Corrs' Construction Law Update

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INTRODUCTION

Arbitration is increasingly becoming a forum of choice for resolving construction disputes. This trend has been assisted by the enactment of the suite of new commercial arbitration legislation in all States and Territories (with the exception of the ACT)[1] bringing the domestic arbitration law into line with the international model law.

As one of the leading construction law practices in Australia, Corrs' construction team is abreast of all developments in best arbitral practice. In this Construction Law Update, published to coincide with the 10th anniversary of the Asia Pacific Regional Arbitration Group (APRAG), we take the opportunity to share with you some of our recent experiences and recent developments in arbitral law.

OUR THINKING

Corrs regularly publishes thinking pieces which consider issues affecting various sectors of the domestic and global economies. We have included at the end of this Construction Law Update links to some of our recent thinking on issues affecting the development of arbitral practice as well as the construction industry generally.

LESSONS LEARNT

The advantages and disadvantages of fast track arbitration

KEY TAKEAWAYS

Used well, fast track arbitration is an efficient and effective means of resolving construction disputes. However, like all forms of dispute resolution, it gives rise to its own set of unique problems. Experience tells us that if these problems are identified and managed effectively, fast track arbitration can deliver results not capable of being achieved by traditional arbitration or litigation.

Fast track arbitration is not a distinct kind of arbitration. Rather, it is simply a meaner, leaner version of traditional arbitration. In contrast to traditional arbitration, procedures in fast track arbitration are expedited to accelerate the delivery of the award. Usually, this is achieved by limiting the timeframes for procedural steps, narrowing disclosure and confining submissions to writing.

The key benefit of fast track arbitration is that parties are able to resolve their disputes faster and at considerably less expense than traditional arbitration or litigation. In the last decade, the construction industry has witnessed a rapid uptake in the number of fast track arbitrations. Whilst parties are drawn to the promise of cost savings, it is fast track arbitration's ability to resolve disputes in weeks or months that makes it particularly suitable to construction disputes. This is particularly the case in large on-going projects.

This article draws on Corrs' experience of some of the most common problems that arise in fast track arbitration and how they can be managed to ensure success.

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[1] *Commercial Arbitration Act 2012* (WA), *Commercial Arbitration Act 2011* (Vic), *Commercial Arbitration Act 2010* (NSW), *Commercial Arbitration Act 2013* (QLD), *Commercial Arbitration Act 2011* (Tas), *Commercial Arbitration Act 2011* (SA), *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT).

An inability to meet strict time limits

For those familiar with the complexity of construction disputes, the idea of using fast track arbitration may be difficult to digest. Construction disputes are factually and technically complex and often require several rounds of submissions and lengthy examination of lay and expert witnesses in the course of their resolution.

Conversely, fast track arbitration requires each stage of the dispute resolution process be shortened, narrowed or confined. This forces a concentration on material questions and evidence whilst simultaneously reducing the number of briefs, length of witness examination and ultimately the length of the hearing.

These procedural limitations affect the overall fact finding process, the parties' ability to present their cases and the tribunal's ability to deliberate on complex questions that may materially affect the legal and financial positions of the parties. Consequently, a failure to meet strict timeframes or an inability to consider all material issues in the time allowed may severely prejudice a party's position.

Experience tells us that to be successful, parties must 'think sharp' and keep their arguments lean and mean. Parties need to manage their time effectively by focusing on what is important. In a practical sense this means making tactical decisions at each stage of the dispute resolution process to make effective use of limited time.

In a recent fast track arbitration Corrs was involved in, each party was afforded limited hours of hearing time. As a result, decisions had to be made as to the number of witnesses that would be cross examined, the method and length of cross examination, the time available for opening and closing submissions and which issues would take precedence.

These can be difficult decisions. However, they are generally easier to make when the parties, and their lawyers, have a thorough understanding of the case, have committed sufficient time to preparation and have experience in making similar decisions.

An inability to commit the necessary resources

The complex nature of construction disputes means that fast track construction arbitrations generally require a concentrated effort of resources from across the parties' businesses. Often pulling employees from site to give evidence or convening the arbitral panel repeatedly to make decisions on commercial issues can be demanding on the parties.

Experts and lawyers often need to be retained on an almost full-time basis to meet all the demands fast track arbitration requires. This may not be realistic for experts who are in high demand or for legal teams that are under staffed or under resourced. Files and documents have to be compiled rapidly and lawyers need to be familiar with the case, the law and the strategy from the very beginning.

In a recent fast track arbitration Corrs was involved in, our quantum expert was required to produce a reply report overnight in response to a change in position from the other side. In the same case, over 20 Corrs lawyers, and countless support staff, were retained on an almost full-time basis for over a month. Corrs was able to draw on the skills of lawyers from its Brisbane, Melbourne and Sydney offices to ensure the necessary resources were available to achieve a successful outcome. Likewise, we were able to retain some of the best experts in the country.

An inability to effectively manage the fast track arbitration

Fast track arbitration requires that each stage of the dispute resolution process be managed professionally and aggressively. In institutional arbitrations, management is generally left to the administering institution. However, some institutions exercise more active organisation than others, so it is vital for the parties to be involved in the management of the arbitration. Conversely, in ad hoc arbitrations, there is no administering institution and the parties are required to take more active roles.

In certain types of construction projects, it will often be advantageous for one party to stall proceedings if a dispute arises. In such circumstances the management styles of the parties and the arbitrator (or arbitrators) will often determine the success of the arbitration. Good lawyers and arbitrators are able to distinguish between an attempt to delay proceedings for procedural gain and a real need to postpone proceedings so as to not endanger the parties' right to be heard.

In a recent fast track arbitration Corrs was involved in, the parties and arbitrators agreed to be contractually bound to a procedural timetable that would govern the entirety of the arbitration. In circumstances where one party wished to depart from the timetable they had to prove why it was necessary. As the arbitrators were contractually obliged to deliver the award by a certain date, a grant of any extension of time ultimately affected the available time the arbitrators had to deliberate and draft the award. This made it difficult for either party to depart from the agreed timetable.

THE NEW YORK CONVENTION—RECENT DEVELOPMENTS

Failure to comply with pre-arbitration steps—is it a question of jurisdiction?

The purpose of the New York Convention[2] is to facilitate the enforcement of international arbitral awards with minimal interference by the courts of the country in which enforcement is sought. Article V of the New York Convention provides limited grounds for refusing enforcement and does not allow an enforcing court to engage in a merits review of the award.

International arbitration in Australia is governed by the *International Arbitration Act 1974* (Cth). This Act gives force of law in Australia to the New York Convention[3] and the UNCITRAL Model Law[4].

Under section 8 of the *International Arbitration Act 1974*, a foreign award (ie an arbitral award made in a country other than Australia and to which the New York Convention applies) may be enforced in Australia. Grounds for refusing to enforce an award are limited to those set out in Article V of the New York Convention. Further, because of the adoption of the Model Law, an award of a tribunal seated in Australia may only be set aside if one of the matters identified in Article 34 of the Model Law is established. The grounds set out in Article 34 of the Model Law are substantially the same as those set out in Article V of the New York Convention. Therefore, where a court in Australia is considering either the setting aside of an award seated in Australia or enforcement of an award seated elsewhere, the court will not generally review the merits of the decision unless those merits relate to a matter the subject of Article V of the New York Convention or Article 34 of the Model Law. These are very limited.

Relevantly, enforcement may be refused or an award seated in Australia set aside where it is made without jurisdiction (eg the composition of the tribunal is contrary to the arbitration agreement or the law of the seat; the subject matter of the dispute is not capable of resolution by arbitration or the matter has not been properly referred to arbitration). This note deals with the last possibility, ie when a party contends that a matter has not been properly referred to arbitration.

Multi-tiered dispute resolution clauses are commonplace in the modern commercial world, and particularly in construction contracts. They typically require parties to negotiate and/or mediate before resorting to arbitration. In bilateral investment treaties, there is often a requirement that the parties exhaust local remedies before referring a matter to arbitration.

Poorly drafted dispute resolution clauses, such as where the start or finish of pre-arbitration steps are unclear or a step cannot practically be completed because it requires the co-operation of one of the parties,[5] give rise to important difficulties. Is a decision of an arbitral tribunal about whether there has been sufficient compliance with pre-arbitral steps:

(a) a jurisdictional issue, which, while a matter within the arbitral tribunal's power to decide in accordance with Kompetenz-Kompetenz principle, is not capable of final determination by the arbitral tribunal?; or

(b) something else, with the result that any award by the arbitral tribunal is final and binding, so that a court will not conduct a merits review of the award on such an issue?

A recent case from the US Supreme Court arising from a bilateral investment treaty (or 'BIT') may provide guidance.

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2 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.
3 See Schedule 1 to the *International Arbitration Act 1974* (Cth).
4 UNCITRAL Model Law on International Commercial Arbitration. See Schedule 2 to the *International Arbitration Act 1974* (Cth).
5 Eg In *Tang Chung Wah (aka Alan Tang) v Grant Thornton International Limited* [2012] EWHC 3198 (Ch), a CEO of one of the parties was required to facilitate a conciliation process but excused himself from involvement in the proceedings.

On 5 March 2014 the Supreme Court handed down its decision in *BG Group Plc v Republic of Argentina*.[6] The facts and background to the case are these. BG Group invested in a privatised natural gas utility operating in Buenos Aires. At the time of the investment, Argentine law linked gas tariffs to the US dollar. Argentina later amended the law changing (among other things) the calculation basis to pesos.

BG Group commenced arbitration proceedings against Argentina pursuant to an investment treaty between the United Kingdom and Argentina. Article 8, which contains the dispute resolution provision, permits arbitration 'where, after a period of eighteen months has elapsed from the moment when the dispute was submitted to [that] tribunal..., the said tribunal has not given its final decision'. Therefore it requires investors to take a dispute to the host State's courts for eighteen months before going to arbitration.

In 2002 Argentina enacted laws that hindered recourse to its judiciary by firms in BG Group's situation. Accordingly BG initiated arbitration without litigating first in Argentina's courts. The arbitral tribunal decided that Argentina's own conduct had waived or excused BG Group's failure to comply with Article 8.

