Arbitration Course Exam Notes

• **Question 1: What information required before accepting arbitration appointment?**
  o Who are the parties?
    ▪ As an arbitrator one must remain impartial and unbiased. Knowing the parties allows the arbitrator to disclose any personal circumstances and information that may cause conflict for either party.
      • Misconduct – s4 (includes bias or apparent bias)
      • Courts have power to set aside award (s42) and/or remove arbitrator (s44) for misconduct.
    ▪ What is the nature of the dispute?
      • Is there a contract?
      • Is there an agreement to arbitrate in Writing?
      • Is there a notice of dispute?
    ▪ Which party (or otherwise who) is seeking me as an arbitrator?
      • Have they complied with the formalities in appointing me?
    ▪ Domestic or International?
  o How long are the proceedings?
    ▪ During the Proceedings
      • Will the parties have representation at the tribunal?
        o If yes, who will represent each party?
      • Will the parties wish to call witnesses?
  o **Do I have Jurisdiction?**
    ▪ What does the arbitration agreement state?
      • What is the circumstances and nature of the dispute?
        o Is there even a dispute?
        o Does the dispute fit within the arbitration clause?
          ▪ If no, have the parties made an ad hoc agreement to refer this to arbitration?
      • Has the arbitration been validly commenced?
        o i.e. Has notice been served in accordance with the arbitration agreement?
  o About the Proceedings:
    ▪ Does the agreement specify rules that apply?
    ▪ When will the arbitration take place?
    ▪ Where will the arbitration take place?
    ▪ What qualifications does the arbitrator require?
  o **General**
    ▪ What relief is sought?
    ▪ (a bit cynical... but) how am I being paid?

• **Question 2: Describe the Grounds on which a Party can Challenge an Award**
  o It is intended that Awards be difficult to challenge for finality
  o There are two grounds:
1) Technical Misconduct – s42
   • Misconduct defined in s4 as...
   • Breach of Natural Justice – Shirley Sloan
     o Arbitrator relied in the award on Australian standards without giving parties the opportunity to be heard on that issue.
     o Award set aside

2) Manifest Error of Law – s38(5)(b)(i)
   • Reflects the decision in Pioneer Shipping v BTP Tioxide Ltd (The Nema) [1982] AC 724 (or Prominade Investments)
     o Prior to this section being inserted, the word manifest wasn't used. Arbitrator's decision could be overturned merely on errors of law.
     o It was decided that you can only appeal on a manifest error of law.
     o The act was amended to read manifest
   • A manifest error of law is an error that is so blatantly obvious it doesn't require any advocacy to be exposed – Pindan Constructions.
     o The award in Pindan was supposed to rule on the basis of breach of contract. It failed to do so and also made reference to the contract being “frustration” in the dictionary sense and also negligence.
     o This was clearly wrong and consequently a manifest error of law.

• Question 3: Describe what the following mean
  o Describe what a Consent award means
    ▪ Not defined in the Act.
    ▪ It is a record of the parties’ wishes. When the parties to a dispute get together and make a mutual agreement as to the terms of the resolution.
    ▪ A consent award is an award on terms agreed by the parties. The benefit to the parties is that it is binding in the same way as a normal award is.
      • It doesn't have to deal with all issues.
      • It doesn't need to have reasons as the parties have implicitly agreed.
    ▪ Before writing the award, make sure that the parties agree. Get the parties to sign off.
      • Terminology “by consent I award as follows”
  o Describe what a Interim award means
    ▪ An award under s4 includes an Interim award.
    ▪ Commercial Arbitration Act 1984 s23
      • Gives the arbitrator the power to make an interim award at any time during the proceedings
    ▪ What is it?
      • An Interim Award rules on certain issues and disposes of them. Subject to an appeal it becomes a final award.
        o This means that any issues dealt with by the interim award are final and with respect to them, the arbitrator is functus officio.
      • Does not deal with costs.
    ▪ What is it for?
      • Used when there is a specific issue in dispute that if resolved may assist
the parties reaching agreement without proceeding to the final award

