# ARBITRATION AND THE COMMERCIAL LIST

Text of a paper delivered by The Hon. Mr Justice Ormiston to members of the Corporate Lawyers Association, Victoria, on 27th November 1985 at the Australian Centre for International Commercial Arbitration, Melbourne.

What I wish to say tonight concerns two developments in the law of practical concern to commercial, and thus corporate, lawyers. The first is the coming into operation on the 1st of April this year of the Commercial Arbitration Act 1984, and the second is the reorganization in the Supreme Court of what will become known as the Commercial List. I shall attempt to relate each development in a way which may be of practical value, although no doubt you are familiar at least with the operation of the Commercial Arbitration Act. Many of you will know a good deal more than I about the practical operation of commercial arbitrations since the Act came into force, so I will concentrate on what, to many, seems the most important change in the law, namely the restriction on the right to resort to the courts by parties to an arbitration.

**Commercial Arbitration Act 1984**

This aspect of the Commercial Arbitration Act derives largely from the amendments made in England by the 1979 Arbitration Act in that country. In the years preceding that amendment, many people had seen the right to seek a case stated and the right to set aside an award as rights which had been abused, and had prevented the arbitrator's award from having the simple finality which many people expected of it. The large number of cases heard by the Commercial Court in England were a tribute not only to the ingenuity of lawyers in that country, but to the expertise of the judges who made up that part of the Queen's Bench Division known as the Commercial Court. I doubt that there was such frequent resort to the courts in Victoria under the Arbitration Act 1958, but the changes brought about to the courts' power to supervise arbitrations are very similar to those introduced in England in 1979. It is inevitable that reference will be made to the surprisingly large body of authority which has considered those amendments to the English law. From my reading on the subject, it is apparent that the ingenuity of the legal profession in that country has not been discouraged by mere changes in legislation.

I turn to the Act and to those parts which seem for present purposes to be of most importance. In the first place, the right to set aside or remit an award on the ground of error of fact or law on the face of an award has been abolished by s. 38(1), and in their place there is now a limited right of appeal to the Supreme Court on

any question of law arising out of an award: see s. 38(2). The two alternative bases of appeal set out in sub-s. (4) are:

(a) The consent of all the other parties to the arbitration agreement; or
(b) The leave of the Supreme Court, which is made subject to s. 40 of the Act.

I doubt that consent will frequently be forthcoming from a successful party to an arbitration, so I concentrate on the second basis. Leave shall not be granted by the Court unless it considers that, having regard to all the circumstances, the determination of the question of law concerned can substantially affect the rights of one or more of the parties to the arbitration agreement. Moreover, the power to grant leave is made subject to s. 40, which enables the party to enter into what is there described as an exclusion agreement.

Leave cannot be obtained where there is an enforceable "exclusion agreement", which is defined in that section. This is neither the time nor the place to discuss exclusion agreements, but their operation is restricted by s. 41 of the Act, and seem primarily directed to international arbitration agreements.

Secondly, in place of the interim and final case stated procedure, s. 39 now gives a limited power to apply to the Supreme Court to determine a question of law arising in the course of an arbitration. However, that power only exists either if the arbitrator or umpire consents or if all other parties consent and, furthermore, the Court can only determine questions so arising if it is satisfied that its determination might produce substantial savings in costs and if the question is one which might lead to the granting of leave to appeal under s. 38 after the making of an award. This is likewise subject to the "exclusion agreement" provisions.

Furthermore, appeals in either kind of proceeding to the Full Court can only be taken by leave if a point of law of general public importance arises or there is some other special reason for the Full Court to consider the question.

There remains a procedure to attack awards on the ground of misconduct (see s. 42) and to remove an incompetent or unsuitable arbitrator or one who is misconducting himself: see s. 44. There is also an interesting new power in the Court pursuant to s. 45 to terminate an arbitration "for want of prosecution". Further powers to enable the Court to make interlocutory orders in arbitrations are contained in ss. 47 and 48.

**Appeals to the Court**

Next, I wish briefly to refer to the machinery which enables these appeals and other applications to be brought to court. The Supreme Court (Commercial Arbitration) Rules came into operation on the 2nd April 1985 as Order 24 of Ch. II of the Rules. Appeals on questions of law shall be brought by notice of motion stating the grounds of appeal, and shall be served and set down for hearing within twenty-one days of the date of the award. The procedure under Order 59 r. 2 relating to appeals from inferior courts is made generally applicable. Other applications under the Act shall be brought by short form Originating Summons, supported by affidavit, and may be made returnable before a Judge sitting in chambers. Service can be effected personally, or by ordinary pre-paid post. The Judge can thereafter give appropriate directions for hearing. Questions arising in the course of an arbitration must be brought within fourteen days of consent being obtained and the limited class of

application to set aside an award for misconduct must still be brought within six weeks of the making of the award. I should add that the Rules, pursuant to power given under the Act, now make detailed provision enabling parties to arbitrations to make payments into court, with consequential provision as to acceptance of moneys so paid in and any necessary taxation of costs.

