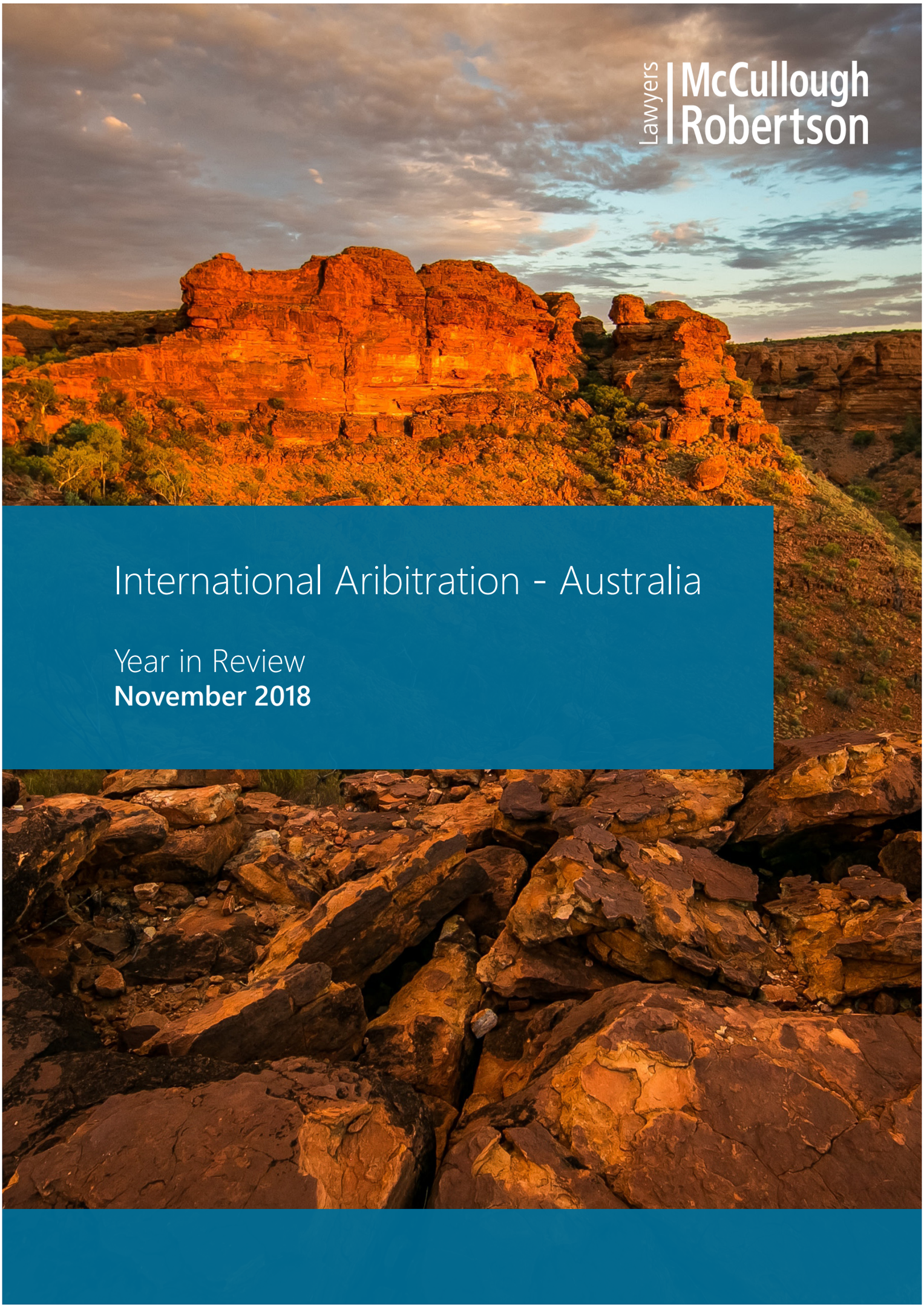

McCullough Robertson Lawyers

International Aribitration - Australia

Year in Review
November 2018

International Arbitration - Australia

Year in Review for RAIF Conference

Australia is rapidly gaining ground as an attractive seat for international arbitration, particularly within the Asia-Pacific region. The last financial year saw both Australia's courts and legislature taking steps towards further entrenching the use of arbitration within Australia's wider legal framework for dispute resolution. This pervasive pro-arbitration sentiment is further reflected in the increasingly dynamic nature of Australia's international arbitration framework, which has transformed and extended the UNCITRAL Model Law on International Commercial Arbitration (**Model Law**) into Australian federal and state legislation. In fact, with the commencement of the *Commercial Arbitration Act 2017* (ACT) on 1 July 2017, all States and Territories in Australia now have their own legislation based on the Model Law.[1] It is these highlights, and many others discussed below, that have made the last year exciting for the Australian domestic and international commercial arbitration space.

Key takeaway points

The key takeaway points from this Year in Review are:

1 The Australian Government has reinforced its intention to ensure Australia continues to gain ground as an arbitration friendly jurisdiction. Notably, Parliament introduced several amendments (now in force) to the *International Arbitration Act 1974* (Cth) (**IAA**), which bring Australia further in line with leading international arbitration jurisdictions, such as the UK, Singapore and Hong Kong.

2 To a significant extent, Australian courts are willing to give primacy to arbitration agreements. In this context, the following notable principles arose, or were reaffirmed, in the case law of 2017-2018:

(a) court proceedings will be stayed in favour of arbitration, except in unique circumstances;

(b) when considering the validity of arbitration agreements, Australian courts are reluctant to determine questions of fact, in recognition of the arbitral tribunal's competence to rule on its own jurisdiction. Nonetheless, the court must be satisfied that there exists an apparently valid arbitration agreement before referring parties to arbitration;

(c) Australian courts take a different approach when reviewing an arbitral tribunal's determination on jurisdiction in that the courts consider that they ought to conduct a hearing *de novo* when faced with an appeal from a tribunal's determination of its own jurisdiction; and

(d) domestic and foreign arbitral awards will be enforced wherever possible, unless the grounds under Article V of the New York Convention have been demonstrated, such as real and egregious unfairness or injustice caused to one of the parties amounting to a breach of natural justice.

3 Australian legislation provides Australian courts with powers to make interim orders in support of arbitral proceedings. Recent decisions have demonstrated how Australian courts will exercise those statutory powers.

[1] *Commercial Arbitration Act 2010* (NSW) (**CAA (NSW)**); *Commercial Arbitration Act 2011* (VIC) (**CAA (VIC)**); *Commercial Arbitration Act 2011* (SA) (**CAA (SA)**); *Commercial Arbitration Act 2011* (TAS) (**CAA (TAS)**); *Commercial Arbitration Act 2011* (NT) (**CAA (NT)**); *Commercial Arbitration Act 2012* (WA) (**CAA (WA)**); *Commercial Arbitration Act 2013* (QLD) (**CAA (QLD)**); *Commercial Arbitration Act 2017* (ACT) (**CAA (ACT)**)

4 Arb-med-arb is permitted under Australian legislation, despite not being available in other international jurisdictions. However, parties must strictly observe the legislative conditions for undertaking arb-med-arb, otherwise they may face significant costs, lengthy delays and ultimately, an unenforceable award.

5 Arbitration is available to parties as an alternative to family court proceedings, although it is currently limited to financial and property disputes and faces a number of barriers to more extensive take-up. It remains to be seen whether Australia will retain its current, restrictive approach, or whether it will broaden the scope of family law arbitration as has recently been done in the United Kingdom.

6 The current LNP Government has shown its support for the increasing use of ISDS in free trade agreements and other treaties (such as the new Peru-Australia FTA and amended Singapore-Australia FTA). However, whether or not Australia continues in this direction is uncertain due to the highly politicised nature of ISDS and the frequent turnover of leaders and governments in Australia.

Key point #1:
The Australian Government has reinforced its intention to ensure Australia continues to gain ground as an arbitration friendly jurisdiction. Notably, Parliament introduced several amendments (now in force) to the *International Arbitration Act 1974* (Cth) (**IAA**), which bring Australia further in line with leading international arbitration jurisdictions, such as the UK, Singapore and Hong Kong.

Civil Law and Justice Legislation Amendment Bill 2017 (Cth)

On 25 October 2018, the *Civil Law and Justice Legislation Amendment Act 2018* (Cth) (**Act**) received assent. This Act has been a long time coming, with the bill having been introduced and read in the Senate for the first time in March 2017. It was not until September 2018 when the Senate agreed to the third reading before the bill made its way to the House of Representatives, where it finally passed both houses on 17 October 2018. The provisions relating to the *International Arbitration Act 1974* (Cth) (**IAA**) commenced on 26 October 2018.

The object of the Act is to 'make minor and technical amendments to civil justice legislation' and it amends various Commonwealth legislation including the IAA. A closer inspection of the amendments to the IAA reveals that they are anything but 'minor and technical'. There are four key amendments to the IAA. These are succinctly and somewhat deceptively summarised in the explanatory memorandum to the Act as:

(a) clarifying the procedural requirements for enforcement of an arbitral award;

(b) specifying expressly the meaning of competent court for the purpose of the UNCITRAL Model Law[2];

(c) clarifying the application of the confidentiality provisions to certain investor-state arbitrations; and

(d) modernising the provisions governing arbitrators' powers to award costs in international commercial arbitration proceedings.

In relation to these amendments, Senator the Honourable George Brandis QC stated in his second reading speech that the Bill:

> '*reflects the Government's commitment to maintain its place in the international legal environment by amending the International Arbitration Act to help ensure that Australian arbitral law and practice stay on the global cutting edge, so that Australia continues to gain ground as a competitive arbitration friendly jurisdiction*.'

The following analysis of the four amendments identifies the significance of these changes to the IAA.

(a) Clarifying procedural requirements for enforcement

This summary is probably the most understated of the four amendments. The Act amends the language in sections 8(1) and 8(5)(f) of the IAA to clarify that a foreign award is binding between the 'parties to the award', rather than to the 'parties to the agreement pursuant to which the arbitration award is made', which is the current language in section 8. The reference to enforcing an award against a party to the arbitration agreement, as opposed to the parties to the award, is in contrast to equivalent legislative provisions in leading international arbitration jurisdictions such as the United Kingdom, Singapore and Hong Kong.