In Washington D.C., the arbitral tribunal concluded that Argentina had not accorded BG Group 'fair and equitable treatment' as required by Article 2(2) of the BIT and ordered Argentina to pay US$185 million in damages. The award was affirmed but then reversed by the Court of Appeals for the D.C. Circuit. It found that the arbitral tribunal had exceeded its powers in permitting the arbitration to proceed because BG Group had failed to satisfy the local litigation requirement in the BIT.

The question before the Supreme Court was (in the words of Justice Breyer, who delivered the opinion of the Court) 'whether a court of the United States, in reviewing an arbitral award, should interpret and apply the local litigation requirement *de novo*, or with the deference that courts ordinarily owe arbitration decisions.'[7] That is, the court would not conduct a merits review of the decision in relation to compliance with the pre-arbitration steps.

The Court's majority held the matter is for the arbitrators, and courts must review their determinations with deference.

First, the Court construed the BIT as if it were an ordinary contract between private parties and determined that it was the objective intention of the parties that the arbitrators were responsible for interpreting and applying the local litigation requirement. The Court reached this decision with the aid of the following assumptions: courts decide substantive issues of arbitrability while arbitrators decide disputes about the meaning and application of procedural matters. The Court said the provision in question was a procedural condition precedent to arbitration.[8] There was nothing in Article 8 or anywhere else in the BIT to determine otherwise.

Secondly, the Court said the fact that the document is a treaty makes no difference to this finding.

The issue has also been considered by courts in Europe (both in the context of BITs and ordinary contracts between private parties). In a decision of the Cour de Cassation (France), [9] it was held that a decision about an alleged failure to satisfy a pre-arbitration requirement is not a decision related to jurisdiction. The arbitral decision was therefore not subject to independent court review (pursuant to Article 1502 of the Code of Civil Procedure).[10]

It is arguable that common law countries such as Australia would reach a similar result. The approach taken respects the arbitral process and the purpose of the New York Convention by restricting unmeritorious complaints by unsuccessful parties to an arbitration that certain pre-arbitral steps were not complied with.

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6 572 US __ (2014).
7 572 US __ (2014) (slip op, at p 2).
8 The Court rejected the United States' view that the local litigation requirement was 'a condition on the State's consent' (the US Solicitor General appeared as *amicus curiae* representing the US Government). The message here is that express language should be used if a State party wishes submission of a dispute to local courts to be a condition to the consent by the State to arbitration.
9 *Poiré v Tripier,* Cour de Cassation, Chambre mixte, February 14, 2003, Revue de l'Arbitrage 2/2003, 403.
10 *Société Nihon Plast Co v Société Takata-Petri Aktiengesellschaft*, Cour d'Appel de Paris, March 4, 2004, Revue de l'Arbitrage 2005, 143.

A state's failure to provide a sufficient enforcement mechanism under the New York Convention may amount to a breach of a bilateral investment treaty

Article V of the New York Convention provides limited grounds for refusing enforcement and does not allow an enforcing court to engage in a merits review of the award.

However, once a State party ratifies the New York Convention, it should be incorporated into the domestic law of the State and by that act, it becomes part of the State's *lex arbitri*. This means it is possible for the domestic courts of different countries to interpret the provisions of the New York Convention differently. Consequently, a court may refuse enforcement by reference to its interpretation of 'public policy' (in Article V(2)(b)). For example, the Supreme Court of India refused to enforce an award on the ground it was contrary to forum public policy because the arbitrators had misapplied Indian law.[11]

Where a court refuses enforcement—not by reference to any legitimate interpretation of the relevant law—but to frustrate the award and protect the domestic party, it may give rise to a claim under a BIT. This argument is made by extension from the decision of the ICSID tribunal in *Saipem SpA v The People's Republic of Bangladesh*.[12]

Saipem and the Bangladesh Oil Gas and Mineral Corporation (Petrobangla) entered into a contract for the construction of a gas pipeline in Bangladesh. The contract contained an arbitration agreement referring all disputes to ICC arbitration before a 3-member tribunal in Dhaka. Petrobangla issued proceedings in the First Court of the Subordinate Judge of Dhaka seeking to revoke the ICC tribunal's authority on the ground the arbitrators misconducted themselves when rejecting certain procedural requests made by Petrobangla during the hearing. The procedural requests largely related to the admission of documents into evidence.

The Court agreed with Petrobangla and revoked the authority of the ICC tribunal on the ground it had conducted the arbitration improperly by refusing the procedural requests made by Petrobangla. Saipem was also enjoined from proceeding with the arbitration. Nonetheless the tribunal continued and rendered an award in Saipem's favour. However Saipem could not enforce the award in Bangladesh (and Petrobangla had no assets outside Bangladesh).

Saipem filed a request for arbitration with ICSID. The ICSID tribunal held the acts of the Bangladeshi court were attributable to the Republic of Bangladesh and amounted to an expropriation by Bangladesh of Saipem's investment in Bangladesh, in breach of the Italy–Bangladesh BIT.

The tribunal said:

- the property expropriated was Saipem's residual contractual rights under the investment as crystallised in the ICC award.
- the actions of the Bangladeshi court amounted to an indirect expropriation as they were 'measures having similar effects' within Article 5.1(2) of the BIT and Saipem was substantially deprived of the benefit of the ICC award.
- the actions of the Bangladeshi court were 'illegal' as contrary to both the principle of abuse of rights and the New York Convention.

This note is not concerned with the adequacy or accuracy of the reasoning of the ICSID tribunal. Save to say there was no evidence the Bangladeshi court was acting in bad faith and if the court was merely applying the *lex arbitri* (or policy settings reflected in the *lex arbitri*), arguably it was entitled to find as it did.

However, it is submitted that where a claimant can discharge a (significant) onus and establish a court has refused to enforce an award for ulterior illegitimate reasons, the State may be susceptible to a claim under a BIT.

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[11] *Oil & Natural Gas Corporation Ltd v Saw Pipes Ltd* (2003) 5 SCC 705. Subsequently, the Supreme Court of India in *Shri Lai Mahal Ltd v Progetto Grano Spa* (3 July 2013) has limited the expansive *Saw Pipes* interpretation of 'public policy' to domestic awards and said in respect of the enforcement of foreign awards, a narrower interpretation of "public policy" applies (ie not in accordance with domestic notions of public policy).

[12] ICSID Case No. ARB/05/7, Award of 30 June 2009.

RECENT INTERNATIONAL DECISIONS

Cruz City 1 Mauritius Holdings v Unitech Limited [2013] EWCA Civ 1512

KEY TAKEAWAYS

The English courts continue to deliver decisions supporting the enforcement of arbitral awards. In *Mauritius Holdings* the court, as a precondition of an appeal against orders requiring the appellant to disclose all of their assets worldwide, ordered the appellant to pay moneys into court as security against an earlier award.

The facts

Cruz City 1 Mauritius Holdings (**Cruz City**) entered into a joint venture arrangement with Unitech Limited (**Unitech**), Burley Holdings Limited (**Burley**) and Arsanovia Limited (**Arsanovia**) (together **the Appellants**) for the commercial development and management of land in Mumbai. In order to facilitate the parties' investments in the joint venture arrangement, Kerrush Investments Limited (**Kerrush**) was incorporated. Disputes arose out of a shareholders agreement between Cruz City, Arsanovia and Kerrush and a keepwell agreement between Cruz City, Unitech and Burley.

The disputes became the subject of three London-seated arbitrations. Cruz City issued arbitration proceedings against Arsanovia and Burley under the shareholders agreement (**Arbitration 1**) and commenced separate arbitration proceedings against Unitech and Burley under the keepwell agreement (**Arbitration 2**). Arsanovia commenced a third set of arbitration proceedings against Cruz City (**Arbitration 3**).

Cruz City succeeded in all three arbitration proceedings and a partial final award was made in Arbitrations 1 (**Award 1**) and 2 (**Award 2**) and a final award in Arbitration 3 (**Award 3**).

The Appellants challenged Awards 1 & 2 on jurisdictional grounds pursuant to section 67 of the *Arbitration Act 1996* in the English Commercial Court. The Appellants were successful and overturned Award 1, but Award 2 was upheld.

Despite having sufficient funds, the Appellants refused to pay Awards 2 and 3 which together exceeded US$300 million plus costs.

In January 2013, Cruz City obtained orders to enforce Awards 2 and 3 under section 66(1) of the *Arbitration Act*. The Court also allowed service of the enforcement orders on law firm Skadden, Arps, Slate, Meagher & Flom (**Skadden**), who had acted for the Appellants in the arbitrations and subsequent court proceedings.

In May 2013, Field J[13] ordered that the Appellants disclose their assets worldwide and upheld the orders entitling Cruz City to serve the enforcement orders on Skadden.

The Appellants commenced an appeal against the decision of Field J, contending:

1 Field J should not have dismissed the Appellants' application to set aside the orders permitting service on Skadden.

2 The orders for worldwide disclosure of assets should not have been allowed because it required disclosure by officers of the Appellants not subject to the jurisdiction of the Court.[14]

In July 2013, Moore-Bick LJ granted the Appellants permission to appeal and stayed execution of Field J's worldwide disclosure order. In response, Cruz City applied for orders that permission to appeal be conditional on the Appellants

[13] See *Cruz City 1 Mauritius Holdings v Unitech Limited* [2013] EWHC 1323 (Comm).
[14] The Appellants relied upon the decision *Masri v Consolidated Contractors International (UK) Ltd (No. 4)* [2009] UKHL 43; [2010] 1 AC 90.

paying the whole, or a substantial proportion, of Awards 2 and 3, or alternatively payment being guaranteed by an English bank.

The decision on Cruz City's application

In deciding Cruz City's application, Gloster LJ found that the Appellants were likely to take all available steps to avoid payment of the Awards 2 and 3. However, the Court recognised there still had to be 'compelling reason' to impose conditions on the Appellants' right of appeal.[15] Unsurprisingly, the Appellants argued that Cruz City had failed to demonstrate a compelling reason in support of its application.[16]

Gloster LJ concluded that the following factors gave rise to there being a compelling reason:

1 The Appellants were in a position to pay the amount owing without undue disruption to their businesses or concerns about insolvency.

2 The Appellants had thwarted, and would continue to thwart, Cruz City's entitlement to enforcement in a variety of jurisdictions.

3 There was evidence before the Court that the Appellants might attempt to transfer assets to other jurisdictions (where enforcement would prove more difficult).

4 Many of the factors characterised as 'compelling' in other English cases considered by Gloster LJ were present in this case.