- Example – *Pindan*
  - The intention of the interim award in *Pindan* was to determine who was liable for what so that the parties could potentially reach an agreement on quantum

- **Describe what a Final award means**
  - It is the Arbitrator’s final decision and is binding (subject to a successful challenge). The parties must abide to the decision. If a party fails to abide by the decision then it is possible to enforce the award as if it was a Court judgment Commercial Arbitration Act 1984 s33
    - It must deal with all substantial issues (*Vilani*)
      - The award was remitted as the arbitrator had failed to deal with s52 of the *TPA* despite the parties arguing about whether pre-contractual representations were misleading and deceptive.
  - Must be in writing
    - The arbitrator is then *functus officio* and cannot revisit except for the slip rule (s30) to correct minor errors such as spelling and arithmetic, or if remitted back to the arbitrator (*Miles v Palm-Bridge*) – s42.

**Question 4: What is “without prejudice” correspondence?**
- It excludes from evidence admissions by conduct or words that a party makes in the course of negotiations to settle a dispute *Field v Commissioner for Railways (NSW)* (1955) 99 CLR 285, 292, Dixon et al.
- What is the purpose of “without prejudice” correspondence?
  - The purpose is to allow the parties to communicate with each other freely.
  - It allows parties to communicate without embarrassment and to negotiate to a settlement in an unhampered manner.
  - It is desirable that parties are able to communicate freely knowing that it won't
- “Without Prejudice Save as to Costs” commonly known as a *Calderbank* offer is a way that parties make offers without prejudicing proceedings that effect the way costs are awarded.
  - The arbitrators should not be aware of these settlement offers.
  - Where an arbitrator accidently receives a without prejudice letter they shouldn't read it, but this is still not enough to disqualify – *Pindan*.
- What does it need to be:
  - Bona fide attempt to reach a settlement
  - See Course Reader vol 2 p141 without prejudice offers

**Question 5: Farm Scenario (Referability of additional disputes) – What do you do?**
- **Step 1: Does the respondent consent to this issue being included in the arbitration?**
  - If so, then the jurisdiction of the panel extends to the incident by an adhoc agreement.
    - Just make sure that it is in writing (to satisfy the definition of an arbitration agreement under s4) and
  - If not, go to Step 2.
- **Step 2: Analyse the Arbitration Agreement**
  - The agreement determines the jurisdiction of the panel.
  - Determine the Scope of the Agreement
**Step 3: Determine whether this dispute is within the scope**
- If the new dispute falls under the arbitration agreement then one of the parties (i.e. The claimant) can apply to extend the reference to include the new dispute – s25.
- As this rests on the construction of the clause (a clause that has not been provided in the factual scenario) it is impossible to conclude.
- However, it is usual that the clause will be worded to define the scope as disputes arising out of or in connection with the contract or words to that effect.
  - Generally tortious disputes are only referable to arbitration where there is sufficient connection with the contract.
  - It does not seem as though the actions of the respondent were happening during the performance of the contract or otherwise had sufficient connection to the contract.
- Probably can't be referred using the existing agreement and s25.

**Step 4: Consolidate**
- Should the negligence be capable of arbitrating under a different agreement use s26 to consolidate the proceedings.

**Question 6: What is the general principle on which arbitrators’ award costs?**
- **So long as the parties had not already reached an agreement or there is a contrary intention in the arbitration agreement:**
  - Like in litigation the successful party should receive their costs.
    - The successful party is the party to who the final flow of money goes - *Palm-Bridge*
  - The decision to award costs is at the discretion of the arbitrator.
    - The arbitrator must judicially exercise their discretion.
  - If the arbitrator chooses not to award costs the arbitrator must give reasons for not awarding costs.
    - *Commercial Arbitration Act 1984 s34*
- **When might the arbitrator depart from the principle?**
  - Where there are separate and distinct issues.
    - Just don't do it the way it was in *Palm-Bridge*
  - If a claim is wildly exaggerated the arbitrator can depart from the principle.
  - If the successful party failed on separate costly issues and it is unreasonable for the party to raise costs on the issue.
- **From Halsburys:**
  - The general rule is that the successful party should recover costs¹ to be taxed as between party and party.² For the purposes of this rule, a claimant is successful where some part of the claim is recovered; a respondent where the claimant recovers no part. Where there are cross-claims the successful party is that which recovers a sum on balance of the two claims.³