[2] UNCITRAL Model Law on International Commercial Arbitration (As adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006) (**Model Law**)

The previous wording of this provision resulted in contradicting Australian case law. The Victorian Court of Appeal held that section 8(1) as it was previously formed imposed a legal onus on the party seeking to enforce the award (**Award Creditor**) to prove that the party which must pay the award (**Award Debtor**) is a party to the arbitration agreement.[3] However, Justice Foster, the Arbitration Co-ordinating Judge in the Sydney Registry of the Federal Court of Australia held that the Award Creditor need only produce the award and the alleged agreement upon which it relied in order to meet the evidential requirements of section 9(1), even if the Award Debtor is not a named party to the arbitration agreement.[4]

This amendment addresses the emergence of joinder and consolidation in arbitration proceedings where there are multi-party or multi-contract proceedings. Many arbitration institute rules have recently been revised to accommodate joinder and consolidation. The recognition and enforcement of an award between parties to the award, as opposed to the parties to the agreement, is a practical and sensible approach. As such, this clarification should be welcomed as it acts to remove a potential unnecessary procedural step which would require the Award Creditor to demonstrate that the award does in fact bind the Award Debtor. It brings the IAA into line with international best practice and reinforces the approach taken by Justice Foster as the approach to be adopted throughout all Australian jurisdictions.

Unlike the remainder of the amendments to the IAA, now that this Act has entered into force, they apply to arbitral proceedings regardless of whether those proceedings commenced before these amendments were enacted. The other amendments to the IAA only apply to arbitration proceedings commenced after 26 October 2018, the date the relevant provisions in the Act commenced.

(b) Specifying the meaning of 'competent court'

Article 6 of the Model Law requires the functions referred to in certain Articles of the Model Law to be performed by the court(s) as specified by each State enacting the Model Law. Australia has specified the courts for the purposes of Article 6 as the supreme court of the state or territory which is, or is to be, the place of the arbitration, or in any case, the Federal Court of Australia.

This specification works well for articles 11(3), 11(4), 13(3), 14, 16(3) and 34(2) which are identified in article 6 of the Model Law and all use the phrase 'the court or authority specified in article 6' to designate power to the relevant Australian court.

However, the following articles do not refer to 'the court or authority specified in article 6' and instead designate power to 'the competent court':

(a) article 17H – recognition and enforcement of interim awards;

(b) article 27 – court assistance in taking evidence;

(c) article 35 – recognition and enforcement of awards; and

(d) article 36 – grounds for refusing recognition or enforcement of awards.

There is no definition of 'competent court' in the IAA or the Model Law which has caused the question of jurisdiction to arise when a party has sought to engage the court's power in relation to these provisions.[5] The Act introduces amendments which would clarify this ambiguity by stating that if the taking of evidence or the recognition or enforcement of awards (interim or otherwise) is to take place in a state or territory, then the supreme court of that state or territory is a competent court, or in any case, the Federal Court of Australia is a competent court. This is another welcome amendment which applies to arbitration proceedings commenced from 26 October 2018. Until then, parties seeking to rely on these provisions will

[3] *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 38 VR 303
[4] *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd* (2012) 292 ALR 161
[5] See, for example, *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd* (2012) 201 FCR 209

need to rely on the common law to establish that the relevant court is a competent court to exercise jurisdiction.

(c) Clarifying the application of confidentiality provisions

The amendments to the confidentiality provisions in the IAA exclude the application of these provisions where the Transparency Rules[6] apply. The application of the Transparency Rules is governed by the *United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (2014)* (**Mauritius Convention**). This update to the application of the confidentiality provisions in the IAA indicates that Australia is taking steps towards implementing transparency in investor-state arbitration.

In July 2017, Australia was the first country in the Asia-Pacific region to become a signatory to the Mauritius Convention. Parties to the Mauritius Convention agree to apply the Transparency Rules where both the State and the claimant investor's State are parties to the Mauritius Convention or where the investor agrees to their application. The Mauritius Convention entered into force on 18 October 2017. Australia is however, yet to ratify the Mauritius Convention.

Once Australia ratifies the Mauritius Convention, investor-state arbitrations between Australia and consenting investors or investors from States party to the Convention will become subject to the Transparency Rules regardless of when the treaty underpinning the arbitration was concluded, or the applicable arbitration rules. Similarly, Australian investors engaging in arbitration against foreign States party to the Convention should be wary that the Transparency Rules may apply. As more countries sign up to the Mauritius Convention, transparency will automatically apply to more investor-state arbitrations.

One way in which the clarifications to the confidentiality provisions could have a role to play now is where parties to an investor-state arbitration, to which the Transparency Rules apply, agree to Australia as the seat of the arbitration. The IAA then provides the appropriate framework in which the Transparency Rules could operate.

The amendments affecting the applicability of the confidentiality provisions apply to arbitration proceedings commenced after 26 October 2018. It is important to note that these clarifications to the confidentiality provisions only apply to investor-state arbitrations and not international commercial arbitrations so private parties who have agreed to international arbitration as a means of resolving their dispute still have the protection of the confidentiality provisions in the IAA, unless they agree to opt out.

(d) Modernising arbitrators' powers to award costs

Finally, the Act removes reference to the taxation of costs in international arbitration. The Explanatory Memorandum states that references to taxing costs are 'outmoded and inflexible in contrast to current practice in international arbitration'. Instead, the IAA simply provides that the tribunal may, in making an award, settle the amount to be paid by whom and in what manner. This is a 'minor and technical' amendment that applies to arbitration proceedings commenced after 26 October 2018 and allows a tribunal to settle costs in a manner it deems appropriate.

[6] United Nations Commission on International Trade Law Rules on Transparency in Treaty-based Investor-State Arbitration (**Transparency Rules**)

Case law

Australian courts are enthusiastic proponents of arbitration within the Australian dispute resolution system, particularly due to the potential for arbitration and other forms of alternative dispute resolution to reduce the backlog of matters faced by the judiciary. Such enthusiasm has been reflected in many decisions handed down this past year which demonstrate the courts' continued commitment to Australia's reputation as a safe arbitral seat.

Key point #2:

To a significant extent, Australian courts are willing to give primacy to arbitration agreements. In this context, the following notable principles arose, or were reaffirmed, in the case law of 2017-2018:

(a) court proceedings will be stayed in favour of arbitration, except in unique circumstances;

...

Stay of proceedings

Several cases were handed down in the past year affirming the preference of Australia courts for staying proceedings in favour of arbitration. Arbitral proceedings were stayed in favour of court proceedings in only one case this year, namely, *Kraft Foods Group Brands LLC v Bega Cheese Ltd*[7]. Discussed below, this case involved unique circumstances where the applicant initiated arbitral proceedings in the US and Federal Court proceedings in Australia and then sought to pursue them concurrently. However, overall, the cases handed down in 2017 and 2018 demonstrate a strong trend amongst judicial decisions that arbitration agreements should be interpreted broadly and upheld as much as possible. The following are cases highlighting the courts' general approach and includes a summary of the Kraft decision.

Warner Bros Feature Productions Pty Ltd v Kennedy Miller Mitchell Films Pty Ltd (2018) 130 IPR 527

In the case of *Warner Bros Feature Productions Pty Ltd v Kennedy Miller Mitchell Films Pty Ltd,*[8] the New South Wales Court of Appeal (**NSWCA**) overturned a primary judge's refusal to grant a stay of court proceedings and refer the dispute to arbitration under section 7(2) of the IAA. The dispute involved an agreement entered into almost a decade ago, when Warner Bros Feature Productions Pty Ltd (**WB Productions**) engaged producer Doug Mitchell and director George Miller on *Mad Max: Fury Road* through their production companies, Kennedy Miller Mitchell Films Pty Ltd and Kennedy Mitchell Miller Services Pty Ltd (together, **Kennedy Miller Mitchell**). The agreement provided that Kennedy Miller Mitchell was entitled to a $US7 million bonus payment if the 'net cost' of the film came in below the budgeted $US157 million (**Letter Agreement**).

A dispute arose as to the calculation of the net cost and Kennedy Miller Mitchell brought proceedings against WB Productions and WB Entertainment (together, **Warner Bros**) in the Supreme Court of New South Wales. Warner Bros sought a stay of litigation and referral to arbitration on the ground that the Letter Agreement included a term requiring the dispute to be submitted to Californian arbitration. The term was allegedly incorporated into the agreement by clause 21, which provided: 'BALANCE OF TERMS: The balance of terms will be WB and WB standard for "A" list directors and producers, subject to good faith negotiations within WB's and WB's customary parameters.' Warner Bros provided evidence that while most agreements with talent end up in a 'long form' format, some, like the Letter Agreement, do not, and may be documented in a shorter deal letter. Further, deals which are not 'papered' in the long form format will often incorporate

[7] (2018) 358 ALR 1 (**Kraft**)
[8] (2018) 130 IPR 527

WB Pictures' standard terms used in the long form agreements by reference to those standard terms. Warner Bros argued that clause 21 therefore incorporated an arbitration clause which made New South Wales a 'clearly inappropriate forum' for arbitration.

Justice Hammerschlag dismissed Warner Bros' application for a stay, finding that clause 21 operated to incorporate terms into the Letter Agreement, however, the contracting Warner Bros entity did not have any terms which were 'standard' which could be incorporated (as opposed to other Warner Bros entities). Further, His Honour found that, even if it was relevant that other Warner Bros group members had formed agreements which required disputes to be arbitrated in California, the studio had not proved these terms were 'standard'.

However, the Court of Appeal (Bathurst CJ, Beazley P and Emmett AJA) unanimously allowed the appeal and set aside the orders made by the primary judge. Chief Justice Bathurst summarised his position in direct terms:[9]

> *'It was not seriously in contest that leave should be granted. The appeal is undoubtedly arguable and, if the applicants' contentions are correct, WB Productions should not be required to litigate in a forum other than the one chosen by the parties through the Letter Agreement. In these circumstances, it is appropriate to grant leave.'*

On the first ground, the Court of Appeal found that the Letter Agreement did incorporate terms which were 'WB standard for "A" list directors and producers' prior to good faith negotiations occurring. This was the interpretation suggested by the text of clause 21, and supported by the fact that other terms were not capable of operating unless these terms were immediately incorporated into the agreement. The Court of Appeal noted that it was irrelevant that the standard terms were not supplied to Kennedy Miller Mitchell:[10]

> *'As was pointed out in* Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165; [2004] HCA 52 at [47]*, legal instruments are "often signed by people who have not read and understood all their terms, but who are nevertheless committed to those terms by the act of signature". Further, there is no reason to assume that those advising [Kennedy Miller Mitchell], who were experienced in the film industry, did not appreciate the meaning of terms which were "WB standard for 'A' list directors and producers".'*

On the second contention, it was held that the Letter Agreement incorporated the arbitration clause which was contained in form agreements held by a division of a subsidiary of WB Entertainment. Clause 21 incorporated terms which were 'habitually proffered' by members of the Warner Bros group for agreements with "A" list directors and producers. The evidence showed that an arbitration clause had been used by Warner Bros group members for almost two decades and was included in the form agreements which were current at the time the agreement was made. Clause 21 therefore operated to incorporate the arbitration clause into the Letter Agreement. Accordingly, the Court of Appeal granted the application for a stay of proceedings and referred the dispute to the JAMS arbitration body in Los Angeles. Chief Justice Bathurst concluded:[11] '*The present dispute involves a matter that "is capable of settlement by arbitration" under the arbitration clause incorporated into the Letter Agreement. It follows that the proceedings… must be stayed under s 7(2) of the International Arbitration Act 1974 (Cth).* The Court of Appeal also ruled that Kennedy Miller Mitchell should pay Warner Bros' costs; not only for the appeal, but also for the original motion for stay.