What I have said so far must sound rather dull, but it comprehends a quite different relationship between arbitrators and the Court, which may appear to many more rational but which at least in its teething stages may prove just as complicated as that which previously existed under the disarmingly simple twenty-three sections of the Arbitration Act 1958. I shall not attempt to forecast what construction will be put on these new provisions, but I may discourage you by saying that in England almost identical sections on the granting of leave to appeal have already been considered twice by the House of Lords. On the last occasion in 1984 their Lordships said that leave should not be granted unless a strong prima facie case of error had been made out: *Antaios Compania Naviera S.A. v. Salen Rederierna A.B.* [1985] A.C. 191.

**New Commercial List**

I turn now to the Supreme Court's own re-arrangement of business by the creation of a new Commercial List. From the 2nd December practitioners will be able to commence actions, applications and appeals in the Commercial List by issuing process directly from the office of the Registrar of the List, without the need to obtain leave to have the proceedings entered in the List. A new definition of "commercial cause" will apply, which may be summarised by saying that it comprehends all matters "arising out of ordinary commercial transactions". Those who abuse the new right to enter cases in the List will be at considerable risk as to costs. A summons for directions must be taken out at the same time, returnable a reasonable time after service of the proceedings. All interlocutory steps will then be regulated by order of either the judge in charge of the List, Mr. Justice Marks, or by one of the other Commercial List judges. A defendant or respondent may apply by summons to bring a matter into the List within fourteen days of service.

Now, although the Commercial List will not be a separate division of the Court, for the first time there will be two judges sitting full-time to hear commercial cases, both at interlocutory and final stages, with a number of other judges effectively making a third judge available throughout the year. There is already a Deputy Prothonotary who acts as Registrar, and a micro computer has been installed to monitor cases. The object will be to give a speedy and efficient service to the commercial community. The members of the legal profession who regularly act in these matters will be asked to cooperate to ensure that matters of importance and urgency can be disposed of fairly and efficiently. Directions hearings will take place every Friday and a calendar system with fixed dates will be adopted for the hearing of matters. It is hoped that urgent interlocutory matters can be heard immediately, other short disputes fixed for hearing within a week or so, and longer cases fixed for hearing at greater intervals. Timetables for necessary interlocutory steps will be fixed by a judge and it will be expected that they should be strictly followed. If there is blatant disregard for times so fixed, cases

may be removed from the List. All applications, interlocutory or final, will be heard by a Commercial List judge, unless otherwise ordered. The judges will expect that counsel briefed in the matter or the solicitor in charge of the matter will be present at Directions' hearings. The object will be to define issues as clearly as possible, to identify issues which may be heard separately, and to avoid unnecessary interlocutory work. For example, the delivery of interrogatories will have to be justified.

What is proposed is largely an experiment, to be refined and adapted as the occasion demands. The changes have come about largely at the instigation of the present Commercial Causes Consultative Committee, which includes your President, Mr. Fitch, which shall continue in active operation. The List's success will depend on the degree to which the commercial community and the profession see that it supplies a need, which has been recognised in England and New South Wales for many years.

How, then, will the Commercial List deal with appeals and applications under the Commercial Arbitration Act? To start with, there must be some flexibility, but it is hoped that most applications under the Act will be entered in the List, except for building, engineering and construction arbitrations, which will naturally fall to be dealt with by the Building List or in the Practice Court, as before. The Directions' hearings will enable the issues to be identified in a convenient way. In appeals the issues will usually be apparent, but directions may well be given requiring the settling of an agreed statement of facts. In other applications, when pleadings are thought to be inappropriate, the judge may direct points of claim and defence to be filed. In the case of questions arising for determination during an arbitration, I hope it will be possible to mould a procedure to enable these questions to be heard expeditiously. A short form Originating Summons and affidavit is prescribed, but one may hope that the facts forming the basis of the question can be agreed either before the application or within a few days, so that an answer may be provided to the arbitrator as soon as practicable. The availability of judges at relatively short notice to hear these short points should be a real opportunity for working out a procedure to meet the needs of those resorting to arbitration. Often a difficult legal point may hold up an arbitration, or the arbitrator's lack of detailed legal knowledge may require evidence to be taken, the need for which may be avoided by obtaining a relatively quick answer from the Court. I am not suggesting that the procedure will be a panacea for all ills, but with application, skill and discretion the new procedures in the Commercial List ought to provide a basis for a more efficient resolution of commercial disputes. In turn, I would hope that this Centre will provide a source from which expert referees may be selected by the Court when difficult questions of technical fact have to be determined in actions brought in the Commercial List. Some people may see the two systems competing, but I believe from speaking with those involved at the Centre that the passing of the Act and the reformation of the Commercial List will give the Court and arbitrators an opportunity to work together, each performing the role to which they are best suited and to the end that the commercial community can have genuine disputes resolved quickly and efficiently. ■