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2. *Commercial Arbitration Acts s34(1)(c). Under the section the arbitrator also has power to order that costs be taxed or settled on a solicitor-client basis, but the power would rarely be appropriate. As to costs generally see practice and procedure [325-9500]-[325-9770]. As to whether a party should be able to recover costs incidental to the arbitration see *Ballantyne v Electricity Trust (SA)* (1994) 62 SASR 133. As to whether non-legal costs are included see *James Aris & Associates v Minister for Works* (1994) 11 WAR 390
3. *Keywest Construction Group Pty Ltd v Footscray Holdings Pty Ltd (t/as Premier Commercial Ceilings)* (unreported, SC(WA), Anderson J, No 27/1992, 23 February 1993, BC9301124). See also *Badge Constructions Pty Ltd v*
The general rule may be departed from but only in exceptional cases and for good reason (which must be plainly recorded in the award), such as:

- (1) a grossly exaggerated claim;
- (2) a failure to establish a substantial claim where the claims are discrete;
- (3) where the claimant’s conduct of the arbitration has been unreasonable or obstructive or has unnecessarily increased the costs;
- (4) where the successful party has unreasonably refused to accept an offer to compromise the dispute.

The arbitrator should provide reasons for any award for costs, particularly where the award departs from the general rule.

**Question 7: Explain the types of Privilege that may attach to a document in arbitration**

- By virtue of the rules of natural justice various evidence must be excluded on the grounds of privilege.
- **Legal Professional Privilege**
  - LPP applies outside of court proceedings.
  - Legal Professional Privilege is designed to ensure that communications between lawyer and client remain confidential.
    - Dominant purpose test (communication for the dominant purpose of obtaining or receiving legal advice or in preparation for legal proceedings – *Esso Resources*)
  - Public policy in ensuring that parties can openly, honestly and fully communicate with their legal representatives to ensure efficient resolution of problems.
- Public Policy
- “Without Privilege”
  - See above
- Note that an arbitrator should be aware that any notes they produce are not privileged for the purpose of the arbitration are not privileged

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*Penbury Coast Pty Ltd BC99000012; [1999] SASC 6; Palm Bridge Pty Ltd v Miles BC200106703; [2001] WASCA 334

4 *Tramountana Armadora SA v Atlantic Shipping Co SA* [1978] 2 All ER 870 at 878; [1978] 1 Lloyd’s Rep 391 at 398 per Donaldson J. However, not where the claimant has merely failed to establish all of its claim: *Demolition & Construction Co Ltd v Kent River Board* [1963] 2 Lloyd’s Rep 7 at 15.

5 *Leighton Contractors Ltd v Railways Commission (WA)* (1966) 115 CLR 575; *Lewis Emanuel & Son Ltd v Sammut* [1959] 2 Lloyd’s Rep 629 at 635

6 In such a case some reduction of costs might be appropriate: *Unimarine SA v Canadian Transport Co Ltd (The Catherine L)* [1982] 1 Lloyd’s Rep 484 at 489. But not where the arbitrator considered that the conduct of the successful party, although legally justified, warranted moral sanction: *Lloyd del Pacifico v Board of Trade* (1930) 37 LL R 103 at 108