Eriez Magnetics Pty Ltd v Duro Felguera Australia Pty Ltd [2017] WASC 304

In the case of *Eriez Magnetics Pty Ltd v Duro Felguera Australia Pty Ltd*,[12] a subcontractor, Eriez, pursued a claim for payment for goods and services provided under a subcontract with Duro (**Subcontract**). Duro

[9] Ibid at [44]
[10] Ibid at [59]
[11] Ibid at [88]
[12] [2017] WASC 304

was party to a head contract with Samsung C&T Corporation for services in relation to the Roy Hill Mining Project in Western Australia (**Contract**). Duro applied for a stay of the court proceedings and for the dispute to be referred to arbitration pursuant to section 7 of the IAA. Although both parties were Australian incorporated entities, the Supreme Court of Western Australia (**WASC**) agreed with the parties as to the applicability of the IAA, given that a clause of the general conditions in the Subcontract provided that arbitration was to be administered by the Singapore International Arbitration Centre in accordance with the UNICTRAL Arbitration Rules.[13] The clause also provided that the appointing authority was the Singapore International Arbitration Centre and the place of arbitration was to be Singapore.

The critical question for the court was to determine the proper construction of the general conditions of the Subcontract, which included clause 42.2 stating:

> 'If the Dispute has not been resolved within 28 days of service of the notice of Dispute or such longer period as the parties may agree in writing, that Dispute shall, *subject to the Dispute being a Pass Through Claim and the operation of the Pass Through Provisions*, be and is hereby referred to arbitration' (emphasis added).[14]

The reference to a 'Pass Through Claim' is significant to the issue which the Court was required to determine. Under the Subcontract, a 'Pass Through Claim' is defined as circumstances in which: …(c) the Subcontractor (Eriez) has rights against the Contractor (Duro) under this Subcontract and the Contractor (Duro) has corresponding rights against the Client (Samsung) under the Contract, etc. The consequence of a claim being a Pass Through Claim under the Subcontract is that Eriez receives, in satisfaction of its claim against Duro, that which Duro has received in satisfaction of its claim against Samsung, unless Duro's claim against Samsung has been reduced by reason of its default under the Contract.[15] Clause 42.4(b) also deals with the resolution of disputes between Eriez and Duro which correspond to a dispute between Duro and Samsung, and provides for consolidation of those disputes by arbitration.

Eriez contended that the words 'subject to the dispute being a pass through claim and the operation of the pass through provisions' contained in clause 42.2 have the consequence that only pass through claims can be referred to arbitration pursuant to that clause.[16] Conversely, Duro contended that these words meant that if any aspect of the disputes the subject of the clause 42 process are pass through claims, then they are subject to the pass through provisions and can only be referred to arbitration consistently with those provisions.[17]

In his reasoning, Martin CJ (as he then was) of the Western Australian Supreme Court referred to authorities dealing with the construction of arbitration agreements, which state that 'courts should adopt a broad, liberal and flexible approach to the construction of such agreements without usurping or ignoring the language used in the particular provisions.'[18] However, the start and end point of any issue with respect to construction must always be the 'plain and clear language' of the arbitration agreement.[19] His Honour acknowledged the words 'subject to the dispute being a pass through claim and the operation of the pass through provisions' were ambiguous, and could be interpreted in favour of both Eriez and Duro.[20] Nevertheless, to adopt Eriez's reasoning and restrict the operation of the arbitration clause to disputes which constitute pass through claims would be 'entirely contrary to any sensible commercial construction…because it would refer to arbitration only that category of dispute of which there is the least point to refer to arbitration.'[21] As such, in his Honour's view, there was no point in referring pass through claims to arbitration between Eriez and Duro, because in those circumstances, Eriez's rights would turn critically upon the resolution of the dispute between Duro and Samsung under the Contract. Consequently,

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[13] *Eriez Magnetics Pty Ltd v Duro Felguerra Australia Pty Ltd* [2017] WASC 304, [12]-[13]
[14] Ibid [33]
[15] Ibid [29]
[16] Ibid [36]
[17] Ibid [27]
[18] Ibid [42]; *Fitzpatrick v Emerald Grain Pty Ltd* [2017] WASC 206 [46] (see below)
[19] *Eriez Magnetics Pty Ltd v Duro Felguerra Australia Pty Ltd* [2017] WASC 304 [43]
[20] Ibid [45]
[21] Ibid [48]

his Honour concluded that the words in clause 42.2 of the Subcontract meant that if the dispute includes a pass through claim, then the dispute is to be referred to arbitration, but subject to the pass through provisions. His Honour also found that clause 42.4 sustained the above proposition, to the extent that it enabled the joinder or consolidation of disputes between Duro and Eriez, and was consistent with a broad approach to the operation of the arbitration provisions.[22] Accordingly, Martin CJ held that the proceedings on foot involved a determination of matters falling within the scope of the arbitration agreement in clause 42 of the Subcontract. Accordingly, as the preconditions to section 7(2) of the IAA were satisfied, the proceedings were stayed and the parties were referred to arbitration in Singapore.

Fitzpatrick v Emerald Grain Pty Ltd [2017] WASC 206

In the course of explaining the WASC's approach to contractual construction, Martin CJ cited his Honour's earlier, but recent decision in *Fitzpatrick v Emerald Grain Pty Ltd* (**Fitzpatrick**).[23] In that case, forty-seven grain growers (the **Growers**) commenced proceedings against Emerald Grain Pty Ltd (**Emerald**) in relation to disputes arising from separate grain pooling contracts between each of the Growers and Emerald. Each of the contracts expressly incorporated the 'Emerald Pool Terms and Conditions' (**Conditions**), available on Emerald's website, which contained a provision requiring disputes '*arising out of, relating to or in connection with*' its terms to be resolved by arbitration (**Arbitration Agreement**). These contracts also incorporated the Trade Rules of Grain Trade Australia (**GTA**), which contained a rule determining that any disputes arising out of a breach of the GTA Trade Rules must be submitted to and settled by arbitration. However, it is was required that any inconsistency between the Conditions and the GTA Trade Rules be resolved in favour of the Conditions.

The proceedings originated with a claim by the Growers that certain proceeds derived from grain pools, to which the Growers all contributed, were being wrongly withheld by Emerald. It was alleged that those proceeds were therefore held by Emerald for the benefit of the Growers, and by reason of various other facts pleaded relating to Emerald's withholding of those proceeds, Emerald had committed a breach of trust. The Growers sought the appointment of a new trustee to administer the trust. Before submitting any statement on the substance of the dispute to the Court, Emerald applied for orders referring the disputes to arbitration pursuant to section 8 of the CAA (WA) and staying the proceedings commenced by the Growers.

Martin CJ set out three critical questions underlying section 8 of the CAA: (1) is there an arbitration agreement between the Growers and Emerald, and, if so, what is the scope of that agreement; (2) do the proceedings include a matter which are within the scope of the arbitration agreement; and (3) is the arbitration agreement incapable of being performed.[24]

With respect to the first question, Martin CJ expressed no doubt as to the existence of an arbitration agreement within the meaning of that expression in section 8 of the CAA (WA). However, to determine the scope of that agreement, his Honour asserted that:

> 'the words used by the parties must be construed objectively by ascertaining what a reasonable businessperson would have understood the words of the contract to mean by reference to its text, context (the entire text of the contract as well as any contract, document or statutory provision referred to in the text of the contract) and purpose.'[25]

Within that interpretive framework, his Honour considered the second question by determining the requisite degree of connection between the contract to which the Arbitration Agreement related and the dispute. Highlighting the significance of each phrase in the clause, His Honour held that 'arising out of, relating to and in connect with' are clearly words of the widest import and concluded that the 'language used in

[22] Ibid [49]
[23] [2017] WASC 206
[24] The Growers did not contend that any arbitration agreement was either null or void or inoperative.
[25] *Fitzpatrick v Emerald Grain Pty Ltd* [2017] WASC 206, [44]; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, 116

arbitration agreement compels the conclusion that an ordinary businessperson would understand the arbitration agreement to extend to, and embrace a very wide ambit of disputes or claims having at least some degree of connection with, or relationship to, the substantive agreement between the parties'.[26] His Honour also referred to the standard of proof delineated by Gleeson J in *Rinehart v Rinehart*[27] (discussed further below), and agreed that it was not appropriate to make any assessment of the merits of the Growers' claims. Rather, the relevant question for the Court was simply whether the Growers' claim is a matter that is a subject of the arbitration agreement. His Honour answered this question in the affirmative, finding that it was not possible to constrain the wide application of the broad language utilised in the Arbitration Agreement, such that all disputes as to whether Emerald held the proceeds on trust, of which it was in breach, were clearly disputes arising out of, relating to or in connection with the Growers' agreements with Emerald. Additionally, the Court rejected the Growers' submission that an inference can be drawn that, by virtue of the parties' agreement to the non-exclusive jurisdiction of Victorian courts, they intended that the Arbitration Agreement should be construed narrowly so as to not impinge on that jurisdiction.