5 It was the policy of English Courts that arbitration awards should be satisfied and executed.[17]

6 There was no reason to suppose that the appeal would be stifled if a payment condition was attached to the grant of permission.[18]

Having determined there were compelling reasons for granting Cruz City's application, Gloster LJ determined that it was entirely appropriate to exercise her discretion and to require the Appellants to pay Awards 2 and 3 into Court.[19]

MRI Trading AG v Erdenet Mining Corporation LLC [2013] EWCA Civ 156

KEY TAKEAWAYS

MRI Trading illustrates the importance of including an arbitration clause within an agreement. Even if there is some uncertainty as to a contractual term, an arbitration clause establishes a clear intention that the parties intend to be bound by the contract in the event of any dispute, including any disputes as to the proper construction of the contract.

This case also acts as a reminder to lawyers drafting arbitration agreements to ensure that all key terms are either expressly agreed or there is a clear mechanism for future agreement. A failure to do so may see the court impose unfavourable terms on the parties.

The facts

In 2005, MRI Trading AG (**MRI**), a Swiss trading company, and Erdenet Mining Corporation (**Erdenet**), a Mongolian mining company, entered into a contract for the sale of copper concentrates (**Original Contract**). Disputes arose between the parties concerning performance. The disputes were referred to the London Metal Exchange for arbitration.

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15 See England's CPR 52.9(1)(c) and CPR 59.2(2); *Cruz City 1 Mauritius Holdings v Unitech Limited & Ors* [2013] EWCA Civ 1512 at paragraphs [18], [21].
16 *Cruz City 1 Mauritius Holdings v Unitech Limited* [2013] EWCA Civ 1512 at [23].
17 See Colman J in *The Naftilos* [1995] 1 WLR 299 at 309–310.
18 *Cruz City 1 Mauritius Holdings v Unitech Limited* [2013] EWCA Civ 1512 at [36].
19 *Cruz City 1 Mauritius Holdings v Unitech Limited* [2013] EWCA Civ 1512 at [37]–[40].

In 2009, the parties entered into a settlement agreement which resolved all disputes under the Original Contract and terminated the arbitration (**Settlement Agreement**). By the Settlement Agreement, the parties agreed to enter into new contracts for the sale of the copper concentrates and resolve any future disputes by arbitration, to be conducted under the rules of the London Metal Exchange.

The parties subsequently entered into three separate, new contracts. The first two contracts, which called for performance during 2009, were fully performed. The third contract, which called for performance during 2010 (**2010 Contract**), left a number of matters to be agreed between the parties at a later date, namely a shipping schedule (clause 6.1), a treatment charge (clause 9.1) and a refining charge (clause 9.2).

A dispute arose when the parties could not agree on the unresolved matters. MRI referred the dispute to arbitration claiming damages for breach of contract. The arbitral tribunal concluded that there was no enforceable obligation on Erdenet to deliver the copper concentrate under the 2010 Contract and found that Erdenet's delivery obligation was non existent. Consequently, MRI's claim for breach of contract failed.

MRI appealed the arbitral tribunal's decision to the High Court under section 69 of the *Arbitration Act 1996*.

The High Court's decision

The High Court upheld the appeal and found the 2010 Contract was capable of enforcement against Erdenet. Eder J determined that both the language of the Settlement Agreement and the 2010 Contract plainly showed that the parties intended for the 2010 Contract to be binding.[20] On that basis, Eder J said the arbitral tribunal should have approached the construction of the 2010 Contract in a way which preserved, rather than destroyed, the parties' bargain.[21]

MRI appealed to the Court of Appeal.

The Court of Appeal's decision

In March 2013, Tomlinson LJ, with whom Pill LJ and McCombe LJ agreed, upheld the decision of the High Court and dismissed the appeal.

The Court of Appeal found that the arbitral tribunal had wrongly concluded that the 2010 Contract should be construed without regard to the Settlement Agreement. Tomlinson LJ said the arbitral tribunal had overlooked clause 25 of the Settlement Agreement which expressly stated that the settlement agreement was to be excluded from the effect of the entire agreement provisions. As such, Tomlinson LJ said that the 2010 Contract had to be construed in light of the fact that it was part of the Settlement Agreement.[22] The 2010 Contract was also part of a wider arrangement between the parties (which had already been partly performed for more than a year) and both parties had received some benefit; not only through part performance, but also by entering into the Settlement Agreement.[23]

Tomlinson LJ also found that the language used by parties, in both the Settlement Agreement and 2010 Contract, evidenced beyond any doubt that they did not intend to remain free to agree or disagree about the unresolved matters, so that if an agreement could not be reached, there would no obligation under the 2010 Contract at all.[24] The mandatory language used in clauses 6.1, 9.1 and 9.2 further supported a construction that the parties intended that a failure to agree would not destroy their bargain and that any dispute should be referred to arbitration.[25]

In summary, the Court of Appeal agreed that the 2010 Contract was capable of enforcement against both parties.

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[20] Per Eder J in *MRI Trading AG v Erdenet Mining Corporation LLC* [2012] EWHC 1988 (Comm), as cited in *MRI Trading AG v Erdenet Mining Corporation LLC* [2013] EWCA Civ 156 at [20].
[21] Eder J as cited in *MRI Trading AG v Erdenet Mining Corporation LLC* [2013] EWCA Civ 156 at [22].
[22] *MRI Trading AG v Erdenet Mining Corporation LLC* [2013] EWCA Civ 156 at [14].
[23] *MRI Trading AG v Erdenet Mining Corporation LLC* [2013] EWCA Civ 156 at [18].
[24] *MRI Trading AG v Erdenet Mining Corporation LLC* [2013] EWCA Civ 156 at [19].
[25] *MRI Trading AG v Erdenet Mining Corporation LLC* [2013] EWCA Civ 156 at [21].

International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd [2013] SGCA 55

KEY TAKEAWAYS

The following case considered whether supplementary agreements entered into by the parties, which did not include an arbitration clause, were subject to an earlier agreement between only two of the parties to arbitrate. The Court of Appeal ultimately held that the parties had not agreed to be bound by the arbitration clause in the earlier agreement.

The facts

International Research Corp PLC (**IRC**), a company incorporated in Thailand, was primarily engaged in the business of providing information and communication technology products and services. Lufthansa Systems Asia Pacific Pte Ltd (**Lufthansa**), a company registered in Singapore, was in the business of providing information technology services to companies in the aviation industry.

In early March 2005, Lufthansa entered into a cooperation agreement with Datamat Public Company Ltd (**Datamat**), the second respondent in the proceedings (**Cooperation Agreement**). It was agreed that Lufthansa would supply, deliver and commission a new maintenance, repair and overhaul system. This system was to be a component of an electronic data system (**EDP system**), which Datamat had agreed to provide Thai Airwards under a separate agreement between Thai Airways and Datamat (**EDP System Agreement**).

Datamat subsequently entered into a sale and purchase agreement with IRC to supply and deliver various hardware and software products for the EDP system and provide a bankers guarantee to serve Datamat's obligations to Thai Airways under the EDP System Agreement.

A short time later, Datamat ran into financial difficulties and a compromise was reached between IRC, Lufthansa and Datamat. This was documented in a supplemental agreement (**Supplemental Agreement 1**). Supplemental Agreement 1 was expressly stated to be annexed to, and formed part of, the Cooperation Agreement. In 2006, a further supplemental agreement (**Supplemental Agreement 2**) was entered into between the same parties. Both Supplemental Agreements prescribed that sums due to Lufthansa from Datamat under the Cooperation Agreement would be settled by deducting amounts directly from IRC's bank account.

Clauses 37.2 and 37.3 of the Cooperation Agreement contained a multi-tiered dispute resolution mechanism which ultimately required the parties to refer disputes to arbitration.

During 2008, Lufthansa claimed that it not been paid and terminated the Cooperation Agreement, Supplemental Agreement 1 and Supplemental Agreement 2. In May 2010, Lufthansa referred the dispute to the Singaporean International Arbitration Centre pursuant to clause 37.3 of the Cooperation Agreement.

IRC objected to the jurisdiction of an arbitral tribunal determining the dispute on the following grounds:

1 it was not a party to the arbitration agreement contained in the Cooperation Agreement; and

2 even if it was a party to the arbitration agreement, Lufthansa had not fulfilled the conditions precedent for the commencement of any arbitration.

The arbitration proceedings

The arbitral tribunal dismissed IRC's objection to jurisdiction and held that the Cooperation Agreement and Supplemental Agreements were all 'one composite agreement' between IRC, Lufthansa and Datamat. As such, the dispute resolution mechanism in the Cooperation Agreement also applied to the Supplemental Agreement 1 and Supplemental Agreement 2.

The arbitral tribunal also held that the conditions precedent set out in clause 37.2 of the Cooperation Agreement were too uncertain to be enforceable. For this reason, Lufthansa was free to refer the dispute to arbitration when it did.[26]

IRC appealed the arbitral tribunal's decision to Singapore's High Court pursuant to Article 16(3) of the UNCITRAL Model Law 1985 (**Model Law**) and section 10 of the *International Arbitration Act* seeking orders to set aside the arbitral tribunal's decision on the basis that it did not have jurisdiction to determine the dispute between IRC and Lufthansa. The High Court dismissed the appeal and IRC appealed to Singapore's Court of Appeal.

The Court of Appeal's decision

The Court of Appeal allowed the appeal and ruled that the arbitral tribunal did not have jurisdiction over IRC and its dispute with Lufthansa.

There were three questions before the Court of Appeal for determination:

1 Was IRC bound by the dispute resolution mechanism in clauses 37.2 and 37.3 of the Cooperation Agreement?

2 If IRC was so bound, were the conditions precedent for arbitration contained in clause 37.2 enforceable and, if so, had they been met?

3 Was there a lacuna in section 10 of the *International Arbitrations Act* in that a Singaporean court could not set aside an arbitral tribunal's preliminary ruling on jurisdiction?

The Cooperation Agreement's dispute resolution mechanism was not incorporated into the Supplemental Agreements

The Court of Appeal concluded that IRC was not bound by the dispute resolution mechanism in the Cooperation Agreement when it entered into the Supplemental Agreements.