7 Only where the offer is an open one or made on the basis that it is without prejudice save as to costs (commonly called a ‘Calderbank Offer’ after *Calderbank v Calderbank* [1976] Fam 93; [1975] 3 All ER 333; [1975] 3 WLR 586). For an example of such an offer see The Australian Encyclopaedia of Forms and Precedents, 3rd ed, Vol 1, alternative dispute resolution, Pr 35.195. An offer of compromise which is made ‘without prejudice’ (see practice and procedure [325-6705]) cannot be put before the arbitrator unless the privilege is waived and the arbitrator cannot have regard to it on the question of costs: *Tramountana Armadora SA v Atlantic Shipping Co SA* [1978] 2 All ER 870; [1978] 1 Lloyd’s Rep 391. Further, the offer must relate only to the disputes in the arbitration proceedings: *New South Wales v Dueeasy Pty Ltd* (1992) 9 BCL 148, SC(NSW)
• **Question 8:** What information should an award compromise before dealing with the dispute?
  o Include:
    ▪ Name of the Parties
    ▪ Preamble
      • Date of the Reference
      • Name of the Arbitrator
      • Date of preliminary conference and hearing
      • Any extensions to the ambit under s25
    ▪ Background to the dispute
      • Issues

• **Question 9:** Circumstances to correct an award
  o Having made an award, an arbitrator is *functus officio* (having discharged their duty an arbitrator is prevented from taking a matter further because of certain regulatory limitations) with respect to the issues contained in that award.
  o For this reason the arbitrators powers to correct mistakes is limited to statutory powers
    ▪ *Commercial Arbitration Act 1984* s30
      • When the award under an arbitration agreement contains:
        o A clerical mistake;
        o An error arising from an accidental slip or omission;
        o A material miscalculation of figures;
        o A material mistake in description of a person, thing or matter; and/or
        o A defect in form.
      ▪ An arbitrator is unable to change their mind once they deliver an award.
      ▪ An arbitrator must give reasons for the correction that is made.
  o In addition to slips ups:
    ▪ The arbitrator can also correct the award with respect to costs where the original award failed to deal with costs and one of the parties has requested directions as to costs within 14 days of the award being published – s34(4) CAA.

• **Question 10:** How is an award enforced?
  o An award is not a judgment of a court.
  o With respect to Domestic Arbitration – If a party has not paid – Under *Commercial Arbitration Act 1984* s33
    ▪ Where the award is made under an arbitration agreement it may with the leave of the court be enforced in the same manner as a judgment or order of the court.
  o With Respect to International Arbitration – New York Convention
    ▪ Article III
      • Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.
• This means that, due to Art I, any award validly made in one contracting state can be enforced as a judgment in another contracting state.
• There are 130 contracting states including all major civilised jurisdictions

• Question 11: What is an interlocutory application? Give three examples
  "Interlocutory applications allow a party to ask the Court for any order other than the final judgment sought in an existing case. The court has the power to make any interlocutory application so long as they would have been able to in regular court proceedings – s47 Commercial Arbitration Act.
  The application is made to the court before the hearing. A Notice of Motion is filed, which is then served on all the affected parties and the presenting an oral argument (a motion) in court. An affidavit (statements of a person's evidence in support of a motion sworn before a solicitor or a justice of the peace) usually accompanies a Notices of Motion.
  Give three examples of an interlocutory application
  ▪ Particulars
    • If a person wishes to obtain some more specific information about what appears in a statement of claim or a defence or other pleading document and through informal means these are unobtainable from the other party's solicitor, it is possible to apply to the court for an order that these be supplied.
  ▪ Discovery
    • Discovery refers to a process whereby each party can examine documents another party holds which are relevant to a matter in issue. In some jurisdictions a party can issue a notice to another party requiring inspection of certain documents or application can be made to the court for access to a class of documents. Some documents are protected from examination by another party such as documents which legal professional privilege protects, that is documents which have been brought into existence for use in getting or giving legal advice or for use in litigation.
  ▪ Interrogatories
    • Interrogatories involve serving on another party a list of questions to obtain sworn answers. Such evidence may then be used at the hearing. There are strict rules which apply to the kinds of questions which may be asked in interrogatories. It is possible to object to interrogatories on the grounds that they lack relevance, are vexatious or oppressive or are privileged. A court can order that further answers be supplied. Failure to comply could result in a party's case being struck out.
  ▪ Withdrawal and discontinuance
    • It is possible for a claimant to withdraw and discontinue proceedings at any time before proceedings with the court's approval.
  ▪ Setting Aside Default judgment
    • A default judgement is one which has been entered where a defendant has failed to take an essential step within the courts prescribed time, such as failing to file a defence within 28 days in the District Court. To have default judgement set aside a defendant applies to the court and provides affidavit evidence which sets out the reason for the default and shows that they have an arguable defence. While it is relatively easy to have default
judgement set aside the court will usually order that the defaulting party pay the other side's costs of the motion and the costs thrown away in having default judgement entered.