The third question was enlivened by the Growers' submission that even if the proceeding gave rise to matters falling within the scope of the Arbitration Agreement, those matters were not arbitrable or capable of being performed in accordance with s8(1) of the CAA (WA). This submission was based on the allegedly non-arbitrable nature of issues with respect to the proper administration of trusts and the relief sought (i.e. the removal of Emerald as trustee). In his Honour's deliberations, Martin CJ referred to Bathurst CJ's conclusion in *Rinehart v Welker*[28] that 'it is only in extremely limited circumstances that a dispute which the parties have agreed to refer to arbitration will be held to be non-arbitrable'.[29] It is against this starting point that the Growers' claims must be considered. The Growers' sought to distinguish the present case from *Rinehart v Welker* on the basis that, unlike the beneficiaries in that case, not all the Growers' supported the reference of the disputes to arbitration in the first place.[30] Martin CJ conceded that there were indeed factual distinctions between the two cases and that the judge in *Rinehart v Welker* (Bathurst CJ) placed significant weight upon the wishes of the beneficiaries. However, his Honour distinguished the present case from *Rinehart v Welker* on a different basis, drawing distinctions between the express family trust disputed in Rinehart and the trust arising from the terms of commercial contracts entered into by the Growers' at arms' length.[31] The equitable rights asserted by the Growers were held to be entirely commercial in character and 'whether or not they have been denied those rights will depend entirely upon the proper construction and effect of their contracts. In those circumstances, the possible legal characterisation of the rights which they assert as equitable does not lead to the conclusion that the disputes are not arbitrable.'[32] Accordingly, the Court stayed the proceedings and referred the parties to arbitration.

CPB Contractors Pty Ltd v Celsus Pty Ltd (fka SA Health Partnership Nominees Pty Ltd) (2017) 353 ALR 84

The case of *CPB Contractors Pty Ltd v Celsus Pty Ltd (fka SA Health Partnership Nominees Pty Ltd)*[33] concerned a number of arbitral proceedings commenced by the South Australian Government against certain construction companies (Project Co, CBP Contracts and Hansen Yunken) contracted to build the Royal Adelaide Hospital. Due to concerns as to the number of arbitral proceedings on foot, the Government and Project Co entered into subsequent arrangements in an attempt to consolidate the arbitration process. However, CBP Contractors and Hansen Yunken (**Builders**) filed a statement in the FCA against Project Co, the Government and others, alleging that the subsequent arrangements had the effect of causing the relevant arbitration agreement to cease to have effect. Project Co, the Government and the project's independent certifier then sought for the totality of the claims made by the builders to be stayed

[26] *Fitzpatrick v Emerald Grain Pty Ltd* [2017] WASC 206, [51]
[27] [2016] FCA 539
[28] [2012] NSWCA 95 (Bathurst CJ)
[29] Ibid [167]
[30] *Fitzpatrick v Emerald Grain Pty Ltd* [2017] WASC 206, [95]
[31] Ibid [98]
[32] Ibid [99]
[33] (2017) 353 ALR 84

mandatorily under section 8(1) of the CAA (NSW), or otherwise pursuant to section 23 of the *Federal Court of Australia Act 1976* (Cth), which gives the Federal Court broad discretion to issue orders of such a kind as the Court thinks appropriate.

The FCA, constituted by Lee J, rejected the Builders' claims that the subsequent arrangements caused the arbitration agreement to become inoperative, because those arrangements did not interfere with the parties' legal rights under the arbitration agreement. His Honour held that the arbitration agreement was still operative and capable of being performed. Thus, the requirements of s 8 of the CAA (NSW) were fulfilled, and a mandatory stay was granted to Project Co and the independent certifier.

Conversely, the Court was not satisfied that the Government requested a referral to arbitration 'not later than when submitting [its] first statement on the substance of the dispute', as required for the grant of a mandatory stay pursuant to s 8 of the CAA (NSW).[34] Nevertheless, the Court decided to exercise its inherent powers to grant a discretionary stay to the Government and independent certifier for the following reasons:

(a) the Builders' claims against the Government were ancillary to the matters the subject of Project Co's stay;

(b) the arbitrator's award would be determinative of factual assertions made in the proceedings against the Government;

(c) it would save time and costs, removing duplication for experts and legal advisors; and

(d) a temporary stay would not cause significant projective upon the Builders.[35]

Kraft Foods Group Brands LLC v Bega Cheese Ltd (2018) 358 ALR 1

In contrast to the stays granted by the courts above, an anti-arbitration injunction was granted by the FCA in *Kraft Foods Group Brands LLC v Bega Cheese Ltd*[36]. In that case, Kraft Foods Group Brands LLC (**Kraft**) granted Mondelez International Inc (**Mondelez**) a licence to use the KRAFT trade mark and related trade dress in connection with certain products in certain territories (**Master Agreement**). The Master Agreement contained an arbitration clause in the following terms:

> 'Step Process: Any controversy or claim arising out of or relating to this Agreement, or the breach thereof (a "Dispute"), shall be resolved: (a) first, by negotiation and then by mediation as provided in Section 7.2; and (b) then, if negotiation and mediation fail, by binding arbitration as provided in Section 7.3. Each party agrees on behalf of itself and each member of its prospective Group that the procedures set forth in this Article VII shall be the exclusive means for resolution of any Dispute. The initiation of mediation or arbitration hereunder will toll the applicable statute of limitations for the duration of any such proceedings.

In 2017, Mondelez sold its Australian and New Zealand business to Bega Cheese Limited (**Bega**). Bega began marketing its peanut butter using the Bega label below and aired commercials on TV and radio. Later in September 2017, Kraft served a Notice of Dispute under the Master Agreement calling for arbitration and alleging that Bega's advertisements were false, misleading or deceptive. Kraft alleged that several advertisements were likely to mislead consumers into thinking that Kraft peanut butter was being replaced by, or had changed to, Bega peanut butter, when in fact Bega had only been granted a temporary license to use the brand. Bega responded on 5 October 2017, arguing that it was not an original party to the Master Agreement, and therefore had not agreed to be bound by the dispute resolution provisions of the Master Agreement. This assertion prompted Kraft to commence proceedings in the New York District Court on 20 October 2017, seeking to compel Bega to submit to mediation and (if necessary) arbitration

[34] Ibid [108]-[109].
[35] *CPB Contractors Pty Ltd v Celsus Pty Ltd (fka SA Health Partnership Nominees Pty Ltd)* (2017) 353 ALR 84, [111], [122]
[36] (2018) 358 ALR 1

so that *'Kraft may halt Bega's blatant violation of Kraft's intellectual property rights and prevent further injury to the world-famous KRAFT brand'*.

Shortly thereafter, Kraft commenced proceedings in the Federal Court of Australia on 9 November 2017, alleging breaches of section 18 the Australian Consumer Law (Schedule 2 of the *Competition and Consumer Act 2010* (Cth)) which provides that *'A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive'.* Mediation was conducted in New York on 12 January 2018, but was unsuccessful. On 13 February 2018, Kraft commenced arbitration proceedings against Bega in New York by filing a Notice of Arbitration with the International Centre for Dispute Resolution.

On the same day, Bega applied to the Federal Court of Australia on an ex parte basis for an anti-arbitration injunction, restraining the United States arbitration. On 16 February 2018, O'Callaghan J made an interim order restraining Kraft from taking any step in the arbitration proceedings and from taking any other step to seek to restrain the Australian proceedings, pending the Federal Court determination of Bega's application after hearing submissions from both parties.

Bega argued the following grounds, relying on the High Court's decision in *CSR Ltd v Cigna Insurance Australia Ltd*:[37]

1 firstly, if the American arbitration was allowed to proceed concurrently with the Australian proceeding, it would interfere with (or would have a tendency to interfere with) the Australian proceedings and the Court's processes due to the possibility or probability of inconsistent findings, and

2 secondly, such an injunction should go in the exercise of the Court's equitable jurisdiction, because compelling Bega to defend substantially the same claim in two jurisdictions would be vexatious or oppressive according to the principles of equity.

Kraft's responses to these grounds were:

1 firstly, the causes of action and relief sought in the Australian proceedings ('the Advertising Dispute') were entirely separate from those raised in the American arbitration ('the Trade Dress Dispute') and therefore there is no risk of inconsistent decisions being made

2 secondly, it had not waived any rights to exercise its rights to arbitrate, and

3 thirdly, it simply sought to enforce and to comply with the contractual bargain contained in the Master Agreement, which also binds Bega, as the successor to Mondelez.

The Federal Court has the power to issue anti-suit and anti-arbitration injunctions under its implied and equitable powers if the duplication of proceedings will interfere with or have a tendency to interfere with the Federal Court proceedings or would be vexatious or oppressive. Central to the consideration is whether there was the prospect of inconsistent decisions being issued in the two jurisdictions. Justice O'Callaghan agreed with Bega that the subject matter of both the Australian litigation and American arbitration necessarily deal with the central issue of who owns the goodwill to the peanut butter trade dress. Further, the question of whether that goodwill is derived from the Master Agreement was related to the first question. Having concluded that there was a substantial degree of overlap in the subject matter of the proceedings, the Court proceeded to investigate whether restraining the taking of any further steps in the arbitration was necessary for the administration of justice to protect the Court's own proceedings or processes. On this question, it concluded in the affirmative:[38]

[37] (1997) 189 CLR 345
[38] Kraft Foods Group Brands LLC v Bega Cheese Ltd (2018) 358 ALR 1, [79]

> *'The question of the ownership of the packaging, get-up (trade dress) is, on the pleadings in this proceeding, central to the question of whether all, or some, of the pleaded representations are false or misleading within the meaning of s 18 of the Australian Consumer Law. That question is also the central issue raised in the notice of arbitration. For those reasons, if both the arbitration and this proceeding run there will, in my view, be a real risk of inconsistent findings on the critical question of who owns the goodwill in the packaging/get-up/trade dress.'*

The Federal Court therefore granted the injunction against arbitration proceedings in New York while allowing court proceedings in Victoria to continue. The judge also dismissed Kraft's contention that the claims in the Federal Court action were not related to the arbitration, saying the advertisements *'can only be false or misleading (if that is what they are) by virtue of the operation and effect of the relevant terms of that agreement'* [39]and stating that Kraft should have brought the Australian Consumer Law claims in arbitration since they are related to the Master Agreement.[40]

This case may appear to contradict the longstanding record of Australian court decisions preferring arbitration over litigation. However, the key difference between this case and the cases above is that the same party, Kraft, commenced both the arbitration and Court proceedings, and then proceeded to attempt to concurrently advance both actions. Indeed, Kraft submitted that if Bega wished to avoid duplication of proceedings, it should have sought a stay of the Australian proceedings in favour of the arbitration (rather than seeking to stay the arbitration in favour of litigation). Nonetheless, the Court rejected Kraft's submission that Bega should have sought a stay of the Australian proceedings under section 7(2) of the *International Arbitration Act 1974* (Cth), in circumstances where Bega knew that the arbitration in New York was 'imminent'. That section relevantly gives the Court the power to stay proceedings on the application of a party, where such proceedings involve determination of a matter that is capable of settlement by arbitration. The Court observed that Bega was under no obligation to seek a stay under that section or otherwise, and held that the injunction should go in the exercise of the Court's implied power.

