Crown Solicitor (Mr. G.J. Ruse)

the Under Secretary for Mines

the Under Secretary for Works

PLAN OF THE REPORT

9. Paragraphs 11 to 31 below contain a discussion of the proposals in the first category referred to in paragraph 7 above. A discussion of the proposals in the second category is contained in the remaining paragraphs.

10. A draft bill is attached to this report as appendix B. It follows the general lines of the draft bill attached to the working paper, modified in minor ways in the light of the comments received. The Commission has also taken into consideration the working papers on commercial arbitration recently issued by the Law Reform Commission of New South Wales and the Australian Capital Territory.

DISCUSSION

Stay of court proceedings

11. The effect of the present s.6 of the *Arbitration Act 1895* is that where there is an agreement to arbitrate and one party, notwithstanding that agreement, commences court proceedings against the other party, that other party will usually succeed on an application for a stay of those proceedings, to enable the dispute to be resolved by arbitration.

Only if special circumstances exist, such as doubt as to the validity of the reference to arbitration, delay in applying for a stay, where charges of a personal character are made or, in some cases where the principal question is one of law, does the court consider it is justified in interfering with the method of settling the dispute by arbitration (see *Russell on Arbitration*, 18th ed. 153-168).

12. In its working paper the Committee, following the recommendation of the sub-committee (see paragraph 6 above), proposed to reverse the practice referred to in the previous paragraph by suggesting the enactment of a provision under which the court would not be able to stay an action "unless it is satisfied that by reason of expense, delay, the nature of the questions in issue, or any other circumstance, justice would be better served by the dispute being determined by arbitration" (cl. 8(4) of bill attached to the working paper, Appendix A).

The proposal also covered the converse case where arbitration proceedings are commenced against a party. The court would be empowered expressly to stay those proceedings, so that the party who commenced them would be obliged to take court proceedings instead (see paragraph 14 of the Committee's working paper)

13. The arguments in favour of this proposed change are set out in paragraph 13 of the working paper as follows -

> "(1) From what was said at its meeting with representatives of interested organisations, the sub-committee formed the view that, notwithstanding some reservations about court procedures, most persons would prefer their disputes to be settled by the court rather than by arbitration. This is so particularly where the matter is not simply one of assessment of value, but involves questions of law, fact or credibility of witnesses.
>
> Some representatives pointed out that an arbitration clause is often included in a contract, not because the parties have brought their minds to the question whether arbitration is the best method of determining any dispute that might arise, but because they have merely followed a precedent. Agreements to arbitrate are often included in some "standard form" contracts, to which a customer or client has no real choice but to subscribe.
>
> (2) The time taken in court proceedings is usually no longer than in arbitration proceedings. The court has ample power to ensure that a dilatory party is penalised.
>
> (3) The expense is, if anything, less in court proceedings: for one thing, the parties do not pay for the services of the judge.
>
> (4) By and large, members of the community have more confidence in a judge, whose training and qualifications fit him to try disputes, than in an arbitrator.

(5) By the time the judge has heard sufficient to enable him to decide whether or not to grant a stay, it would be simpler and quicker to allow him to complete the hearing rather than for the proceedings to start afresh before an arbitrator."

14. Three commentators were in favour of this proposal. The Law Society of Western Australia said that it fully supported the proposals contained in the working paper. The Under Secretary for Works said that his department was in full agreement with the proposals of the Committee. The former Crown Solicitor, Mr. Ruse, said that he agreed with the Committee's provisional views and had no comments to make.

15. On the other hand, the Fire & Accident Underwriters Association, the Australian Institute of Quantity Surveyors, Mr. Davies and Mr. McCardell disputed the validity of each at the arguments put forward by the sub-committee in favour of the proposed change. They are of the opinion that arbitration proceedings are in general speedier and more economical than court proceedings, and have the additional important advantages of finality (since there is no appeal from an arbitrators decision) and privacy (since the public has no right to attend arbitration proceedings).