- **Subpoenas**
  - A subpoena is a court issued document requiring a party to attend the court to produce documents, give evidence or both. A prescribed fee is paid to have the court issue a subpoena and it is also required that conduct money is paid to cover travel and other reasonable expenses which will be incurred in complying with a subpoena. Subpoenas must be served within a reasonable time of the date for compliance and the court rules prescribe specific time limits in some circumstances.

- **Extending the ambit**
  - Under s25

- **Inspection of Property**
  - If one of the parties is resisting access to the property by one of the experts.

- **Question 12:** List and discuss five substantive requirements of a valid and enforceable award
  - Under s29 the award must be
    - 1) In writing
    - 2) Signed
    - 3) Include reasons
  - Also
    - 4) The award must be complete. It must discuss all issues submitted to the tribunal – *Vilani*
    - 5) The reasons must be sufficiently correct in law. Whilst it can include errors in law, if there is a manifest error it will not be enforceable.
  - The award must be certain. It must deal with and conclude on all matters submitted to the tribunal.
  - The award must be clear, decisive and precise. It must be a reasonable decision in that it must give reasons for making the award.
    - 1) The award should set out all facts necessary for a court to make a decision on the question of law.
    - 2) The award must not set out the evidence from which the finding of fact was made as the findings are not open for review.
    - 3) The award should have an explanation as to how the decision was reached
    - 4) If more than one reason supports the conclusion then the reasons must be stated.
    - 5) The award must state if certain arguments of fact were not made out.

- **Question 13:** What is security of costs? When will an arbitrator seek security for their own costs?
  - Security of costs is where one or both of the parties provide some kind of assets as security to pay the costs of the other or the arbitrator in the event that they default.
  - Arbitrator has the power to get security for costs for themselves – s34.
    - Where a Respondent has a reasonable apprehension that the claimant will be unable to pay the Respondent costs if the Respondent is successful. Where the
the claimant is a corporation the court can grant an order that the claimant provide security for costs – *Corporations Act 2001* (Cth) s 1335(1)

- Commercial Arbitration Act 1984 s 47 which allows courts to make interlocutory orders in relation to arbitration proceedings also allows an order for security of costs
- An arbitrator can order security of costs if this has been allowed for by the arbitration agreement. It is unusual that this would be in the agreement. However, many agreements adopt sets of arbitral rules and some of these rules (such as the London Court of International Arbitration) confer on the arbitrator the power to order security of costs.