[39] Ibid [95]
[40] Ibid [96]

Key point #2:

To a significant extent, Australian courts are willing to give primacy to arbitration agreements. In this context, the following notable principles arose, or were reaffirmed, in the case law of 2017-2018:

...

(b) when considering the validity of arbitration agreements, Australian courts are reluctant to determine questions of fact, in recognition of the arbitral tribunal's competence to rule on its own jurisdiction. Nonetheless, the court must be satisfied that there is an apparently valid arbitration agreement before referring parties to arbitration;

(c) Australian courts take a different approach when reviewing an arbitral tribunal's determination on jurisdiction in that the courts consider that they ought to conduct a hearing de novo when faced with an appeal from a tribunal's determination of its own jurisdiction;

Jurisdiction

A party to an arbitration agreement may argue that a particular dispute lies outside that arbitration agreement in two forums:

1 through the courts on the basis that the dispute falls outside the scope of the arbitration agreement or otherwise that the agreement is void or inoperative; or

2 through the arbitral tribunal, by challenging the jurisdiction of an arbitral tribunal once it has been constituted.

The two cases below identify the different approaches taken by the courts when faced with such jurisdictional questions. The Full Court of the Federal Court's judgment in *Hancock Prospecting Pty Ltd v Rinehart*[41] concerns the standard of proof that should be applied when determining the validity and scope of an arbitral agreement, and therefore whether a court should refer the dispute to arbitration. On the other hand, the Victorian Supreme Court's judgment in *Lin Tiger* concerns the standard of review to be applied by a court reviewing an arbitral tribunal's determination on its own jurisdiction.

Rinehart saga

The past year has brought with it several updates with respect to the long-running dispute between Wright Prospecting Pty Ltd (**WPPL**) and Gina Rinehart's Hancock Prospecting Pty Ltd (**HPPL**). WPPL first commenced proceedings in this matter in 2010,[42] against HPPL and Hope Downs Iron Ore Pty Ltd (**HDIO**). The proceedings concerned the ownership rights and royalties in mining interests known as 'Hope Downs' and 'East Angelas'. Later in 2014, Bianca Rinehart and John Hancock commenced proceedings in the Federal Court against their mother Georgina Rinehart (**Mrs Rinehart**) (both in her personal capacity and capacity as trustee of two trusts), HPPL and its subsidiaries, 150 Investments Pty Ltd (**150 Investments**) (controlled by Mrs Rinehart) and other children of Mrs Rinehart. Bianca Rinehart and John Hancock claimed that their mother, Mrs Rinehart, assumed a position of control in entities within the Hancock Group and breached her duties as fiduciary and trustee.

Mrs Rinehart and HPPL opposed these allegations, and claimed that Bianca Rinehart and John Hancock were barred from seeking relief in the Supreme Court due the existence of contractually binding arbitration agreements contained in two deeds signed in 2006 and 2007. Each of those deeds included a clause which referred 'any dispute under this deed to arbitration. Bianca Rinehart and John Hancock claimed that the execution of the deeds was procured and rescinded by Mrs Rinehart's and HPPL's misconduct, including

[41] (2017) 350 ALR 658

[42] *Wright Prospecting Pty Ltd v Hancock Prospecting Pty Ltd,* Supreme Court of Western Australia CIV 3041 of 2010

unconscionable conduct, undue influence, duress and misleading and deceptive conduct. Bianca Rinehart and John Hancock sought a declaration that the deed and arbitration agreement were void.

Following this, HPPL applied for a stay of the Federal Court proceedings and applied for the matter to be referred to arbitration, pursuant to national uniform legislation, including section 8(1) of the *Commercial Arbitration Act 2010* (NSW) and section 8(1) of the *Commercial Arbitration Act 2012* (WA) (**Arbitration Acts**). Under these acts, where an action is brought before a court in a matter which is the subject of an arbitration agreement, if a party requests not later than when submitting its first statement on the substance of the dispute that a matter be heard in arbitration, then the court must refer the parties to arbitration. Exceptions apply where the agreement is found to be null and void, inoperative or incapable of being performed.

In a later hearing in the Federal court,[43] Justice Gleeson ordered a trial to determine whether any of the arbitration agreements were null and void, inoperative or incapable of being performed within the meaning of the Arbitration Acts. However, in November 2016, HPPL and HDIO requested a chamber summons to seek orders that HPPL, HDIO, Mrs Rinehart, Bianca Rinehart and John Hancock be referred to arbitration pursuant to the Western Australia Arbitration Act and that the proceedings be stayed pending the outcome of any arbitration. The Full Court of the Federal Court heard the appeal and set aside Justice Gleeson's order and ordered that the Federal Court proceeding be stayed pursuant to section 8(1) of the Arbitration Acts, pending any arbitral reference between the parties or further orders.

In February 2018, the Supreme Court of Western Australia made directions that the referral to arbitration and stay applications be listed for a special appointment in May 2018. Bianca Rinehart and John Hancock later filed a chambers summons seeking interlocutory orders that 150 Investments and Mrs Rinehart and associated parties be restrained from relying upon, invoking or otherwise taking steps to further the Hope Downs deed, including the arbitration agreement. Mrs Rinehart and 150 Investments then sought chamber summons orders that the issues in dispute be referred to arbitration pursuant to section 8(1) of the Western Australia Arbitration Act and that the chamber summons be stayed pending the outcome of any arbitration. Alternatively, Mrs Rinehart and 150 Investments sought an order that the parties be restrained from bringing or maintaining the chamber summons or that the chamber summons be dismissed. HPPL and HDIO filed chamber summons of similar effect to Mrs Rinehart and 150 Investments.

The Supreme Court of Western Australia considered whether to make any orders pertaining to the enforceability of the arbitration agreement. Justice Le Miere delved into the Full Court of the Federal Court's approach in making this determination.[44] His Honour considered two approaches in determining the validity of an arbitration agreement. The English courts adopt a 'merits' or 'balance of probability' approach whereby the court conducts a full merits hearing regarding the existence and scope of the arbitration agreement. The approach taken in other Model Law jurisdictions is a 'prima facie' approach where, if there appears to be a valid arbitration agreement which prima facie covers the matters in dispute, the court's enquiry stops there and the matter is referred to arbitration. Then it is for the arbitrator to determine jurisdiction and scope of the arbitration agreement.

The Full Court of the Federal Court continued to say that the prima facie approach gives support to the jurisdiction of the arbitrator and his or her competence, while preserving the role of the Court as the ultimate arbiter of questions of jurisdiction. This was in line the Federal Court's decision, which commended the prima facie approach and noted that it recognised the arbitral tribunal's competence to rule on its own jurisdiction as provided for in the Act. The appropriate role for the court is to satisfy itself that there is an apparently valid arbitration agreement and then to take a broad view when characterising the disputes to determine whether they fall within the scope of the arbitration agreement, without delving into the merits of the case. Further, when ascertaining what matters fall within the scope of the arbitration agreement, it is the width or narrowness of the terms of the arbitration agreement which need to be considered. In this particular dispute, the relevant phrase of the arbitration clauses were '*any dispute under this deed*' and '*all disputes hereunder*'. The question was whether the argument over the validity of the deeds themselves

[43] *Rinehart v Rinehart (no 3)* (2016) 337 ALR 174
[44] *Hancock Prospecting Pty Ltd v Rinehart* (2017) 350 ALR 658

was encompassed by the wording in these arbitration clauses. His Honour summed up the Full Court of the Federal Court's findings that deciding whether a dispute is within the scope of an arbitration agreement will generally require considering the nature and circumstances and forming a view as to the legal meaning of the arbitration agreement without fully hearing the dispute. Ultimately, the application was dismissed and the scope of the arbitration agreement was to be heard in an upcoming hearing. The Court refused to make a finding of fact on whether the arbitration agreement was void and that matter would not be heard at the upcoming hearing as it was brought too late. This matter demonstrates the courts willingness to give primacy to arbitration agreements and the reluctance to determine questions of fact before a decision is made as to whether to refer the dispute to arbitration. The Court articulated that in determining the scope of an arbitration agreement, regard will be had to the specific nature and circumstances of the arbitration agreement.

Bianca Rinehart and John Hancock were subsequently granted special leave to appeal to the High Court of Australia on the ground that the Full Court erred in finding that clauses expressed to cover disputes under agreement extended to disputes concerning the validity of the deeds or provisions. The hearing was held on 13 and 14 November 2018 and the High Court has now reserved its decision. It is likely that judgment will be handed down in early 2019, and will be of significant importance for the interpretation of arbitration agreements in Australia.

Lin Tiger Plastering Pty Ltd v Platinum Construction (Vic) Pty Ltd [2018] VSC 221

The court's approach to determining disputes in respect of the jurisdiction of an arbitral tribunal was also considered in the subsequent case of *Lin Tiger Plastering Pty Ltd v Platinum Construction (Vic) Pty Ltd* (**Lin Tiger**).[45] Lin Tiger Plastering Pty Ltd (**Applicant**) was the subcontractor that performed plastering and other works, and Platinum Construction (Vic) Pty Ltd (**Respondent**) was a builder of commercial and residential developments. The Applicant contracted with the Respondent in relation to the construction of two Melbourne properties (the **Subcontracts**). A dispute arose under the Subcontracts and the Respondent commenced an arbitration, involving an arbitrator appointed by the President of the Master Builders Association of Victoria. That arbitrator ruled that the arbitral tribunal had jurisdiction to determine the dispute, because the alleged arbitration agreements within the Subcontracts were valid and not affected by the operation of the *Domestic Building Contracts Act 1995* (Vic) (**DCBA**), explained below.