In reaching this view, Sundaresg Menon CJ considered that the IRC's only substantive obligation under the Supplemental Agreements was to act as a payment agent, or payment conduit for Datamat. The primary contractual obligations under the Cooperation Agreement otherwise remained intact between Datamat and Lufthansa.[27] Even though the Cooperation Agreement had to be read with the Supplemental Agreements to understand IRC's obligations, IRC took no other obligation under the Cooperation Agreement.[28] By agreeing to such an arrangement, IRC could not have been expected to get involved in an arbitration concerning disputes as to whether Lufthansa had performed its obligations under the Cooperation Agreement.[29]

Applying a contextual construction of the Supplemental Agreements (rather than the previously preferred strict rule approach), the Court of Appeal held that the parties had not intended clauses 37.2 and 37.3 of the Cooperation Agreement to be incorporated as part of the Supplemental Agreements. Therefore, the arbitral tribunal did not have jurisdiction over IRC in its dispute with Lufthansa.[30]

In reaching its decision, the Court of Appeal held it was unnecessary to answer the two remaining questions, but did so in any event.

The conditions precedent set out in clause 37.2 were enforceable and had not been met

The Court of Appeal agreed that clause 37.2 set out a mandatory regime which required specified personnel to meet prior to the commencement of any arbitration. These steps were conditions precedent to the commencement of an arbitration.[31]

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26 See *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd* [2013] SGCA 55 at [10].
27 *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd* [2013] SGCA 55 at [38].
28 *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd* [2013] SGCA 55 at [41]–[42].
29 *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd* [2013] SGCA 55 at [48].
30 *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd* [2013] SGCA 55 at [53].
31 *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd* [2013] SGCA 55 at [54].

However, the Court of Appeal reached a different view as to whether the conditions precedent had been met. Sundaresg Menon CJ found that the required personnel had not attended the meetings or negotiations required in order to comply with clause 37.2. Consequently, the arbitral tribunal did not have jurisdiction over IRC in its dispute with Lufthansa.[32]

There was no lacuna in section 10 of the International Arbitration Act

Both parties disagreed with the High Court's obiter comments that there appeared to be a lacuna in section 10 of the *International Arbitration Act* and argued that Article 16(3) of the Model Law empowered the court to 'decide the matter'.

The Court of Appeal agreed. Sundaresg Menon CJ found that an application to the Court to decide jurisdiction of an arbitral tribunal pursuant to section 10 of the *International Arbitration Act*, when read together with Article 16(3) of the Model Law, was a perfectly legitimate means of challenging an arbitral tribunal's preliminary ruling on jurisdiction. Therefore, there was no lacuna in the law.

RECENT COMMONWEALTH DECISIONS

TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia (2013) 87 ALJR 410

KEY TAKEAWAYS

The High Court has provided certainty that Australia's *International Arbitration Act 1974* is constitutionally valid and international arbitral decisions can be enforced within Australia.

The facts

TCL Air Conditioner (Zhongshan) Co Ltd (**TCL**), a company registered in China, entered into a distribution agreement with Castel Electronics Pty Ltd (**Castel**), a company registered in Australia, which granted Castel the exclusive right to sell in Australia air conditioners manufactured by TCL (**Agreement**). The Agreement provided for any disputes to be referred to arbitration in Australia.

In 2008, Castel referred to arbitration in Australia contractual claims against TCL. The arbitral tribunal upheld Castel's claims and required TCL to pay Castel the sum of $3,369,351. A further award was made requiring TCL to pay Castel's costs in the sum of $732,500.

TCL refused to pay and Castel commenced proceedings in the Federal Court of Australia to enforce both awards. TCL opposed enforcement on the ground that the Federal Court lacked jurisdiction, or alternatively, if it did have jurisdiction, the awards should not be enforced because to do so would be contrary to public policy. TCL also commenced separate proceedings in the Federal Court to set aside the arbitral awards on the basis that both awards were contrary to public policy because of an alleged failure by the tribunal to afford TCL natural justice.

The Federal Court's decision

Murphy J held that the Federal Court had jurisdiction under the *International Arbitration Act 1974* to enforce both arbitral awards.[33] His Honour refused to set aside either award and rejected TCL's claim that it had not been afforded natural justice.[34]

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32 *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd* [2013] SGCA 55 at [56]–[63].
33 *Castel Electronics Pty Ltd v TCL Air Conditioners (Zhongshan) Co Ltd* (2012) 201 FCR 209.
34 *Castel Electronics Pty Ltd v TCL Air Conditioners (Zhongshan) Co Ltd (No 2)* [2012] FCA 1214.

TCL then applied to the High Court of Australia for constitutional writs of prohibition and certiorari, challenging the validity of the *International Arbitration Act* on the basis that the jurisdiction conferred on the Federal Court by Article 35 of the Model Law was incompatible with Chapter III of the *Australian Constitution*.

The High Court's decision

TCL argued that, to the extent that section 16(1) of the *International Arbitration Act* gave effect to Articles 5, 8, 34, 35 and 36 of the Model Law (being the basis for the Federal Court's jurisdiction to enforce arbitral awards) it was invalid on two grounds:

1 The jurisdiction conferred under the *International Arbitration Act* requires judges in the Federal Court to act in a manner which substantially impairs the institutional integrity of the Federal Court.

2 The *International Arbitration Act* impermissibly vests the judicial power of the Commonwealth in arbitral tribunals because the enforcement provisions of the *Act* render an arbitral award determinative.[35]

Castel opposed the appeal, which was supported by the Attorneys-General for the Commonwealth, New South Wales, Victoria, South Australia, Queensland and Western Australia. The Australian Centre for International Commercial Arbitration Ltd, the Institute of Arbitrators and Mediators Australia Ltd and the Charted Institute of Arbitrators (Australia) Ltd were also all given leave to appear *amici curiae* and file written submissions in support of the validity of the *International Arbitration Act*.

On 13 March 2013, the High Court unanimously dismissed TCL's application and upheld the constitutional validity of the *International Arbitration Act*. There were two separate sets of reasons.

In a joint judgment, Hayne, Crennan, Kiefel and Bell JJ held:

(a) It is not possible to imply a term into every arbitration agreement that the arbitral tribunal's authority is limited to the correct application of the law.[36]

(b) The determination of a dispute by an arbitral tribunal does not involve the exercise of sovereign power of the State to determine or decide controversies. Once parties have agreed to submit a dispute to arbitration, the parties respective rights and liabilities under an agreement, which gives rise to an arbitration, are replaced by the new obligations that are created by the arbitral award.[37]

(c) The task of the Federal Court is to determine the enforceability of the arbitral award by reference to criteria (which are set out in Articles 5, 34, 35 and 36 of the Model Law).[38]

(d) An arbitral award in a private arbitration does not involve any impermissible delegation of federal judicial power. In giving force of law in Australia to the Model Law, section 16(1) of the *International Arbitration Act* does not contravene Chapter III of the *Australian Constitution*.[39]

In separate joint reasons, French CJ and Gageler J held:

(a) Article 28 of the Model Law (which requires an arbitral tribunal to determine disputes according to the law such rules of law as are chosen by the parties) is directed to the application of the law, not the correctness of its application. His Honours rejected TCL's argument that there is an implied term in every arbitration agreement that the arbitral tribunal is limited to a correct application of law.[40]

(b) The making of an arbitral award is not an exercise of the judicial power of the Commonwealth. The existence and scope of the authority to make an award is founded on the voluntary agreement of the parties who submit to the

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35 *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* (2013) 87 ALJR 410 at 425.
36 *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* (2013) 87 ALJR 410 at [71].
37 *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* (2013) 87 ALJR 410 at [107]–[108]; see also *CFMEU* (2001) 203 CLR 645 at [31].
38 *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* (2013) 87 ALJR 410 at [111].
39 *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* (2013) 87 ALJR 410 at [111].
40 *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* (2013) 87 ALJR 410 at [15]–[17].

arbitration. The exercise of that authority by a tribunal lacks the essential foundation for the existence of judicial power.[41]

(c) The enforcement of an arbitral award by a competent court under Article 35 of the Model Law is an exercise of a judicial power of the Commonwealth. However, except to the extent that there may be a ground for refusing enforcement under Article 36 of the Model Law, an error of law on the part of the tribunal in making the award is irrelevant to the question of legal right or obligation to be determined under Article 35 of the Model Law.[42]

(d) The inability of the Federal Court, as a competent court under Articles 35 and 36 of the Model Law, to refuse to enforce an arbitral award on the ground of error of law does nothing to undermine the institutional integrity of the Federal Court. Enforcement of an arbitral award is enforcement of a binding result to submit the dispute to arbitration; not enforcement of any disputed right submitted to arbitration.[43]

The High Court's decision is significant, not only in terms of the enforceability of an international arbitral award within Australia but in a commercial context. The decision reinforces the validity of the *International Arbitration Act* and maintains Australia's attractiveness to parties wanting to nominate Australia as a seat for arbitration disputes.

Amcor Packaging (Australia) Pty Ltd v Baulderstone Pty Ltd [2013] FCA 253

KEY TAKEAWAYS

The Courts continue to interpret arbitration clauses widely. Parties should take particular care when drafting an arbitration clause if it is not intended for all disputes to be referred to arbitration. In this case, Corrs acted for Amcor Packaging (Australia) Pty Ltd.

The facts

Between 2007 and 2010 Amcor Packaging Australia (Australia) Pty Ltd (**Amcor**), a manufacturer and distributor in the paper industry, entered into negotiations with Baulderstone Pty Ltd (**Baulderstone**), a building and construction company, for the design and construction of a building to house a large paper machine, and for the installation of the paper machine at an Amcor Site in New South Wales. The project became known as the 'B9 Project'.

In March 2008, as part of Baulderstone's tender proposal, Baulderstone's general managers for Victoria and New South Wales, advised Amcor that they believed a Guaranteed Maximum Price (**GMP**) was the most suitable form of contract for the B9 Project. In September 2008, Amcor informed Baulderstone that it was the successful tenderer to undertake 'stage 1' of the B9 Project. The parties entered into a Project Delivery Proposal Agreement (**PDPA**).

Drafts of the GMP design and construct contract were exchanged in early 2010. Despite there being no final agreement in place, Baulderstone performed the stage 1 works on the B9 Project.

On 6 May 2010, Amcor and Baulderstone agreed on a GMP of around $202 million. However, instead of executing a final agreement, a letter of intent was signed clarifying all major issues, including price. The letter of intent required the parties to cooperate in good faith and use reasonable endeavours to negotiate and execute the final design and construct contract.