  - When will an arbitrator seek security for their own costs?
    - All the time. However, particularly where one of the parties appears to be unable or unwilling to pay for the arbitration.
    - An arbitrator will be particularly keen to get security for costs where the party concerned:
      - Has little or no assets in the jurisdiction
      - Is of questionable solvency

**Question 14: Is any and all evidence allowed at an arbitration hearing?**

  - No, not any and all evidence is allowed, but it is still very broad. Subject to natural justice they are not bound by the rules of evidence. An arbitrator may dispense with the rules of evidence and may inform themselves in matters as the arbitrator thinks fit s 19(3)
    - Subject to the arbitration agreement it is possible to give evidence orally, under oath or affirmation. Commercial Arbitration Act 1984 s 19(1) & (2)
    - It is possible that evidence is given by way of an affidavit s 19(2)
    - It is possible to use views and inspections as a source of evidence s 19(3)

  - Without rules of evidence:
    - The rule against hearsay is done away with to allow greater flexibility in the arbitration process. However the arbitrator has an added responsibility to ensure a fair hearing.
      - However, an arbitrator must take a common sense approach to hearsay evidence.
    - Leading questions are fine.
  
  - However, there will be evidence that cannot be allowed because it is precluded either by the rules of natural justice or allowing it is offensive to basic rights of the parties.
  
  - Explain any evidence that an arbitrator should disallow
    - The tribunal can exclude evidence at the request of a party or on its own motion if:
      - The evidence lacks sufficient relevance or materiality;
      - The evidence is privileged
      - The evidence is a “without prejudice” communication
      - There is unreasonable burden to produce the evidence
      - Opinion evidence that isn't given by an expert.
Case Studies

• Case 1: Vilani [2002] WASC 112
  o A building contract (partly written, partly oral) that lacked an annexure (something that provided for the completion dates.
    ▪ Oral evidence was led
    ▪ Alleged that the builder made representations about the date of completion (10 weeks from the start)
      • It induced the contract
    ▪ Written submissions included reference to the oral conversations and what was misleading and deceptive.
      • The award failed to deal with the claims that the oral conversations were misleading and deceptive.
        o Arbitrator didn't have a legal background
  o Does failure to take into account an issue constitute technical misconduct?
    ▪ Well, the Act says you have to give reasons.
      • See s26
      • Failure to do so is technical misconduct
    ▪ You don't have to take into account everything, but you must deal with the substantial issues.
      • Finding out what the terms of the contract were is substantial.
    o Remedy
      ▪ Do you set aside?
        • There is technical misconduct – yes
      ▪ Do you remove the arbitrator or remit?
        • Courts do not like to remove arbitrators.
        • Remit to the arbitrator.

• Case 2: Pindan
  o There was an argument on contract.
    ▪ The arbitrator handed an award down saying it was negligence and also referred to frustration (in the dictionary sense)
      • This was a manifest error of law
  o The dispute was significant in terms of time. Weighing up fairness and convenience it should be remitted to the arbitrator.
    ▪ The judgment set out the applicable tests.
  o Award must be clear, concise, certain, complete and able to be enforced.
  o Failure (by the arbitrator) to comply with a court direction is a grounds for removing an Arbitrator.

• Case 3: Shirley Sloan [2000] WASC 99
  o Arbitrator relied on the Australian Standards to judge the condition of the wood without allowing the parties the opportunity to reply to that.
    ▪ s19 – Breach of Natural Justice

• Case 4: Oldfield [2000] WASCA 255
Case 5: *Miles v Palm-Bridge* [2001] WASC 42 (about Costs)

- Miles engaged an architect as an expert witness. At one stage, Mile's architect expert was making notes, Mr Palm came and smacked him in the face (literally)
- Arbitrator found for the owner for some, the builder for others.
- s34 – unless a contrary intention... the costs of the arbitration is at the discretion of the arbitrator.
  - The starting point is, at common law, that costs go to the successful party.
  - The arbitrator found the builder was entitled to costs.
  - The reason was that the builder had been successful on defending more claims then the owner (even though the award was going to the owner).
- Winner appealed costs on manifest error of law
  - Award remitted, costs went to the winner
  - Where there are separate and distinct issues there may be an argument as to apportionment of costs.
- When it was remitted the arbitrator still got it wrong
  - The builder's wife had died and he couldn't afford to appeal
  - They just walked away

- Costs example (in the context of *Miles*)

- Form of the Award
  - Clearly identify at the start what the award is (e.g. Interim Award, Final Award)