The Applicant sought a determination by the Court under section 16(9) of the CAA (Vic) that the arbitral tribunal did not have jurisdiction to determine the subcontracting dispute between the Applicant and Respondent. The basis of its argument stemmed from its interpretation of cl 41.2 of the Subcontract, which stated: 'all disputes between a Head Contractor carrying out domestic building work and its Subcontractor on that work…are "domestic building disputes" pursuant to the [DBCA]; and… the primary forum for resolution of domestic building disputes is the Victorian Civil and Administrative Tribunal ["VCAT"].' The Applicant submitted that dispute was caught by this provision because it was a 'domestic building dispute', and therefore should be heard by VCAT. However, the Respondent referred to clause 41.4 of the Subcontract, which stated that matters in dispute between the builder and subcontractor that were not 'domestic building disputes' must be submitted to arbitration. Under the DCBA, a 'domestic building dispute' includes a dispute between a builder and a subcontractor in relation to the carrying out of domestic building work.[46] Domestic building work includes the erection of a home and any associated work[47], but does not include plastering carried out under a contract for only that type of work.[48] Accordingly, the Respondent submitted that the DCBA's operation was excluded as the Subcontracts were for one type of work only, that being plastering.

The court noted that the jurisdiction of the arbitral tribunal would only yield to mandatory VCAT jurisdiction, which in turn, would only accrue if the dispute was subject to the DBCA. To this end, Croft J held there

[45] [2018] VSC 221
[46] DCBA s 52
[47] DCBA s 5
[48] DCBA s 6(2); *Domestic Building Contracts Regulations 2017* (DCBR) r 7(g)

were two determinative matters to be addressed: 'what is the power of the court under section 16(9) of the CAA (Vic), and did the Applicant carry out "domestic building works" under the Subcontracts.'[49]

The first issue concerned whether an appeal under section 16(9) of the CAA (Vic) is a hearing *de novo* or a review of the ruling on the arbitral tribunal on jurisdiction. Although the parties made 'scant' submissions on this question, Croft J took the opportunity to discuss the issue at length. His Honour noted that there is currently a lack of authority on the issue and the Model Law neither prescribes nor expressly resolves the question of the standard of judicial review of jurisdictional awards.[50] However, in the absence of statutory guidance, Model Law jurisdictions have generally adopted a de novo standard of review in proceedings.[51] Croft J found the English position persuasive, which was settled in the case of *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan*[52] (**Dallah**). That case involve a challenge to enforcement in English of an arbitral award made by the International Chamber of Commerce in Paris on jurisdiction grounds. Considering the question of the appropriate standard of review, Lord Saville stated:[53]

> 'In my judgment therefore, the starting point cannot be a review of the decision of the arbitrators that there was an arbitration agreement between the parties. Indeed no question of a review arises at any stage. The starting point in this case must be an independent investigation by the court of the question whether the person challenging the enforcement of the award can prove that he was not a party to the arbitration agreement under which the award was made. The findings of fact made by the arbitrators and their view of the law can in no sense bind the court, though of course the court may find it useful to see how the arbitrators dealt with the question.'

On the basis of that authority and other commentaries of a similar view, Croft J concluded that a hearing *de novo* is the correct standard of review to be applied under section 16(9) of the CAA and '[d]eference should duly be given to the cogent reasoning of the arbitral tribunal but the Court is the final "arbiter" on the question of jurisdiction'.[54]

The second question as to whether the DCBA applied was dealt with in brief and as a hearing *de novo*, with limited reference to the arbitrator's reasoning in the award. Croft J referred to the Scope of Works to both Subcontracts and affidavit evidence adduced by both parties to determine whether the Applicant only undertook one type of work, that being plastering.[55] Ultimately, Croft J found the witness for the Respondent to be a very experienced and convincing witness, noting that 'opinions of those with relevant expertise and experience in the building industry are relevant in this respect'.[56] His Honour found that the only works undertaken by the Applicant under the Subcontracts were plastering works, and it thus followed that the DBCA did not apply because they were not 'building works' for the purposes of the DCBA and that the mandatory and exclusive jurisdiction of VCAT was not enlivened. It was therefore found that the arbitral tribunal correctly determined in favour of its own jurisdiction.[57]

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[49] *Lin Tiger Plastering Pty Ltd v Platinum Construction (Vic) Pty Ltd* [2018] VSC 221, [23]
[50] Ibid [28]
[51] Ibid [28]
[52] [2010] 1 All ER (Comm) 917, upheld on appeal in *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs of the Government of Pakistan* [2010] 3 WLR 1472
[53] *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs of the Government of Pakistan* [2010] 3 WLR 1472 [160]
[54] *Lin Tiger Plastering Pty Ltd v Platinum Construction (Vic) Pty Ltd* [2018] VSC 221, [40]
[55] Ibid [41] – [47]
[56] Ibid [46]
[57] Ibid [48]

Key point #2:

To a significant extent, Australian courts are willing to give primacy to arbitration agreements. In this context, the following notable principles arose, or were reaffirmed, in the case law of 2017-2018:

...

(d) domestic and foreign arbitral awards will be enforced wherever possible, unless the grounds under Article V of the New York Convention have been demonstrated, such as real and egregious unfairness or injustice caused to one of the parties amounting to a breach of natural justice.

Lahoud v The Democratic Republic of the Congo [2017] FCA 982

Lahoud v The Democratic Republic of the Congo[58] (**Lahoud**) is notable for being the first Australian decision to recognise and enforce an International Centre for Settlement of Investment Disputes (**ICSID**) award as if it was a judgment of the FCA pursuant to section 35(4) of the IAA. That case originated with a dispute between the applicants and the respondent (**the DRC**) in relation to a company called 'IMPOREX' which conducted business activities in the Democratic Republic of the Congo. The parties engaged in an arbitration process conducted by a tribunal of three arbitrators, which published their award in favour of the applicants on 7 February 2014 (**Award**). On 29 March 2016, a different constituted tribunal rejected a request from the DRC for the annulment of the Award (**Annulment Decision**). The applicants then applied to the Federal Court to have the Award and the Annulment Decision enforced in Australia.

Gleeson J first noted that section 32 of the IAA provides that Chs II to VII (inclusive) (encompassing chapters including jurisdiction, conciliation and arbitration) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (**Investment Convention**) have the force of law in Australia. Section 33 provides that an award under the Investment Convention is binding and is not subject to any appeal or to any other remedy, otherwise than in accordance with the Investment Commission. Importantly, section 35(4) of the IAA provides that '[a]n award may be enforced in the Federal Court of Australia with the leave of that court as if the award were a judgment or order of that court.' Further, articles 53 to 55 in IV of the Investment Convention provide for the recognition, enforcement and execution of awards. In relation to the procedural requirements for enforcement, rule 48.49 of the *Federal Court Rules 2011 (Cth)* (**FCA Rules**) identifies further procedural requirements for the recognition of an ICSID award, which essentially involves the filing of an original application accompanied by an affidavit. Additionally, under r 28.50 of the FCA Rules, English translations must be provided to the Court.

Ultimately, the Court recognised and made orders for the enforcement of both the Award and the Annulment Decision under s 35(4) of the IAA, finding it was appropriate to enforce both decisions in light of the overall objects of the IAA contained in s 39(2). Gleeson J was satisfied that the applicants had complied with rr 38.49 and 28.50 of the FCA Rules, and both the Award and Annulment Decision were 'awards' within the meaning of s 35(4) of the IAA. Additionally, Gleeson J was satisfied that the Foreign States Immunities Act did not apply to protect the respondent in this case, because the two ICSID tribunal decisions demonstrated that the DRC had submitted to their jurisdiction.

Liaoning Zhongwang Group Co Ltd v Alfield Group Pty Ltd [2017] FCA 1223

Gleeson J also decided the case of *Liaoning Zhongwang Group Co Ltd v Alfield Group Pty Ltd,*[59] in which her Honour enforced an arbitral award made by the China International Economic and Trade Arbitration Commission (**CIETAC**) pursuant to s 8(3) of the IAA. Alfield Group Pty Ltd (**Alfield**) is a branch of Liaoning Zhongwang Group Co Ltd (**Zhongwang**) established in Australia. In that case, Zhongwang sought summary judgment under s 31A of the Federal Court of Australia Act on its application to enforce a foreign arbitral award in the FCA under s 8(3) of the IAA. The foreign arbitral award was issued by CIETAC in 2011

[58] [2017] FCA 982
[59] [2017] FCA 1223

and determined the dispute between the parties in Zhongwang's favour (**CIETAC Award**). Alfield resisted enforcement of the CIETAC Award on the grounds that:

1 there was no valid arbitration agreement between the parties (**Basis 1**);

2 Alfield was unable to present its case in the arbitration (**Basis 2**); and/or

3 enforcement of the CIETAC Award would be contrary to public policy because:

(a) the mercantile agreement containing the arbitration agreement was a sham document; and

(b) Alfield was unable to participate fully in the arbitration hearing due to a threat made to the liberty of its sole director, Dong Wu, by a representative of Zhongwang and Mr Wu's reasonable fear of detention in China (**Basis 3**).

The claims submitted to arbitration were based on a document between the parties entitled 'Mercantile Agreement', which contained an arbitration clause. Outlining the overarching principles, Gleeson J stated that in order to succeed on summary judgment under s 31A(1) of the Federal Court of Australia Act 1976 (Cth) and rule 26.01(1) of the Federal Court Rules, Zhongwang must establish that Alfield 'has no reasonable prospect of resisting its application for enforcement of the award' and in determining whether there is a reasonable prospect of success, the Court must make 'a practical judgment as to whether Alfield has more than a fanciful prospect of success'.[60]

At first glance, Gleeson J was satisfied that Zhongwang had a prima facie entitlement to enforcement of the award, as it had met the requirements in s9(1) of the IAA as to the evidence necessary for enforcing a foreign award. Her Honour also determined that the law of China would be applied. Turning then to Basis 1, Gleeson J noted that Alfield's argument was based upon the premise that the Australian law on sham applies in the absence of evidence of the law of China. However, for the purposes of applying s 8(5)(b) IAA, her Honour took the view that the 'proper interpretation of s 8(5)(b) is that the requirement for proof of the circumstance that the arbitration is not valid under the law of the country where the award was made is a requirement for affirmative proof of the foreign law by the party seeking to invoke s 8(5)(b).'[61] Accordingly, in the absence of evidence of the law of China, it was held that Alfield had no reasonable prospects of establishing that the arbitration agreement was not valid under the law of China.[62]

With respect to Basis 2, the Court accepted evidence from Zhongwang that the tribunal was not notified that Mr Wu would not attend the oral hearing. Alfield did not request for the arbitration to proceed on written evidence and submissions nor did it make any application arranging for Mr Wu to give evidence by audio-visual link or telephone. Alfield did not respond to the tribunal's request in relation to any objection it had to further materials provided by Zhongwang. Further, Alfield did not seek to communicate to the tribunal any explanation for ceasing to participate in the arbitration after 13 June 2011. Her Honour was satisfied that Alfield did not have reasonable prospects of demonstrating that it was unable to present its case in the arbitration proceeding, particularly as there was no evidence that Mr Wu's attendance at the oral hearing was necessary to enable Alfield to present its case, nor was there any evidence that Alfield ceased to participate in the arbitration proceeding because of an inability to present its case in the proceeding.[63]