In July 2010, Baulderstone advised Amcor that its parent company had withdrawn its approval of a GMP for the B9 Project. As a consequence, Amcor claimed significant loss and damage and commenced proceedings in the Federal Court for preliminary discovery from Baulderstone.

Baulderstone sought to have the proceedings stayed pursuant to section 8 of the *Commercial Arbitration Act 2011* (Vic) (**CAA Vic**) and section 23 of the *Federal Court of Australia Act 1976* (Cth).

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41 *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* (2013) 87 ALJR 410 at [28]–[31].
42 *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* (2013) 87 ALJR 410 at [32]–[33].
43 *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* (2013) 87 ALJR 410 at [34], [39].

The two issues before the Federal Court were whether:

1 the Federal Court was required to stay the proposed proceedings under section 8 of the CAA Vic; and

2 the Federal Court could determine Amcor's interlocutory application for preliminary discovery.

The decision

Marshall J agreed the Court was required to stay the proceedings, including Amcor's interlocutory application for preliminary discovery.

The first question Marshall J considered was whether there was an arbitration agreement between the parties. Baulderstone argued that clause 31 of the PDPA evidenced an arbitration agreement. Amcor argued that its loss did not arise out of the PDPA, but arose from the proposed GMP contract which had never come into existence (and for which there was no arbitration agreement).

Clause 31.1 of the PDPA stated:

> *A Party must not start court proceedings (except proceedings seeking interlocutory relief) or any other available form of dispute resolution in respect of a Dispute unless it has complied with this Clause 31.*

'Dispute' was defined, relevantly, to mean 'a dispute arising out of or in connection with this Agreement'.

Marshall J found that the words 'in connection with' meant that the dispute resolution clause set out in clause 31 was intended to have wide application so that any matter which related to the PDPA would be subject to arbitration under clause 31.[44] Marshall J also agreed with the proposition that the words 'in connection with' in the context of a 'dispute' should 'exclude only claims unrelated to the commercial transaction covered by the contract.'[45] Marshall J held the GMP contract was in connection with the matters the subject of the PDPA.

In reading clause 31 of the PDPA as a whole, Marshall J determined that reference to 'interlocutory' in clause 31.1 did not contemplate any type of interlocutory relief. Instead, it only contemplated the kind of relief mentioned in clause 31.11. On that basis, his Honour found that, notwithstanding the existence of an arbitration agreement, there may be circumstances where urgent relief is required from the Court. However, in the ordinary course of events, non-urgent interlocutory applications, such as Amcor's application for preliminary discovery, did not require urgent intervention and could be appropriately addressed in the arbitration.[46]

RECENT WESTERN AUSTRALIAN DECISIONS

Pipeline Services WA Pty td v ATCO Gas Australia Pty Ltd [2014] WASC 10

KEY TAKEAWAYS

With the introduction of the new *Commercial Arbitration Act 2012* (WA), the Western Australian Supreme Court has confirmed that it will continue to adopt a broad, liberal and flexible approach to construing arbitration clauses in an agreement. In this case Corrs acted for ATCO.

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44 *Amcor Packaging (Australia) Pty Ltd v Baulderstone Pty Ltd* [2013] FCA 253 at [29].

45 *Amcor Packaging (Australia) Pty Ltd v Baulderstone Pty Ltd* [2013] FCA 253 at [32] citing *Dowell Australia Ltd v Trident Contractors Pty Ltd* [1982] 1 NSWLR 508 at 515 as applied by Refshauge J in *Lightsource Technologies Australia Pty Ltd v Pointsec Mobile Technologies AB* [2011] ACTSC 59 at [132].

46 *Amcor Packaging (Australia) Pty Ltd v Baulderstone Pty Ltd* [2013] FCA 253 at [41].

The facts

During 2012 ATCO Gas Australia Pty Ltd (**ATCO**) sought to extend the underground gas pipeline network in an area near Yanchep in Western Australia. ATCO invited tenders for the installation, including any necessary underground excavation work. ATCO accepted Pipeline Services WA Pty Ltd's (**Pipeline**) tender for the work and the parties entered into a written agreement (**Agreement**).

Clause 25 of the Agreement set out the dispute resolution mechanism to be followed in the event of any dispute under the Agreement. Relevantly, clause 25.4(a) provided:

> *If the dispute is still to be resolved within two weeks of having been referred to the Chief Executive Officers then either party may by notice to the other party refer the dispute to arbitration in accordance with the provisions of the Commercial Arbitration Act 1985 (WA)..., and for the purposes of the Commercial Arbitration Act, the parties agree that this Agreement is an arbitration agreement...*

Shortly after Pipeline commenced work, it was informed that unexploded ordnance had been found in the area in which the pipeline was to be installed. Following discussions with ATCO, Pipeline was informed that the Agreement would be terminated and ATCO would call for new tenders.

Pipeline submitted a tender in respect of the revised scope of work and continued to carry out the balance of the work in accordance with the Agreement. It was then told that its tender had not been successful. At this time the parties agreed the Agreement had been terminated. However, the parties were unable to agree to Pipelines entitlement to be paid for the work performed prior to the termination.

Pipeline commenced proceedings in the Supreme Court. ATCO entered a conditional appearance and applied to the Court for the following orders:

1 the proceedings be stayed pending compliance with the dispute resolution procedure in clause 25 of the Agreement; and

2 pursuant to section 53 of the *Commercial Arbitration Act 1985* (WA) (**1985 CAA**) the proceedings be stayed until completion of any arbitration of any outstanding disputes not able to be resolved by the negotiation mandated in clause 25 of the Agreement.

The application came on for hearing before Martin CJ on 14 August 2013. Unbeknownst to the parties and the Court, on 7 August 2013 the *Commercial Arbitration Act 2012* (WA) (**2012 CAA**) had come into force.

Accordingly, ATCO's application gave rise to the following issues for determination:

1 should ATCO's application for a stay of proceedings be dismissed because it had not been made under the 2012 CAA.

2 did section 8 of the 2012 CAA apply, and in particular:

- (a) did the arbitration agreement in clause 25 survive termination of the Agreement for the performance of the works;
- (b) was clause 25 void for uncertainty;
- (c) had ATCO waived its entitlement to insist upon compliance with clause 25;
- (d) was the dispute between the parties capable of being resolved by arbitration; and
- (e) was ATCO precluded from requesting a referral under section 8 because of it has submitted a statement on the substance of the dispute before requesting such a referral?

The decision

Martin CJ granted ATCO's application to stay the proceedings and referred the matter to arbitration. In doing so, his Honour considered each issue separately.

Should ATCO's application be dismissed because it was not made under the 2012 CAA?

Pipeline argued that because ATCO had commenced its application in June 2013, when the 1985 CAA applied, its application should be dismissed; requiring ATCO to make a fresh application under the 2012 CAA.

Martin CJ rejected Pipeline's argument for two reasons:

1 Pipeline's contention ignored that part of ATCO's application which had sought the Court to exercise its inherent jurisdiction; and

2 Pipeline's contention was directly contrary to the overarching objectives of the rules of the Court and the paramount object of the 2012 CAA.[47]

Did section 8 of the 2012 CAA apply?

In finding that, contrary to Pipeline's submissions, section 8 of the 2012 CCA did apply, his Honour held:

1 notwithstanding that clause 25 of the Agreement did not expressly state that it survived termination of the Agreement, a broad, liberal and flexible approach to its construction was to be preferred;[48]

2 there was no uncertainty or lack of clarity in clause 25 or in its operation;[49]

3 Pipeline's contention that ATCO's conduct in failing to invoke clause 25 in the face of Pipeline's threat to commence proceedings was a deliberate decision and was not supported by the facts of the case;[50]

4 clause 25 employed language of wide import to describe the disputes falling within its terms; subsequently capturing the subject matter of the proceedings before the Court;[51]

5 Pipeline's contention that its claim against ATCO fell within one of the categories,[52] meaning that it could not be the subject of arbitration, smacked of 'desperation';[53] and

6 Pipeline's argument that ATCO had submitted its first statement on the substance of the dispute to the Court (by filing an affidavit in support of its application to stay the proceedings), making it too late for ATCO to request that the matter be referred to arbitration, was also redolent of desperation.[54]

Should there be a stay of proceedings prior to any reference to arbitration pursuant to section 8 of the 2012 CAA

Martin CJ found that compliance with clause 25 of the Agreement was a mandatory prerequisite to the commencement of legal proceedings.[55] Further, and in circumstances where his Honour had found that the matter fell within the scope of section 8 of the 2012 CAA, the Court had no choice but to refer the matter to arbitration.

Final comments

As an aside, his Honour commented that an interesting question might have arisen as to whether a stay could have been granted without ordering a reference to arbitration, having regard to the terms of section 5 and section 8 of the 2012 CAA. His Honour noted that section 8 of the 2012 CAA was silent on the question whether a reference to arbitration could or should be accompanied by a stay of proceedings. He opined that section 5 might suggest that the Court lacked the power to order a stay without referring the dispute to arbitration because such a power would be inconsistent with the paramount objective of the 2012 CAA, which was to facilitate the fair and final resolution of

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47 *Pipeline Services WA Pty Ltd v Atco Gas Australia Pty Ltd* [2014] WASC 10 at [34]–[39].
48 *Pipeline Services WA Pty Ltd v Atco Gas Australia Pty Ltd* [2014] WASC 10 at [41]–[53].
49 *Pipeline Services WA Pty Ltd v Atco Gas Australia Pty Ltd* [2014] WASC 10 at [54]–[67].
50 *Pipeline Services WA Pty Ltd v Atco Gas Australia Pty Ltd* [2014] WASC 10 at [71].
51 *Pipeline Services WA Pty Ltd v Atco Gas Australia Pty Ltd* [2014] WASC 10 at [79], [81].
52 The categories being matters which involve public rights, interests of third parties, which are the subjects of the uniquely governmental authority: see *Pipeline Services WA Pty Ltd v Atco Gas Australia Pty Ltd* [2014] WASC 10 at [80].
53 *Pipeline Services WA Pty Ltd v Atco Gas Australia Pty Ltd* [2014] WASC 10 at [81].
54 *Pipeline Services WA Pty Ltd v Atco Gas Australia Pty Ltd* [2014] WASC 10 at [84]–[87].
55 *Pipeline Services WA Pty Ltd v Atco Gas Australia Pty Ltd* [2014] WASC 10 at [89].

commercial disputes by an impartial arbitral tribunal. However, because neither party had adopted this position, the question did not arise for his determination.[56]

Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd (2013) 298 ALR 666

KEY TAKEAWAYS

This case considered a number of issues with respect to exercise of the Court's powers when the parties had previously agreed that any dispute be referred to international arbitration. The Court affirmed that if the requirements of section 7 of the *International Arbitration Act 1974* (Cth) are satisfied, and the arbitration agreement is not null and void, a stay of proceedings will be granted under section 7(2). In this case Corrs acted for MCC WA, MCC Sanjin and their parent company MCC Corporation.