16. The Fire & Accident Underwriters' Association also said that the Committee had attempted to generalise on the complete range of commercial contracts and that there were a number of advantages in the use of arbitration clauses in insurance contracts. Such clauses avoided an excess of litigation in that a claimant could, by threatening court action with its attendant publicity, force the insurance company into an unfair settlement. The Association also said that there should be no lack of confidence in an arbitrator in insurance disputes as the standard contract provides that the arbitrator must be agreed to by both parties.

17. It is the view of Mr. McCardell that "if the parties to a contract have agreed to settle their disputes in private by arbitration, it is an imposition against their liberty to deprive them of the right to do so".

18. The Co-ordinator of Development and Decentralisation, the General Manager of the State Electricity Commission and the Under Secretary for Mines, whose comments were made orally to a member of the Commission, regard the fundamental issue as the question whether a party who had entered into an agreement to refer disputes to arbitration should be

permitted to take court proceedings instead. In their view, a person who has freely negotiated an arbitration clause should not be entitled to go back on it because at a later stage he prefers adjudication by a court. They regard it as not in the public interest that courts should in such circumstances be empowered to intervene.

19. All the comments were studied by the original sub-committee (see paragraph 6 above). It remained convinced that its approach was correct. The sub-committee is of the view that at the time of entering into the agreement parties may not have a clear conception of the nature of disputes likely to arise under it. These usually relate to a conflict of evidence or a question of law or the interpretation of a document, matters which it considers are best determined by the court. It acknowledges that some disputes are simply as to the value of work done, the standard of workmanship, or the cost of making good defects, which do not normally involve value judgments on evidence or other judicial questions, and are thus suitable for informal determination by a person with experience in the particular industry concerned. In such latter cases, the sub-committee considers that under its proposed formula (see paragraph 12 above) the court would stay court proceedings.

20. The sub-committee is of the view that some commentators appear to have thought that the proposal would empower the court to intervene even though **both** parties wished the dispute to be determined by arbitration. This is not so. The sub-committee's proposal would have no application in such a case, and could not prevent the parties proceeding to arbitration should they both wish to do so.

21. The sub-committee agrees that in cases where the parties, acting at arms length, had specially negotiated the arbitration clause, that clause should generally be given effect to. It considers that under the formula submitted, the court would in such cases stay the action. However, to overcome any doubt, it suggests that express reference to this situation be included as one of the circumstances to which the court must have regard in deciding whether or not to stay the action.

22. The Commission has given long and careful consideration to this question regarding the stay of proceedings. While the Commission is unanimous in its other recommendations, it is divided on this question.

Majority View

23. The views expressed on the question emphasise a conflict of principle. On the one hand it can be contended that the parties to a contract, having agreed to refer disputes to arbitration, should be bound by their agreement. On the other it can be contended that disputes involving questions of law and possibly those involving an evaluation of disputed evidence, should be determined by tribunals which are legally trained. If there were a sufficiently large body of legally trained and experienced arbitrators available (as there is in some of the larger jurisdictions) the conflict would be resolved. In the alternative, if it were possible to define with sufficient precision the areas of the disputes which could be left to lay arbitration and those which only the courts would be fully competent to deal with, the conflict in principle would also be resolved. But such definition would be difficult, to say the least.

24. In the face of these difficulties, two members of the Commission, Mr. Rowland (who was also a member of the sub-committee) and Professor Edwards, adopt the views of the sub-committee. In the opinion of these members the courts can be relied on, particularly given the legislative guide lines referred to in paragraphs 12 and 21 above, to ensure that each case is dealt with by the appropriate tribunal.

25. Following the recommendation of the Queensland Law Reform Commission, legislation has been enacted in that State empowering the court to order that an arbitration agreement shall cease to have effect (thus enabling the matter to be litigated in the court) in cases where it is more convenient and beneficial to have all the issues or all the parties before the court in the same action (see the *Arbitration Act 1973* (Qld) s.7(2) and (3)). A similar recommendation was made by the South Australian Law Reform Committee of the Australian Capital Territory in its working paper on arbitration.

