THE INSTITUTE OF ARBITRATORS AUSTRALIA

Examination for assessment and grading February, 1994

NOTE:-

1. Reading time is 30 minutes.
2. Time for writing is limited to three hours.
3. This exam should be done under examination conditions.
4. All questions are compulsory.
5. Where arbitration legislation is applicable, answer according to your State.
6. The examination is a "closed book" examination i.e. candidates may not take any notes or reference materials into the examination. Upon entering the examination room each candidate will be handed a "clean" copy of the relevant State/Territory Commercial Arbitration Act or Ordinance for use in the examination.

Question 1 (10 marks)

White orally agreed with Grey to sell his vacant house to Grey and then confirmed the oral arrangement in a letter. The letter was endorsed "subject to contract" and the text included the words "subject to contract".

Grey paid a deposit to White and then occupied the house, with White's permission.

On the day after Grey moved in, White received an offer from Black, whose offer was much better than Grey's offer.

White then told Grey that he intended to sell the house to Black and that therefore he, Grey, should vacate the house.

What rights, if any, did Grey have? Give reasons for your answer.

Comment

This question required the candidate to assess whether upon the circumstances given, a valid contract had been entered into between White and Gray. Most candidates were aware of the general requirements with which a valid contract must comply.

Candidates had to consider the meaning and effect of the words "subject to contract" in the context in which it was found. Some of the best candidates were able to refer to *Masters v Cameron* (1954) 91 CLR 353. Even without knowledge of that case, many candidates were able to examine the situation in principle and see that there were three possibilities:-

(a) **the parties had entered into a contract and intended to be immediately bound, but envisaged the contract being recorded in a formal document at a later stage;**
(b) **the parties had agreed upon all the terms of a sale, but did not intend to be bound to proceed unless a formal contract was signed; and**
(c) **the parties had not agreed all their terms and had simply reached an understanding in principle that might result in a binding contract at a later stage.**

Consideration should also have been given by the candidates as to whether, if the parties had agreed sufficient terms to constitute an enforceable contract, the terms as to the agreement being "subject to contract" had been waived by the subsequent conduct of White in agreeing to accept a deposit and permitting Gray to occupy the house. The question of estoppel arising on those facts against White should also have been considered.

Another aspect which many candidates raised was the various State laws relating to such contracts having to be in writing or evidenced in writing and signed by the party to be charged. Payment of a deposit and occupation of the house by Gray was also perceived as relevant performance in that context, although some candidates felt that Gray's occupancy could be ambiguous, possibly arising out of a tenancy.

Because of the limited extent of the factual material given, this question was not one to which there could be any categoric "right" answer. The candidate who intended to gain good marks had to address the issues, and indicate what sort of conclusions could be reached which were consistent with the known facts.

Candidates who concluded that Gray had a cause of action had then to deal with the remedies which were open to Gray. Good candidates pointed out that if successful, Gray had the option of specific performance (affirming the contract) or accepting repudiation by White in suing for damages.

Question 2 (10 marks)
A farmer and a fencing contractor made an oral agreement concerning the erection of several kilometres of wire fencing. The only written part of the arrangement is the price in dollars per kilometre scribbled in the contractor's writing on the back of an empty used envelope addressed to the farmer, who folded the envelope and put it in his pocket.

The contractor had experienced problems with other farmers concerning locations of fences. He therefore said to the farmer at the time of making the arrangements, "If we have an argument about this then I want it settled by an independent arbitrator if we can't fix it ourselves". The farmer replied in agreement, "Sure", not expecting any need to consider the point further.

"What's more", said the contractor, "do we agree not to go to court before an arbitration?"

"No worries, mate", replied the farmer, wondering why the contractor was saying these things. The question disappeared from his mind when his wife, who was present, placed another plate of scones on the table.

A dispute did arise and it seemed to the contractor that a considerable sum of money, by his standard, was at risk. On then raising the issue of arbitration in discussion with the farmer, he was told to go and jump in the lake.