The facts

In June 2008, Cape Lambert Resources Ltd and Mt Anketell Pty Ltd (**Cape Lambert parties**) agreed to sell certain mining tenements and related assets to MCC Mining (Western Australia) Pty Ltd (**MCC WA**). The parties entered into an asset sale agreement with the purchase price of $390 million to be paid in three tranches (**asset sale agreement**). The first two tranches were paid but the third tranche of $80 million was not paid.

Clause 16.2 of the asset sale agreement set out the governing law (Western Australia) and the mandatory dispute resolution procedures to be followed in the event of a dispute.

In December 2009, the parties to the asset sale agreement agreed to amend the agreement to novate MCC Australia Sanjin Mining Pty Ltd (**MCC Sanjin**) for MCC WA (**novation agreement**). Under the novation agreement, MCC Sanjin was required to perform all of MCC WA's obligations under the asset sale agreement.

Also in December 2009, Metallurgical Corporation of China Ltd (**MCC**), the parent company of MCC WA and MCC Sanjin, agreed to guarantee the payment of the third tranche of the purchase price under clause 3.5 of the asset sale agreement (**guarantee agreement**).

One of the central issues to arise before the Western Australia Court of Appeal was the effect of clause 3.5(b) of the guarantee agreement, which said:

> *If there is any dispute between the parties to this document regarding whether an amount if payable that amount will be paid into an escrow account organised by a solicitor that is independent from the parties (on such reasonable escrow terms as the parties may agree in good faith) and must be released as soon as practicable in accordance with the outcome or decision of the mediation or arbitration (as the case may be).*

Although not in identical terms to the asset sale agreement, the guarantee agreement also set out a mandatory regime for the resolution of any disputes under the guarantee agreement.

A dispute arose between the parties when the Cape Lambert parties asserted that MCC WA and MCC Sanjin, in breach of the asset sale agreement, had failed to act in good faith and use all reasonable endeavours to do all things necessary to procure the grant of approvals required to allow mining to take place on the tenements (the subject of the asset sale agreement) by 11 June 2010. The Cape Lambert parties argued that as a consequence, MCC Sanjin was liable to pay the $80 million within 7 days without the right counterclaim or set off. The Cape Lambert parties made demand for payment of the $80 million of MCC pursuant to the guarantee agreement.

The Cape Lambert parties commenced proceedings in the Supreme Court of Western Australia. As against MCC Sanjin and MCC WA, the Cape Lambert parties sought declaratory relief, together with judgment in the amount of $80 million plus interest.

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[56] *Pipeline Services WA Pty Ltd v Atco Gas Australia Pty Ltd* [2014] WASC 10 at [93]–[94].

At around the same time as instituting these proceedings, the dispute resolution procedures, specified in both the asset sale agreement and guarantee agreement, were invoked.

MCC Sanjin subsequently sought a stay of the proceedings on the grounds that both the asset sale agreement and guarantee agreement contained arbitration agreements and those agreements governed the disputes the subject of the legal proceedings.

In response to MCC Sanjin's stay application, the Cape Lambert parties applied for an interlocutory injunction requiring MCC to pay $80 million into an escrow account as a condition of any stay of the legal proceedings.

The matter came before Corboy J at first instance before being appealed to the Supreme Court of Western Australia Court of Appeal.

The decision at first instance

At the time the matter was heard by Corboy J, the parties informed the Court that they intended to mediate the dispute. During the course of the proceedings the mediation occurred but failed to resolve the dispute. Consequently, Corboy J referred the question of whether MCC should pay the $80 million into an escrow account pursuant to clause 3(b) of the guarantee agreement to an arbitrator as a preliminary issue and directed the parties to arbitration.[57]

The Cape Lambert parties appealed Corboy J's decision to the Court of Appeal.

The Court of Appeal decision

The Cape Lambert initially argued three grounds of appeal. During the course of the hearing, the Cape Lambert parties argued an additional fourth ground of appeal.

The first two grounds of appeal were closely related, advancing the proposition that the right to be protected by the making of the interim order was the right to have funds transferred into escrow pending resolution of the dispute by either mediation or arbitration. As a result, the fact that the mediation had concluded did not materially affect whether an interim order pending arbitration could be made.[58]

The third ground asserted that Corboy J erred in the exercise of the discretion conferred by section 7(3) of the *International Arbitration Act 1974*. The Cape Lambert parties said that his Honour had failed to take into consideration the power conferred by that section which should have been exercised by making an order that MCC pay $80 million into an escrow account.[59]

The fourth ground argued that the escrow dispute was itself a dispute falling within the scope of the dispute resolution procedure set out in the guarantee agreement.[60]

The Court of Appeal (consisting of Martin CJ, McClure P and Buss JA) unanimously dismissed the appeal. Martin CJ wrote the lead judgment.

In reaching its decision, the Court of Appeal determined the fourth ground of appeal before considering the other three grounds. Martin CJ formed the view that if the Cape Lambert parties failed on fourth ground of appeal they would unlikely succeed on the other three grounds of appeal because an order requiring MCC to pay funds into the escrow account would effectively resolve the escrow dispute.

Ground 4

Ground 4 concerned the proper construction of the guarantee agreement (particularly clauses 3(b) and 9.9). In construing the guarantee agreement, Martin CJ held it accorded with both Australian law and the law of international commerce to adopt an expansive approach to the construction of arbitration clauses.[61]

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57 *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd* (2013) 298 ALR 666 at [29]–[30].
58 *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd* (2013) 298 ALR 666 at [33].
59 *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd* (2013) 298 ALR 666 at [33].
60 *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd* (2013) 298 ALR 666 at [34].
61 *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd* (2013) 298 ALR 666 at [56]–[63].

The Cape Lambert parties argued that:

1 the demand for $80 million, due and payable by MCC Sanjin under the asset sale agreement, was made in accordance with that agreement;

2 the demand for payment had been made on MCC in accordance with the guarantee agreement, with the result that MCC was obliged to pay the guaranteed amount within 24 hours of its demand; and

3 in the event of any dispute between MCC and the Cape Lambert parties as to whether the amount was payable under the guarantee agreement, MCC was still required to pay the disputed amount into an escrow account in accordance with clause 3(b).[62]

In its responsive submissions, MCC drew attention to clause 3(a) of the guarantee agreement requiring the Cape Lambert parties to serve a demand supported by evidence substantiating the amount of the guaranteed obligation before the obligation to pay arose under the guarantee agreement. MCC contended that the evidence substantiating the amount of the guaranteed obligation owed could only be provided after the dispute resolution procedure in the asset sale agreement had been complied with. MCC contended that the required evidence could only be the arbitrator's award resolving the dispute.[63]

Martin CJ accepted MCC's submission that there was an arguable, genuine dispute between parties as to whether MCC was required to pay the $80 million into the escrow account. His Honour said the question to be answered was whether the escrow dispute was a dispute which fell within the dispute resolution procedure in the guarantee agreement.

Both parties provided substantive submissions on how the dispute resolution procedure in the guarantee agreement ought to be interpreted.[64] Martin CJ largely accepted the arguments of MCC and dismissed ground 4 of the appeal for the following reasons:

1 the agreement to refer disputes to arbitration should be a given a broad and liberal construction, and that parties to commercial agreements are unlikely to have intended that different disputes be resolved in different tribunals or fora;[65]

2 the fundamental obstacle faced by ground 4 was that the construction it would place upon the guarantee agreement was fundamentally inconsistent with the plain and ordinary meaning of the dispute resolution procedure, which required any dispute arising out of, or in connection with the guarantee agreement to be resolved by the procedure in that clause;[66] and

3 the escrow dispute was a dispute within the meaning of the language used in the dispute resolution procedure clause in the guarantee agreement.[67]

Martin CJ then dealt with the Cape Lambert parties' three remaining grounds of appeal. His Honour confirmed that Corboy J had been correct to conclude that the escrow dispute was subject to the mandatory dispute resolution procedure set out in the guarantee agreement. On that basis, the Court was constrained by section 7 of the *International Arbitration Act* and had to give effect to the agreement between the parties. To not do so would have been entirely inconsistent with the Court's obligations under section 7 and the objects of the *International Arbitration Act*.

Martin CJ also concluded that the orders sought by the Cape Lambert parties were outside the scope of the powers conferred by section 7(3) of the *International Arbitration Act*.[68] The Court (by Martin CJ and Buss JA) held that the orders made by the Corboy J at first instance had the character of facilitative machinery orders that did not usurp or subvert the powers of the arbitrator in the resolution of the dispute.

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62 *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd* (2013) 298 ALR 666 at [65].
63 *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd* (2013) 298 ALR 666 at [66].
64 *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd* (2013) 298 ALR 666 at [74]–[78].
65 *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd* (2013) 298 ALR 666 at [78].
66 *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd* (2013) 298 ALR 666 at [79].
67 *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd* (2013) 298 ALR 666 at [79]–[81], [115].
68 *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd* (2013) 298 ALR 666 at [82], [89].

The Court affirmed that it had a limited role to play when parties agree to resolve their disputes by international commercial arbitration and upheld MCC's notice of contention that the Cape Lambert parties went beyond the scope of the orders authorised by section 7 of the *International Arbitration Act*, having regard to the circumstances in which the orders were sought.[69]

D & Z Constructions Pty Ltd v IHI Corporation [2013] WASC 265

KEY TAKEAWAYS

While this case was delivered under the now repealed *Commercial Arbitration Act 1985* (WA), it provides a useful summary of some of the general principles the Court will consider in deciding an application for leave to appeal from the award of an arbitrator (under the then Act). Time will tell whether the same general principles will be adopted under the new Act.

The facts

A dispute arose between D & Z Constructions Pty Ltd (**D&Z**) and IHI Corporation (**IHI**) in connection with the Bluewaters Power Station near Collie in Western Australia. IHI was the EPC contractor.