The proposal of the majority (see paragraph 24 above) gives the courts more extensive powers.

26. The New South Wales Commission does not propose that the court's powers should be widened generally, but it distinguishes between "contracts of adhesion" and other contracts and suggests a number of provisions for the regulation of arbitration proceedings arising out of contracts of adhesion. It described contracts of adhesion in its working paper (paragraph

4) as "standard form contracts common in business today, dictated by one party to another and not open to change by negotiation." (But cf. the definition in clause 7 of the New South Wales Commission's draft bill appended to its working paper).

The New South Wales Commission also suggests that a *Scott v Avery* clause should have no effect in a contract of adhesion unless the clause has been confirmed by the parties after the dispute arose.

Mr. Rowland and Professor Edwards doubt whether contracts of adhesion as defined in the New South Wales Commission's draft bill cover the area of concern in Western Australia, or whether the nature and degree of regulation of arbitration proceedings arising out of such contracts proposed will provide a sufficient answer to the problem in this State. In their view a greater degree of flexibility is required and clause 8(3) of the proposed bill attached to this report (Appendix B) provides this. In particular the requirement that the court shall not grant a stay of court proceedings unless it is satisfied that the agreement to arbitrate was specially negotiated, will enable the courts in appropriate cases to ensure that parties are not forced unwillingly into arbitration under contracts of adhesion.

Minority view

27. The other member, Mr. Freeman, believes that the approach suggested by the sub-committee and recommended by the majority of the Commission goes too far and would tend to encourage a party to repudiate his promise to arbitrate. In his view a person who has freely negotiated an arbitration clause should not be entitled to go back on it because at a later stage he prefers adjudication by a court (see paragraph 18 above). The approach by the majority of the Commission, which appears to be without precedent, was subject to criticism by Professor Nygh of the University of Sydney who delivered a paper on "International Commercial Arbitration in Australia and New Zealand" at the Lawasia Conference in Jakarta in July 1973.

28. Section 6 of the existing Act in effect imposes a prima facie duty on the courts to act upon and give effect to an agreement to arbitrate by staying the proceedings in the absence of sufficient reason to the contrary. Mr. Freeman considers that the fact that the courts have exercised the right to interfere sparingly (see paragraph 11 above) does not warrant the introduction of provisions (see clause 8 of the draft bill) which, in his view, would require the

party applying for a stay of the court proceedings to show good cause why the court should not itself settle the dispute. As is stated in paragraph 114 of the working paper of the New South Wales Law Reform Commission -

> "It is right that, where there is an agreement that differences will be arbitrated, a party proceeding in court in breach of the agreement should at least bear the onus of showing why the court proceedings should be allowed to continue. It is right too that the onus should not be a light one".

29. Mr. Freeman recognises that problems do exist in respect of contracts of adhesion in so far as such contracts are not freely negotiated and contain an arbitration clause in standard form which is not open to change. Circumstances may well arise in which it would be inequitable to compel a weaker party in a contract of adhesion to go to arbitration and the courts should, it is submitted, be empowered to take those circumstances into account in determining whether to grant a stay of proceedings.

In his view the provisions of subclauses (1), (3) and (4) of clause 8 of the draft bill should be deleted and replaced by a provision similar to section 6 of the existing Act with the addition of a new subsection along the following lines -

> "The court in considering whether to stay the action shall take into account -
> (a) the nature of the questions in issue;
> (b) questions of expense or delay involved in the proceedings;
> (c) whether or not the agreement to arbitrate was freely and specially negotiated;
> (d) such other matters as the court thinks fit".

This approach would avoid the difficulty of defining precisely the concept of a contract of adhesion (see the working paper of the New South Wales Law Reform Commission paragraph 74, and clause 7 of that Commission's draft bill). The courts would be encouraged by such a provision to adopt a more flexible approach, particularly in respect of contracts of adhesion, without derogating from what should be an objective of the law, namely, to give effect to an arbitration agreement freely negotiated.