What do you see as the rights and obligations of the farmer and the fencer at that point in time, in respect to the avenues of dispute resolution?

Comment:

The question was about oral arbitration agreements, the definition of arbitration agreement in the Acts, the relevance of section 55 and the options open to the parties. Most candidates referred to some of those issues but not all of them. The answers collectively showed that too many candidates do not take the trouble to be sure of a question before attempting to answer. Many answers contained red herrings not present in the question. Candidates reading this comment in future years should heed the advice: "Be sure of the question and don't waste time writing anything irrelevant."

Many candidates concluded, wrongly, that because the arbitration agreement was oral and not covered by the Act's definition then it must be unlawful. There is no logic in that. What would be true would be that the Act is not applicable, as a rule but then s 55 does refer to oral agreements!

Question 3 (10 marks)

(1) If you were invited to accept nomination as sole arbitrator in a matter concerning the two parties in a contract, would you ask for a copy of a notice of dispute before accepting the nomination?
(2) If you answer "yes" to (1), how would you judge if the document provided is a proper notice of dispute?
(3) If you answer "no" to (1), give your reasons and state when, if at all, you would ask to see a notice of dispute.
(4) If your answer to (1) is "it depends on the circumstances", explain the circumstances that would influence your action.
(5) If your answer to (1) is none of the above three options, state your own answer and an explanation of it.

Comment:

It is fundamental to arbitration that there be a dispute, not merely a desire for a third-party opinion. A nominee-arbitrator should not go too far in considering the matter without first having evidence that a dispute does exist. Candidates who adopted that approach were on very safe ground but were very few.

Candidates who Interpreted "accepting nomination" as simply allowing oneself to be nominated were correct in stating that having a copy of a notice of dispute was not essential.

Candidates who interpreted "accepting nomination" as appointment as arbitrator were correct (in terms of good procedure) to say that they should sight the notice of dispute before appointment. This is for purposes of identifying possible conflicts of interest, complying with the arbitration agreement and having an understanding of the nature and scope of the dispute.

Very few candidates discussed the meaning of "accepting nomination" Most assumed one of the above interpretations without question.

Very few candidates referred to the significance of s 3 of the Act.

Question 4 (10 marks)
You have been nominated arbitrator in a dispute under the *Commercial Arbitration Act.* At the provisional preliminary conference you call for the arbitration agreement. It is contained in a sub-contract in standard form. The Claimant is the Sub-contractor. The builder named in the sub-contract asserts that you have no jurisdiction to hear the matter as it had assigned the sub-contract to another company just before it received the Notice of Dispute. That other company is also present at the conference and confirms the assignment. The sub-contractor says it knows nothing of the assignment.

State your course of action, your ruling and give your reasons.

Comment:
This question was badly answered. Most candidates misconstrued the question.

Contractual liabilities cannot be "assigned" (or better, novated) without the consent of the other contracting party.

Here the nominated arbitrator could have invited evidence to see if "assignment" was expressly dealt with.

Unless there are special circumstances, the conference should then have proceeded immediately where the claimant subcontractor so desired it. Where appropriate evidence was forthcoming the conference should have proceeded with the other company as respondent. If not, the conference could have proceeded with the builder as respondent, whether the builder remained or not.

Question 5 (10 marks)
Describe and discuss the differences between a call for documents made during a hearing, and a subpoena issued to obtain documents which is returnable during a hearing.

Comment
This question polarised the candidates – they either did quite well or very badly. It was surprising how many did not have any ideas.

Question 6 (10 marks)
At a hearing, a party responding to a subpoena for documents, raised an objection to providing a certain document, on the basis that it was "confidential and not in the public interest to reveal certain of its contents".

What is the legal position with respect to such a claim? Discuss the possible ways in which you, as the arbitrator, may properly deal with the matter.

Comment
The question was generally answered to a higher standard, with a uniform distribution across the marks.