During 2006, IHI requested tenders for the civil works. In early 2007, IHI entered into a cost reimbursable contract with D&Z. During the performance of the contract, the scope of work was varied to include civil works for a second power station unit. D&Z completed the works in late 2008.

D&Z commenced arbitration proceedings to recover unpaid moneys under the contract and an unpaid bonus. IHI counterclaimed for monies it said it had paid D&Z in excess of the amount due under the contract, plus damages for defective works.

The arbitrator issued an interim award. He held that:

1 He was unable to rely on the figures claimed by D&Z as reflecting costs properly payable under the contract. The systems used by D&Z to capture its costs were unreliable because D&Z inappropriately claimed increased costs without basis in an apparent strategy to maximise cost recovery.[70]

2 Because he was not able to properly ascertain the amount due to D&Z under the contract, it followed that he was not in a position to set off any amounts which might be due to IHI by way of damages. On that basis, he found that D&Z had breached its obligations to monitor and report on its actual costs compared to the estimated contract price as varied. Further, after April 2008, D&Z failed to take reasonable steps to minimise its actual costs. He accepted that any amount paid by IHI over and above the amounts properly due to D&Z could be recoverable as damages for those breaches. However, after evaluating the evidence, the reasonable value of the work performed by D&Z under the contract was less than the amount actually paid by IHI. Accordingly, he was not satisfied that IHI had established an entitlement to damages for breach of contract, and its counterclaim was dismissed.[71]

D&Z applied for leave to appeal the arbitrator's decision to the Supreme Court of Western Australia.

The decision

In dismissing D&Z's application, Martin CJ summarised some of the general principles governing appeals from arbitrator's awards under the *Commercial Arbitration Act 1985* (WA) (**Act**) as follows (citations omitted):[72]

> *1 An appeal lies on a question of law 'arising out of an award'.*
>
> *2 The subject matter of any appeal is confined to questions of law.*

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69 *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd* (2013) 298 ALR 666 at [102].
70 *D & Z Constructions Pty Ltd v IHI Corporation* [2013] WASC 265 at [42]–[43].
71 *D & Z Constructions Pty Ltd v IHI Corporation* [2013] WASC 265 at [46]–[47].
72 *D & Z Constructions Pty Ltd v IHI Corporation* [2013] WASC 265 at [2].

3 *The scheme of the Act is to hold parties to their agreement to accept factual findings made by arbitrators.*

4 *In the absence of the consent of all parties to the arbitration agreement, an appeal can only be brought with the leave of the court.*

5 *Leave cannot be granted unless the court considers that the determination of the question of law concerned could substantially affect the rights of at least one of the parties to the arbitration agreement, and either:*

(a) *there is a manifest error of law on the face of the award; or*

(b) *there is 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.*

6 *The requirement that the error of law must be manifest on the face of the award means that it must be apparent to that understanding by a reader of the award.*

7 *The requirement that the error be manifest on the face of the award does not import a requirement that the error of law have a particular quality or character, so as to include only facile errors, and exclude complex errors.*

8 *Even if the statutory requirements for the grant of leave are satisfied, the court retains a residual discretion to refuse leave. That discretion will be exercised having regard to the rival merits of assured finality on the one hand and upon the other the resolution of doubts as to the accuracy of the legal reasoning followed by the arbitrator. Other matters to be taken into account when deciding whether leave should be granted (assuming the statutory requirements are satisfied) include the character or quality of the error of law, whether the rights of the parties will be substantially affected by the determination of the question of law, and all the circumstances of the case.*

Applying these general principles, Martin CJ determined that D&Z had not established any error of law on the part of the arbitrator which might substantially affect the rights of one of the parties to the arbitration agreement.

RECENT QUEENSLAND DECISIONS

Parsons Brinckerhoff Australia Pty Ltd v Thiess Pty Ltd [2013] QSC 75

KEY TAKEAWAYS

Multi-tiered dispute resolution clauses can be difficult and complex to apply, especially when subjective criteria are employed to trigger each process. This case serves as a reminder that thresholds such as 'best endeavours' are plagued with uncertainty and can lead to unnecessary delays. Lawyers drafting multi-tiered dispute resolution clauses should consider objective triggers for each process to ensure that such clauses achieve the intended expediency in resolving disputes and where desired, achieve expedient progression to arbitration.

The facts

Thiess Pty Ltd (**Thiess**) entered into a Collaborative Consultancy Agreement (**CCA**) with Parsons Brinckerhoff Australia Pty Ltd (**PB**) to carry out specified works in relation to the Airport Link Project. Under the CCA, a leadership team comprising representatives from Thiess and PB known as the CLT was constituted to provide guidance on the performance of the agreed works.

Clause 21.1 of the CCA set out a procedure for dispute resolution between the parties. It was a mandatory, multi-tiered dispute resolution clause comprising the following procedures:

(a) the parties must use their **best endeavours** to settle disagreements in good faith in a manner consistent with the Collaborative Agreement Charter;

(b) if the disagreement remained unresolved, one party may give written notice to the other within 14 days of the initial disagreement to refer the dispute to the CLT;

(c) the CLT must consider the disagreement referred to it and give due consideration to submissions by both parties;

(d) the CLT must use its best endeavours to reach a decision within 30 days of being notified of the disagreement. If the decision is unanimous, that decision becomes binding and final on the parties;

(e) if the CLT is unable to reach a unanimous decision, it must explore and, if possible, agree on the methods of resolving the dispute by other means; and

(f) if the disagreement still remains unresolved, one party may by written notice refer the disagreement to arbitration or litigation.

Thiess and PB had previously referred disputes to the CLT, which resulted in unsuccessful mediation and litigation. There was also an ongoing claim by Thiess that PB engaged in misleading and deceptive conduct before entering into the CCA.

The dispute in this case concerned whether Thiess, in referring the dispute to arbitration, had acted honestly and reasonably and in good faith to resolve the dispute.[73] The question arose in circumstances where Thiess had said during the course of the mandated negotiation period that it saw little point in complying with the CAA's dispute resolution process without the participation of PB's insurers.

The decision

The Queensland Supreme Court held that, given the background of prior disputes and unsuccessful mediation between the parties, Thiess had not acted unreasonably or contrary to its obligation to use best endeavours. Boddice J held that Thiess' position in referring the dispute to arbitration that there was 'no more work for clause 21 to do' was to be viewed in the context of the impasse between the parties. Thiess did not have to agree with PB's position. Given the history of dealing between the parties, Thiess' refusal could not be said to amount to a failure to use its best endeavours to resolve the disagreement.

If nothing else, this case highlights the difficulty is assessing the obligation arising from the duty to use 'best endeavours', which should be read with the recent High Court decision in *Electricity Generation Corporation (trading as Verve Energy) v Woodside Energy Ltd*, in which the High Court accepted that 'best endeavours' and 'reasonable endeavours' impose 'substantially similar obligations'.[74]

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[73] *Parsons Brinckerhoff Australia Pty Ltd v Thiess Pty Ltd* [2013] QSC 75 at [27].
[74] (2014) 88 ALJR 447 at 456 [40].

RECENT NEW SOUTH WALES DECISIONS

Thaler v Amzalak [No 2] [2013] NSWSC 632 and *Thaler v Amzalak [No 3]* [2013] NSWSC 1315

KEY TAKEAWAYS

The New South Wales Supreme Court accepted that the court of a different legal system could also be an arbitral tribunal. The fact that the arbitration was conducted in a foreign language, Hebrew, did not affect the enforceability of the arbitral award in New South Wales. However, the court held it was improper for the arbitrators to confer among themselves in Yiddish in the presence of the parties when only one of the parties understood Yiddish.

The facts

Mr Thaler and Mr Amzalek had a dispute about the off-market sale of 685,000 shares in a company, Tiaro Coal Limited. In essence, Mr Thaler (who lived in Jerusalem) contended that his Australian representative reached agreement for the purchase of the shares. Mr Amzalek contended that there was no such agreement. The parties agreed to submit their dispute to a Beth Din. Both parties accepted this was an arbitration agreement.

Mr Thaler prevailed before the Beth Din and Mr Amzalek was ordered to pay him $318,000. The Beth Din's decision was brief: only six paragraphs. Mr Amzalek disputed the decision and attempted to have the Beth Din reconsider it. That attempt failed. Mr Amzalek refused to comply with the decision and the Beth Din subsequently issued a 'siruv', a form of contempt of court order, 'a serious sanction under Jewish law'.

Mr Thaler sought to enforce the Beth Din's decision as an arbitral award. He applied to the New South Wales Supreme Court for leave to enforce the judgment under the 'old' *Commercial Arbitration Act 1984* (NSW).

Inadequate reasons for decision

Schmidt J concluded that Ben Din's reasons did not comply with the requirement to state the reasons for making the award. Schmidt J accepted the reasons for an arbitral award are not to be judged according to the standard for judicial decisions, but that the reasons given by the Beth Din fell well short of the required standard. (So short, in fact, that Mr Thaler had indemnity costs awarded against him, as Schmidt J held 'Mr Thaler should have known that realistically, he had no prospects of success in … enforcing the Beth Din's award'.) Schmidt J also held that the requirement to give reasons cannot be satisfied by comments made during an arbitration.

Misconduct during the arbitration

The brevity of the reasons—in particular their failure to mention Mr Amzalek's defence—also satisfied Schmidt J that the arbitration was subject to misconduct.

Schmidt J identified a number of instances that where Mr Amzalek had been denied natural justice. Schmidt J also concluded that the arbitral tribunal (of three rabbis) was not impartial. (Indeed, Schmidt J concluded that the evidence of one of the rabbis 'had to be approached with some caution').

Ringwood Agricultural Co Pty Ltd v Grain Link (NSW) Pty Ltd [2013] NSWSC 191

KEY TAKEAWAYS

This case demonstrates that a decision to not participate in a dispute resolution process (and, in particular, a properly-constituted arbitration) is rarely a sound strategic move. A party cannot complain about an arbitral tribunal making a wrong decision when it does not contest the other party's evidence.

The court appears to have followed the Hong Kong Court of Appeal in *Grand Pacific Holdings Ltd v Pacific China Holdings Ltd (in liq) [No 1]* [2012] 4 HKLRD 1, in accepting that only serious or egregious lapses or breaches will justify setting aside an arbitral award under the new *Commercial Arbitration Act 2010* (NSW).