Additionally, in light of her Honour's conclusions above, Gleeson J found that without more, there was no foundation for a conclusion that enforcement of the award would be contrary to public policy and therefore, her Honour rejected Basis 3. Accordingly, the Court made the orders sought by Zhongwang, noting that 'the whole rationale of the Act, and thus the public policy of Australia, is to enforce [foreign] awards

[60] Liaoning Zhongwang Group Co Ltd v Alfield Group Pty Ltd [2017] FCA 1223, [7]-[8]
[61] Ibid [97]
[62] Ibid [110]
[63] Ibid [118]

wherever possible in order to uphold contractual arrangements entered into in the course of international trade'.[64]

Mango Boulevard Pty Ltd v Mio Art Pty Ltd [2017] QSC 87

Moving to a different jurisdiction, the case of *Mango Boulevard Pty Ltd v Mio Art Pty Ltd*[65] (**Original Judgment**) is an example where a party has sought to set aside an arbitral award under section 34 of the *Commercial Arbitration Act 2013* (Qld) (**the Act**). This decision was appealed in the case of *Mango Boulevard Pty Ltd v Mio Art Pty Ltd*[66] on the basis that the primary judge erred in not setting aside the award for the arbitrator's failure to afford procedural fairness.

The dispute between the parties originated from a joint venture for the development of land, specifically that the parties were unable to determine the share price pursuant to clause 4.1 in the Share Sale Agreement (**SSA**). At arbitration, it was stipulated that the arbitrator, in reaching his decision, 'must adopt the same methodology as provided in clause 4.4'.[67] This required the arbitrator to make assumptions agreed by the parties, particularly that the project would achieve a profit on cost percentage return of 25%. In determining the subject property's market value under the SSA, the arbitrator was required to consider the 'real life market considerations' and 'commercial reality' of the project. In rejecting Mango Boulevard's expert evidence, the arbitrator concluded that a 'competent', 'prudent' or 'rational' developer would not purchase the subject property unless they reasonably believed they could return a profit of 30% to 45%.[68] It is on this point that Mango Boulevard sought to set aside the arbitrator's decision on two grounds. Firstly, that the methodology used by the arbitrator to determine the share price departed from the requirements of the SSA and was beyond the scope of the submission to the arbitration. Secondly, that the arbitrator failed to accord procedural fairness or acted in breach of the rules of natural justice by rejecting Mango Boulevards' expert witness, which meant it was unable to present its case and that the award is in conflict with the public policy.

Mango Boulevard first sought to set aside the arbitral award in the Supreme Court of Queensland under sections 34(2)(a)(ii) or 34(2)(b)(ii) of the Act, which provide that the Court may only set aside an arbitral award under the Act in circumstances where:

1 the party making the application furnishes proof that it was otherwise unable to present the party's case; or

2 the Court finds that the award was in conflict with the public policy of the State.

The primary judge concluded that the arbitrator had appropriate reasons to reject the evidence of Mango Boulevard's expert witness, and that his error to not put this to the witness or counsel for Mango Boulevard did not amount to or cause a real practical injustice such as to set aside the award under section 34 of the Act.[69]

Mango Boulevard appealed the Original Judgment in the Queensland Court of Appeal, on the basis that:

1 the learned primary judge erred in not finding that the arbitrator had conducted or resolved the arbitration in a manner that caused real unfairness or real practical injustice to the appellant; and

[64] *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* (2011) 277 ALR 415, [126] (Foster J)
[65] [2018] 1 Qd R 245
[66] [2018] QCA 39
[67] *Mango Boulevard Pty Ltd v Mio Art Pty Ltd* [2018] QCA 39, [8]
[68] Ibid [10]
[69] Ibid [19]

2 on the basis of the error in paragraph (a), the learned primary judge erred in not finding that the arbitral awards delivered by the arbitrator should be set aside pursuant to sections 34(2)(a)(ii) or 34(2)(b)(ii) of the Act.[70]

Ultimately, the court held that contrary to Mango Boulevard's contentions, it was not possible to conclude that there had been a real unfairness or real practical prejudice in this case. Mango Boulevard had been provided ample opportunity to present its case. This was evidenced by the arbitrator's willingness for Mango Boulevard to re-call their witness to give further evidence. However, Mango Boulevard failed to do so on multiple occasions, choosing to present its case in the way it determined was appropriate. In conclusion, his Honour found that section 34 of the Act was intended to not 'protect a party from its own failure or poor strategic choices'.[71] To set aside the award would effectively 'bail out parties who have made choices that they might come to regret'.[72] Accordingly, the Court dismissed the appeal.

Structural Monitoring Systems Ltd v Tulip Bay Pty Ltd [2017] WASC 379

Similarly, in *Structural Monitoring Systems Ltd v Tulip Bay Pty Ltd*[73] (**SMS v Tulip**), the WASC dismissed an application to set aside an arbitral award on the ground of alleged misconduct pursuant to section 42 and 44 of the CAA WA. In that case, the arbitration agreement was contained in clause 17 of an agreement between Structural Monitoring Systems Ltd (**SMS**), Tulip Bay Pty Ltd (**Tulip**) and a Mr Kenneth Davey (**Agreement**), which provided that a single arbitrator would be appointed with the unanimous consent of the parties, but if agreement could not be reach within 14 days, then 'the arbitration shall be heard and determined by three (3) arbitrators'.

A dispute arose under the Agreement in relation to intellectual property and SMS ceased making royalty payments that were owed to Tulip and Mr Davey under the Agreement, who then commenced proceedings in the WA District Court and was awarded a default judgment. Tulip and Mr Davey also issued a statutory demand against SMS for payment of the judgment debt. Later on 7 June 2012, SMS issued a notice referring the dispute to arbitration, and commenced proceedings in the WA Supreme Court to set aside the statutory demand against it.

In accordance with the Agreement, SMS appointed an arbitrator (Mr Philip George Clifford), Tulip appointed another (Mr Kelvin Lord) and then the two arbitrators, after an eight month delay, appointed a presiding arbitrator (Mr Peter John Hannan). The final award was delivered four and a half years after the notice of reference to arbitration was served. SMS then sought orders setting aside the award on the ground of misconduct, said to be constituted by:

1 denial of procedural fairness, by taking into account submissions from Tulip and Mr Davey, to which SMS allegedly had no opportunity to respond;

2 excessive delay in the delivery of the award; and

3 the matter being decided by two of the arbitrators (Mr Hannan and Mr Clifford) in circumstances where three arbitrators had been appointed.

In relation to the first ground, SMS's primary argument alleged that SMS was denied an opportunity to respond to submissions made by Tulip and Mr Davey on 20 January 2016 in answer to 22 issues identified by the tribunal in relation to the parties' prior written submissions lodged on 9 July 2015.[74] Counsel for SMS alleged that if SMS had known reliance would be placed on those submissions of 20 January 2016, it would have made submissions on them. However, Martin CJ rejected this proposition on the basis that it was inherently unlikely that a response from SMS would have dealt with any issues that were not already alive

[70] Ibid [5]
[71] Ibid [83]
[72] Ibid [85]
[73] [2017] WASC 379
[74] *Structural Monitoring Systems Ltd v Tulip Bay Pty Ltd* [2017] WASC 379, [91]-[92]

between the parties from the exchange of prior materials, and in any case, SMS had 'every opportunity to put its case in relation to those matters before the arbitrator'.[75] Accordingly, SMS' failure to deal with those matter could not be attributed to any conduct on the part of the arbitrators, Tulip or Mr Davey.[76]

With respect to the second ground, Martin CJ agreed that were was indeed 'excessive delay in the delivery of the award', as two of the arbitrators' reasons for decision were published more than 16 months after the evidence and submissions of each party had been served. The third arbitrator later indicated his agreement with those reasons and the 'final award' was published 18 months after the evidence and submission were received.[77] However, none of the parties could adduce any persuasive authorities in support of their claims, and SMS admitted that although this ground supported the first ground, it could not of itself support a conclusion that procedural fairness had been denied. Accordingly, his Honour determined that the delay in the publication of the reasons and the award could not constitute misconduct of a kind which would justify setting aside the award.

Finally, as to the third ground, no persuasive authorities were put forward by the parties. Nonetheless, Martin CJ proceeded to consider the critical question of this ground, being, did Mr Lord 'hear' and 'determine' the arbitration as required under clause 17 of the Agreement. His Honour stated that the reference to the arbitration being 'heard' was not intended to mean that there must be an oral hearing.[78] Rather, 'the word 'heard' should be construed as encompassing whatever procedure the arbitrators and parties adopt in order to place before the arbitrators the evidence and submissions required to determine the dispute.'[79] As such, clause 17 would be complied with if Mr Lord considered the evidence and submissions presented by the parties and determined the terms upon which their dispute should be resolved.[80] Martin CJ referred to several persuasive features of the evidence, including on one hand that Mr Lord was copied into all communications and was provided with the evidence, submissions and joint reasons (to which he expressed his concurrence in a letter), while on the other, he did not sign the award or charge any fees for his services.[81] Martin CJ held that any failure on the part of an arbitrator to turn his mind to the evidence, submissions and award and either express or concur in reasons, was an abdication of his responsibilities as an arbitrator, which would be a finding of a very serious nature.[82] However, in the absence of any evidence to this effect, his Honour was not prepared to find Mr Lord did not 'hear and determine' the dispute. Accordingly, Martin CJ concluded that SMS failed to establish misconduct on the part of the tribunal which would justify the court's intervention in setting aside the award. However, his Honour emphasised his dissatisfaction with the conduct of the arbitration, stating that the arbitration 'fell well short of a paradigm example of efficient and cost-effective dispute resolution' and contrary to these legislative objectives, the dispute would have been resolved much more quickly, cheaply and finally if the parties had gone to court.