***Scott v Avery* clauses**

30. A *Scott v Avery* clause in agreements to arbitrate provides that there is no right of action under the agreement except upon an award of an arbitrator. If such a clause is included in an agreement therefore, there would be no question of commencing court proceedings in relation to a dispute covered by the agreement (see *Scott v Avery* (1856) 5 H.L. Cas. 811, followed by the Full Court of Western Australia in *Fryer v Plucis* [1967] W.A.R. 161). If the proposal of the sub-committee is to have practical effect it would be necessary to enact also a provision limiting the effect of such a clause.

31. Section 25(4) of the *English Arbitration Act* deals with the problem of *Scott v Avery* clauses by giving the court a discretion to order that such a clause shall cease to have effect. But it would seem preferable to make the clause void absolutely. Clause 9 of the draft bill (Appendix B) is designed to give effect to this recommendation.

Other matters of contention

32. The sub-committee recommended that the legislation should require the arbitrator to make his award in writing and to give reasons for his decision unless the parties, after the dispute has arisen, waive the requirements. This recommendation follows a similar suggestion of the Queensland Law Reform Commission which has now been enacted (the *Arbitration Act 1971* (Qld) s.24). Mr. Davies and Mr. McCardell disagreed with the proposal in its particular form. Although they agreed that arbitrators should give reasons, they did not wish for these reasons to be deemed part of the award, because to do so would make more effective the court's power to set aside an award for error of law on the face of the award and would thus impair the concept of finality which they think is desirable in arbitration. In the Commission's view this is precisely why the reasons should be declared part of the award. The Commission considers that the court should have wide powers of reviewing the decision of an arbitrator to ensure that his decisions do not contain mistakes of law. Clause 22 of the draft bill attached (Appendix B) is designed to give effect to this recommendation.

33. The sub-committee recommended that legislation along the lines of s.l8(3) of the *English Arbitration Act* should also be adopted in this State. That provision makes void any agreement that the parties shall bear their own costs of any arbitration proceedings, unless the

parties have agreed after the dispute has arisen, to bear their own costs. The provision was introduced in England so that a party is not inhibited from taking proceedings under the arbitration agreement notwithstanding that he had a good case. The Commission adopts the recommendation of the sub-committee. Clause 24(3) of the attached draft bill (Appendix B) is designed to give effect to the recommendation.

34. The sub-committee recommended that legislation similar to s.27 of the English *Arbitration Act* should be enacted in this State. That section empowers the court to extend the time within which a party must commence proceedings under the agreement if otherwise undue hardship would be caused. The clause appears to have worked well in England and the Commission recommends its adoption here. No commentator disagreed.

35. The sub-committee proposed that the new *Arbitration Act* should bind the Crown. Under the existing Act (s.24) the court has no power to stay court proceedings to which the Crown is a party notwithstanding that the Crown has bound itself to arbitrate (*R. v. Colonial Mutual Insurance Co*. (1903) 5 W.A.L.R. 46). The Commission agrees with the sub-committee that in this area the Crown should not be in a different position from a subject. The English *Arbitration Act* binds the Crown, as does the Queensland *Arbitration Act 1973*. The South Australian Law Reform Committee has also recommended that its Act bind the Crown (Fifth Report, clause 5 of proposed bill).

Machinery and procedures of arbitration

36. The following paragraphs make reference to changes which the sub-committee proposed and which the Commission agrees should be included in the legislation. They are largely self-explanatory and, in the main, are aimed at improving the machinery and procedures of arbitration. They are not dependant on the proposals discussed above and could be introduced whether or not those changes are accepted. The clause references refer to the clauses in the draft bill attached (Appendix B).

37. (a) The draft bill covers oral as well as written agreements to arbitrate. There seems no reason why oral agreements should be excluded. The New South Wales Law Reform Commission and the Law Reform Commission of the

Australian Capital Territory have also suggested that oral arbitration agreements should be included.