Question 7 (10 marks)
What are the usual roles and rules concerning examination-in-chief, cross-examination and re-examination during the conduct of a hearing in commercial arbitration?

As this question related to the usual roles and rules in connection with examination of witnesses, good candidates spent some time pointing out the arbitrator's discretion as to the procedures involved in the arbitration, so that the usual procedure should not be regarded as compulsory in situations where it was inappropriate. Such candidates explored alternatives, such as the use of statements of witnesses or affidavits for the purpose of examination in chief.

The better candidates also dealt with the use of leading questions, observing that they were not to be used in examination in chief as a rule, except in dealing the formal or preliminary matters, whereas leading questions were permitted on cross examination.

The most common error made by candidates in answering this question was the wide-spread misconception that in cross examination, questions must be limited to matters arising out of examination in chief. Better candidates were aware that in cross examination, opposing counsel may raise matters going to the credit of the witness or which would advance their own case.

Re-examination seemed to pose fewer problems for the candidates, with most candidates being aware of the rules in relation to it. Most candidates were also familiar with the roles of the various parties involved in the arbitration and the extent and manner which the arbitrator himself should intervene.

To get good marks, candidates answering this question had to deal fairly extensively with the entire topic, rather than confine themselves to a few sketchy remarks in an attempt to simply define the terms

Question 8 (10 marks)
At the commencement the last day of hearing a party requests you as arbitrator to consent to it making an application to the Supreme Court for a determination of a question of law which went to the heart of the matter and which had arisen in the course of the arbitration.

State your course of action, your decision and give your reasons.

Comment:
This question was badly answered.

An arbitrator should give his or her consent only where the question of law is:-

(a) real and substantial and not mere pretext for delay;
(b) clear-cut and capable of being accurately defined; and
(c) of such importance that resolution of it is necessary for the proper determination of the matters in issue.

In order to apply this test, the party requesting the consent of the arbitrator should first be required by the arbitrator to formulate in writing the precise question of law which he wants determined by the court. It must be a question of law – not one of fact dressed up as a question of law. If and when the party has done that, the arbitrator should invite submissions from the parties in regard to the matter. It should not be overlooked that there are two conditions precedent to the existence of a jurisdiction in the court to entertain an application made with the consent of an arbitrator. These are:-

(a) the court must be satisfied that determination of the application might produce substantial savings in cost to the parties; and
(b) the court must be satisfied that the question of law is one in respect of which the court would be likely to grant leave to appeal in respect of determination by the arbitrator on that point.

Given the circumstances posed in this question, any point of law is most unlikely to have any significant impact on the dispute other than delay, and ordinarily consent should not be given at such a late stage of the hearing; particularly where a statement of the reasons for making the award is to be included in the award.

In some circumstances it may be otherwise where the parties have agreed in writing that such a statement is not to be included in the award and a valid exclusion agreement is not in force.

Question 9 (10 marks)
State the basic principles to be applied by an arbitrator when deciding the question of which party is to succeed in a claim for its costs of the reference and award.

Comment:
Most candidates said "costs follow the event" but many failed even to mention section 34 of the Commercial Arbitration Act, or when the arbitrator has a discretion as to costs, and how that discretion is circumscribed by both statute and legal precedents.

Question 10 (10 marks)
You are the arbitrator in an arbitration, and you have just made and published an award which includes the statement:

> "The Respondent shall also refund to the Claimant, the sum of $2,500 which the parties have agreed was paid in error during the course of the project".

Assume this statement is based on what you were told in submissions during the hearing and there is no supporting documentary evidence.

After receipt of the award, the Respondent wrote to you objecting to this statement and alleging there was no such agreement.

What would you do? Discuss the issues.

Comment:
Nearly all candidates mentioned "functus officio" but many did not say much more. Section 30 was often referred to but many who did so procrastinated as to whether they believed it applies in this case. The essence of the question was 'What would you do? Discuss the issues." Many candidates strayed from that, with the result that the number of their words were disproportionately higher than their marks.