The facts

The parties were in dispute about the delivery of grain. Their contract included an arbitration agreement. The new *Commercial Arbitration Act 2010* (NSW) (**Act**) applied, as the buyer commenced the arbitration in September 2011 (even though the underlying contract was dated 24 July 2010).

The seller did not initially participate in the arbitration, the rules for which permitted either party to seek an oral hearing at an early stage. The arbitrators made an interim award, in effect deciding liability in favour of the buyer, but asking for further evidence on quantum. Following the interim award, the seller sought to participate in the arbitration and requested an oral hearing. That request was denied by the arbitral tribunal, who subsequently made a decision on the written material provided.

The seller applied to set aside the arbitral award on the basis that it had been denied natural justice by being denied an oral hearing.

The decision

Hammerschlag J accepted that the procedural rules for the arbitration meant that the arbitral tribunal's request for further submissions gave a further opportunity for the parties to seek an oral hearing. However, Hammerschlag J considered that the seller did not want an oral hearing on just the issue of quantum: it wanted an oral hearing on the entire dispute, including the parts of the dispute that had been decided in the 'interim award'. For that reason, Hammerschlag J held that the arbitral procedure was in accordance with the parties' agreement and the Act.

Even if there had been a breach of the arbitration agreement, Hammerschlag J considered the propositions that the seller proposed to agitate at the oral hearing had no prospect of success. Therefore, Hammerschlag J was not satisfied that the seller had been prejudiced by the alleged failure to be afforded natural justice so there was no justification to set aside the arbitral award.

RECENT VICTORIAN DECISIONS

Subway Systems Australia v Ireland [2013] VSC 550

KEY TAKEAWAYS

According to the Victorian Supreme Court, the Victorian Civil and Administrative Tribunal (VCAT) is **not** a 'court' for the purpose of section 8 of the *Commercial Arbitration Act 2011* (Vic) which requires courts to refer disputes to arbitration where requested by a party, unless the agreement is null and void, inoperative or incapable of being performed.

The facts

In 2003, Aaron and Lynette Ireland (**Irelands**) entered into a franchise agreement (**Franchise Agreement**) with Subway Systems Australia Pty Ltd (**SSA**), and an ancillary agreement with Subway Realty Pty Ltd (**SR**) for a Subway franchise business in the Doncaster shopping centre. The Subway business had to be relocated during a redevelopment and was not moved to the new food court when it was completed.[75] This led to a dispute in the Victorian Civil and Administrative Tribunal (**VCAT**). SSA and SR sought leave to appeal the VCAT decision in the Victorian Supreme Court arguing that:

1 that VCAT was bound to refer the dispute between the Irelands and SSA to arbitration pursuant to section 8 of the *Commercial Arbitration Act 2011* (Vic) (**CAA**) and erred in not doing so.[76]; and

2 VCAT erred in not finding VCAT to be a 'court' for the purposes of section 8(1) of the CAA.

Section (8) of the CAA provides that the court 'must' grant a stay of proceedings and refer the parties to arbitration unless the arbitration agreement is 'null and void, inoperative or incapable of being performed'.

The decision

Croft J dismissed the appeal and determined that VCAT is not a 'court' for the purposes of section 8(1) of the CAA. Consequently, VCAT was not bound to refer the dispute between the Irelands and SSA to arbitration pursuant to section 8 of the CAA.[77]

Interpretation of 'court'

Croft J considered how 'court' was construed in case law, within the CAA as a whole, the legislative history of the CAA and the purpose of VCAT. SSA submitted that there are cases in which the word 'court' is used in legislation and has been construed to include VCAT or other statutory tribunals. However, SSA conceded there are other instances where it was not construed in this way. Considering the cases, SSA submitted that the word 'court' should be given a liberal and beneficial construction to accord with the purpose and policy of the CAA.[78] The Irelands submitted that the dominant legislative intention should be considered and relied on the case of *Director of Housing v Sudi.*[79] In that case VCAT was held to be an administrative tribunal, not a 'court'.

In addition to the CAA, Croft J also considered aids to interpreting legislation such as the *Interpretation of Legislation Act 1984* (Vic). Croft J stated the purpose of the CAA to be to 'facilitate commercial arbitration efficiently and without unnecessary delay and expense by adopting a well accepted international regime, in the form of the Model Law, which emphasises and enhances court assistance rather than court intervention'.[80] Croft J noted the international materials related to the CAA are to aid in the interpretation of the CAA, not to replace the CAA.[81]

Croft J considered the attention given by Parliament to the definition provisions of the CAA and had regard to the specific reference to the Supreme Court, the County Court and the Magistrates' Court in s 6 of the CAA. Croft J stated that it was obvious that if Parliament had intended to refer to VCAT in any of the provisions of the CAA, particularly s 8, it would have done so.

The arbitration agreement

The Franchise Agreement between the Irelands and SSA contained an arbitration agreement in the form of a cascading dispute resolution provision. The validity of this agreement was questioned during the proceedings and Croft J noted that, while the validity was not directly relevant to the grounds of appeal, if the arbitration agreement was ineffective, the appeal would only be a hypothetical question and could not proceed. The validity of the arbitration agreement appears to have been assumed in the VCAT proceedings.[82]

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75 *Ireland v Subway Systems Australia Pty Ltd & Anor (Retail Tenancies)* [2012] VCAT 1061.
76 *Subway Systems Australia v Ireland* [2013] VSC 550 at [3].
77 *Subway Systems Australia v Ireland* [2013] VSC 550 at [41].
78 *Subway Systems Australia v Ireland* [2013] VSC 550 at [14].
79 [2011] VSCA 266.
80 *Subway Systems Australia v Ireland* [2013] VSC 550 at [27].
81 *Subway Systems Australia v Ireland* [2013] VSC 550 at [28].
82 *Subway Systems Australia v Ireland* [2013] VSC 550 at [44].

His Honour stated that the arbitration agreement contained many errors, including:

1 incorrectly defining UNCITRAL (the agreement contained the incorrect name in long form followed by the correct acronym);

2 not specifying an arbitration association or any clear machinery for selecting an arbitration association; and

3 not containing a mechanism for appointing members of the arbitration tribunal or default rules of a specific arbitration tribunal to be followed.[83]

Despite these errors, Croft J said the Court should still strive to uphold the validity of arbitration agreements.[84] In this case, as no arbitration authority or default rules were provided for in the arbitration agreement, the parties were left to rely on the 1976 UNCITRAL rules (as the Franchise agreement was executed in 2003, the 2010 UNCITRAL rules were not applicable).

Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd (No 3) [2013] VSC 435

KEY TAKEAWAYS

The Supreme Court in this case confirmed its intention to uphold commercial arbitration agreements and, in order to do so, will adopt broad interpretations of arbitration clauses over narrow ones.

This case also shows that where it is the clear intention of the parties in their written agreement that disputes are to be arbitrated the courts must, under section 8 of the *Commercial Arbitration Act 2011* (Vic), refer them to arbitration.

The facts

Blanalko Pty Ltd (**Blanalko**) engaged Lysaght Building Solutions Pty Ltd (**Lysaght**) to undertake design and construction of a rail freight terminal, a container paved area and a locomotive workshop together with associated facilities in Penfield, South Australia (**Contract**). The Contract, incorporating Australian Standard Contract AS4300–1995, was governed by Victorian law and contained a variant of the standard dispute resolution clause (**Clause 47**) which:

1 provided two alternatives for dispute resolution following the issuing of a notice of dispute (the parties meet to resolve the dispute or have the Superintendent make a decision on the dispute before they meet), with the dispute ultimately being referred to arbitration; and

2 expressly carved out claims for payment due under the contract.

Lysaght submitted various progress payment claims relating to works performed at the rail freight terminal which Blanalko failed to pay. Lysaght sought summary judgment for those payments. Blanalko filed a defence denying liability and a counterclaim alleging breaches of contract and damages.

Lysaght applied for a stay of Blanalko's counterclaim pursuant to section 8 of the CAA which requires that a Court 'must… refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.' Blanalko contested the stay application, claiming that section 8 only operated when parties had clearly contracted to arbitration to the exclusion of the courts and claimed that Clause 47 was a 'non-exclusive arbitration clause' and therefore section 8 of the CAA did not apply.

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83 *Subway Systems Australia v Ireland* [2013] VSC 550 at [45]–[51].
84 *Subway Systems Australia v Ireland* [2013] VSC 550 at [48].

The decision

Vickery J did not accept the narrow interpretation of the arbitration clause contended by Blanalko. Further, his Honour held that, because Blanalko did not follow certain procedural steps in the arbitration agreement, it was not open to Blanalko to 'avoid the bargain reflected in the arbitration agreement it had entered into.'[85]

His Honour granted the stay application with respect to the disputes that did not fall within the carve out for payment claims. In granting the application, Vickery J noted that the word 'must' in section 8 of the CAA removes the court's discretion to refuse to grant a stay.[86] His Honour observed that while the statutory meaning is clear, in some cases (such as the current case) where payment claims are clearly carved out, inefficiencies in case management may arise due to the potential for proceedings on the same project being conducted before different tribunals.[87]

Vickery J did not accept Blanalko's submission that clause 47 constituted a 'non-exclusive arbitration clause', stating that regardless of the alternative chosen by the parties (to meet themselves or to have the Superintendent make a decision on the issue before they met), if the dispute remained unresolved, the dispute, as is set out in Clause 47, 'shall be and is hereby referred to arbitration.'[88]

His Honour held the parties had 'expressed a clear intention in their written agreement that an outstanding dispute, in the circumstances described, is required to be referred to arbitration, and is not to be heard and determined by a court.'[89] This enlivened section 8 of the CAA and resulted in the court referring the parties to arbitration.

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85 *Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd (No 3)* [2013] VSC 435 at [156].
86 *Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd (No 3)* [2013] VSC 435 at [156].
86 *Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd (No 3)* [2013] VSC 435 at [125].
87 *Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd (No 3)* [2013] VSC 435 at [126].
88 *Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd (No 3)* [2013] VSC 435 at [141].
89 *Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd (No 3)* [2013] VSC 435 at [142].

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"[Matt] provided valuable support, strategic advice, insight and good humour in a troublesome case."

"Steps ahead of the opposition, commercially, legally and tactically—proves a winning formula."

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"Leading Lawyer - Construction" - Chambers Global Guide, 2008-2013

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