(b) An agreement to arbitrate and the authority of the arbitrator is not to be affected by the death of a party - cl. 12.

(c) An uneven number of arbitrators may decide by a majority vote - cl.13(b).

(d) The umpire may enter upon the reference in lieu of the arbitrators if they have given notice that they cannot agree - cl.14(l)(b).

(e) To replace an arbitrator who has already entered on the reference, the leave of the court must be obtained - cl.15(l)(a). Mr. McCardell does not agree that leave should be required. The sub-committee's reason for recommending this change was that the question of the costs of the abortive proceedings could arise, which should be subject to a direction of the court.

(f) The procedure for the issue and service of writs of subpoena are prescribed - cl.l8(2), (3) and (4).

(g) Parties are required not to obstruct arbitration proceedings and power is expressly given the arbitrator to proceed ex parte (this is already the law - *Benedetti v Sasvary* (1967) 2 N.S.W.R. 792) - cl.20.

(h) Unless otherwise agreed an arbitrator is empowered to make an interim award and to order specific performance - cl.23(a) and (b).

(i) Unless the award otherwise directs, the sum awarded to be paid carries interest - cl.26.

38. The Supreme Court is given the following express powers -

(a) To direct the issue in interpleader proceedings to be determined in accordance with the arbitration agreement - cl.11.

(b) To order security for costs, discovery of documents and the like - cl.19. Under the existing law the court has no power to order security for costs (*R.J. Davies Ltd. v. C.R. Keath Earth Moving Co. Ltd* [1965] W.A.R. 189).

(c) To remove a dilatory arbitrator and appoint a fresh arbitrator - cl.21(3).

(d) To authorise an application for an amendment to an award to provide for costs - cl.24(4).

(e) To resolve disputes about an arbitrator's fees - cl.25.

(f) To correct obvious mistakes in an award - cl.30.

(g) On an application to set aside an award, to order money payable under the award to be secured - cl.31(4).

(h) To appoint a fresh arbitrator in the place of an arbitrator removed by it and, in cases where the authority of an arbitrator is revoked or a sole arbitrator is removed by it, to order that the agreement to arbitrate shall cease to have effect in respect to that dispute - cl.32(l) and (2).

(i) To set aside an award for "jurisdictional error" and "misconduct" - cl.31. Under the present law the court can set aside an award for "misconduct" by an arbitrator. This term is misleading since it covers mistakes by the arbitrator in relation to the proceedings as well as misconduct in the narrow sense. As a drafting convenience the term "jurisdictional error" is used in the draft bill to include mistakes both of jurisdiction and within jurisdiction which are grounds for setting aside the award. The meaning of the term "misconduct" is correspondingly restricted to improper behaviour.

39. Messrs. Kott Wallace & Gunning suggested that the powers given the Supreme Court under the legislation should also be exercisable by the District Court where the amount in issue is within that court's jurisdiction. This question was considered by the sub-committee,

which decided that the present law, which gives exclusive jurisdiction to the Supreme Court, should continue. The Commission agrees with the sub-committee. Most of the powers given the Supreme Court under the *Arbitration Act* are similar to those it traditionally exercises in relation to inferior judicial tribunals. The jurisdiction of the District Court does not include appellate or supervisory powers, and an extension in this limited area would not be justified.

RECOMMENDATIONS

40. The Commission, by a majority, recommends that the power of a court to determine a dispute, notwithstanding an agreement to refer that dispute to arbitration, should be widened in accordance with clause 8 of the draft bill attached (Appendix B).

41. The Commission unanimously recommends that provisions along the lines of the other clauses of the draft bill be enacted.

42. It is to be noted that the recommendations do not relate to legislation to give effect to the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The Commission has assumed that this matter lies outside its terms of reference.

CHAIRMAN

MEMBER

MEMBER

18 January 1974