Hui v Esposito Holdings Pty Ltd and Ors (2017) 345 ALR 287

Nevertheless, as demonstrated in *Hui v Esposito Holdings Pty Ltd and Ors*,[83] courts are willing to set aside arbitral awards where a party is found to genuinely be deprived of a reasonable opportunity to present its case or is denied a realistic possibility of a successful outcome. That case concerned a share sale agreement between Esposito Holdings Pty Ltd (**Esposito**) and UDP Holdings Pty Ltd (**UDP**) in relation to shares in 5 Star Foods Pty Ltd (**5 Star**). Hui acted as guarantor for UDP. Claiming that moneys were owed to it, Esposito served a notice of arbitration on UDP, 5 Star and Hui, in response to which UDP and 5 Star counterclaimed that Esposito had breached several warranties under the share sale agreement.

[75] Ibid [95]-[96]
[76] Ibid [95]
[77] Ibid [109]
[78] Ibid [139]
[79] Ibid [139]
[80] Ibid [140]
[81] Ibid [142]
[82] Ibid [144]
[83] (2017) 345 ALR 287

In a preliminary hearing, Esposito sought a partial award against UDP, Hui and 5 Star, in relation to their liability for unpaid instalments. UDP and 5 Star objected to the making of this award at the directions hearing, on the basis that their case involved a set-off defence (or cross claim) for breaches of warranty by Esposito and their preparation of their case was delayed by Esposito delaying their disclosure of certain materials. The arbitrator directed that the preliminary hearing would address Esposito's claims without determining any set offs or cross claims, as these could be dealt with as a 'phase two'.[84]

The hearing took place on 3 June 2015 and UDP and 5 Star did not appear, because they were in administration and considered that their arguments on set offs and counterclaims would not be heard in that preliminary hearing anyway. Through the hearing, the arbitrator stated that he would accept that there were claims for a set off for the purposes of the preliminary hearing, but would make no judgment on the merit of those claims.[85] To the dismay of UDP, Hui and 5 Star, on September 2015, the arbitrator issued reasons for determining in favour of Esposito and against the availability of the warranty claims as set-offs, despite this latter issue being outside the scope of the preliminary hearing and on which no submissions were made. Hui challenged the arbitrator's reasons on procedural fairness grounds and requested that the arbitrator withdraw himself from the matter. On 15 April 2016, the arbitrator rejected Hui's application and issued a partial award giving effect to his reasons. Later on 12 September 2016, the arbitrator issued a partial award declaring the unpaid sums against Hui, UDP and 5 Start, and a second award dismissing Hui's application.

In the present Federal Court case, Hui sought to set aside the partial award under Article 34 of the UNCITRAL Model Law on the grounds of reasonable opportunity to present its case and public policy,[86] and an order to remove the arbitrator under Article 12 for bias.[87] Beach J considered the exchanges between the parties up to and during the preliminary hearing and found that the arbitrator had clearly indicated that the availability and merits of set-off defences were not within the scope of the hearing. As a result, 'real unfairness or real practical injustice' had been caused through the arbitrator's denial of a reasonable opportunity for Hui to present its case, and a reasonable person in the shoes of Hui could not have reasonably foreseen that the arbitrator would stray into areas well beyond the scope of the issues that defined the preliminary hearing. Accordingly, Beach J characterised the arbitrator's conduct in the arbitral proceedings as an 'exceptional' and 'egregious' breach of the rules of natural justice under Australian public policy.

With respect to Hui's challenge to the arbitrator's impartiality, Beach J determined that the s 18A 'real danger of bias' test should be interpreted from the perspective of a reasonable bystander, and could be satisfied if there was a 'real possibility' of prejudgment. From Beach J's reasoning in this decision, it appears that the test for satisfying the 'real danger of bias' test in s 18A closely resembles the equivalent test for arbitrator bias in the UK, which asks whether a 'fair minded and informed observer would conclude that there was a real possibility that the tribunal was biased'.[88] Applying this formulation, his Honour held that the arbitrator had conducted himself in such as way that the parties (especially Hui and the other respondents) could no longer have confidence in the arbitrator's ability to come to a fair and balanced conclusion on the issues.[89] Accordingly, Beach J order that the relevant parts of the arbitral awards infected with bias be set aside and a new arbitral tribunal be constituted to consider the balance of the claims.

The cases above demonstrate that courts must be satisfied that an arbitrator breached the rules of natural justice in an 'egregious' and 'exceptional' way to set aside an award. It is not merely sufficient that the parties were not happy with the outcome or that the arbitration was conducted in a less-than-perfect manner, as in SMS v Tulip.

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[84] *Hui v Esposito Holdings Pty Ltd and Ors* (2017) 345 ALR 287, [19]-[25]
[85] Ibid [126]-[170]
[86] IAA ss 18C, 19
[87] IAA s 18A
[88] This test was adopted by the House of Lords in the case of *Porter v Magill* [2002] 1 All ER 465
[89] *Hui v Esposito Holdings Pty Ltd and Ors* (2017) 345 ALR 287, [247]

Key point #3:
Australian legislation provides Australian courts with powers to make interim orders in support of arbitral proceedings. Recent decisions have demonstrated how Australian courts will exercise those statutory powers.

Freezing orders

Trans Global Projects Pty Ltd (in liq) v Duro Felguera Australia Pty Ltd [2018] WASC 136

The Western Australian Court of Appeal (**WACA**) has recently confirmed the willingness of Australian Courts to issue freezing orders to prevent the frustration of arbitral awards. On 11 October 2018, the WA Court of Appeal upheld a freezing order against Duro Felguera Australia Pty Ltd (**Duro**), prohibiting it from disposing of any prospective proceeds awarded to Duro out of its ongoing arbitration against Samsung C&T Corporation, seated in Singapore (**Samsung Arbitration**). The freezing order was sought by Trans Global Projects Pty Ltd (in liquidation) (**TGP**), who is engaged in a separate Australian-seated arbitration against Duro. TGP applied for the order due to concerns that Duro would loan the Samsung Arbitration proceeds to its Spanish parent company, Duro Felguera SA (**Duro SA**) and default on any potential award in favour of TGP.

Duro performed work over several years for the Roy Hill Iron Project (**Project**) under a contract with Samsung C&T Corporation. In May 2014, Duro and TGP entered into a subcontract (**Subcontract**) pursuant to which TGP agreed to transport processing facility components for the Project. Within a year of the Subcontract's commencement, Duro and TGP had substantial claims against each other and on 19 June 2015, TGP served a notice of a reference to arbitration. Both parties agreed that the IAA applied to the dispute. TGP was placed into voluntary administration on 30 July 2015 and then in liquidation on 15 September 2016. A few years later on 11 April 2018, TGP's liquidators gave notice of their intention to pursue TGP's claims against Duro under the Subcontract. TGP also sought an undertaking from Duro, but Duro declined to give an undertaking not to deal with its assets. In response, TGP applied on 19 April 2018 for a freezing order against Duro to prevent it from dealing with, disposing of or removing its assets from Australia before an arbitral award could be made and enforced.

On 7 May 2018, the primary judge in the WASC (Tottle J) granted the freezing order pursuant to Order 52A rule 5(4) of the *Rules of the Supreme Court 1971* (WA) (**Rules**), operative 'until further order'.[90] In his Honour's reasons, Tottle J considered the following three questions, which reflect the test set out in Order 52A rule 5 of the Rules:

(a) Did TGP have a 'good arguable case on an accrued or prospective cause of action'?[91]

(b) Was there a danger that a future arbitral award and any judgement in favour of TGP would be unsatisfied, because Duro's assets would be removed from Australia or disposed of?

(c) Was it in the interests of justice to grant a freezing order?

Answering each question in the affirmative, Tottle J was particularly persuaded by evidence indicating that Duro SA was in need of funds that would likely be extracted from Duro and sent to Duro SA (in Spain). Tottle J referred to the fact that significant funds had been transferred to Duro SA in the past and that the board and management of Duro SA were in a position to exert effective control over Duro's affairs.

[90] See, *Trans Global Projects Pty Ltd (in liq) v Duro Felguera Australia Pty Ltd* [2018] WASC 136
[91] Ibid [20]

Duro appealed this decision on two grounds:

(a) the primary judge erred in fact and law in being satisfied under O 52A r 5(4)(b)(ii) of the Rules that there was a danger the prospective judgment would be wholly or partly unsatisfied because the assets of Duro would be disposed of, dealt with or diminished in value; and

(b) in the alternative, the primary judge erred in making the freezing order operate 'until further order'; rather, it should operate only until the arbitral tribunal had a reasonable opportunity to consider for itself whether to grant equivalent relief.

Prior to addressing the two grounds of appeal, the WA Court of Appeal, constituted of Buss P, Murphy JA and Mitchell JA, gave significant consideration to jurisdictional matters. The Court confirmed that its power to make a freezing order was derived from two concurrent sources: (1) the UNCITRAL Model Law on International Commercial Arbitration (1985) (**Model Law**), which has the force of law in Australia under s16 IAA; and (2) the inherent or implied power of the Court.

First, art 17J of the Model Law bestows courts with the same power as an arbitral tribunal to grant interim measures in relation to arbitration proceedings, which courts must exercise in accordance with their own procedures.[92] An order under art 17J can be made by a State Court exercising its federal jurisdiction arising under the IAA, as conferred by s 39(2) of the *Judiciary Act 1903* (Cth), read in conjunction with s 76(ii) of the *Australian Constitution*. Second, the Court has inherent or implied power to make a freezing order under art 35(1) of the Model Law, which states that an arbitral award shall be recognised and enforced by a competent court irrespective of the country in which it is made. This provision confers federal jurisdiction on Courts to make enforcement orders, and in doing so, implicitly empowers them to make other orders necessary for the proper exercise of that jurisdiction. This inherent or implied power extends to making a freezing order in relation to an anticipated arbitral award.[93]

Having established the Court's jurisdiction to grant an order, the WA Court of Appeal dismissed the appeal for the reasons below.

Ground 1

The first ground involved a consideration of Order 52A rule 5(4)(b)(ii) of the Rules, which as indicated above, provides that the Court may make a freezing order against a prospective judgment debtor if satisfied that there is a danger that a prospective judgment will be wholly or partly unsatisfied because the assets of the prospective judgment debtor are disposed of, dealt with or diminished in value.

The WA Court of Appeal noted that the language of this provision was intended to reflect the general law in relation to the inherent or implied power of a Court to grant a freezing order. In line with these general law principles, the Court stressed that it was not sufficient to merely show that one or more of the events described in O 52 r 5(4)(a) or (b) might occur. Instead, the Court must be satisfied that the award will be party or wholly unsatisfied *because* one or more of those events might occur.[94] To this end, the applicant must prove, on the balance of probabilities, a set of facts from which the Court can infer the existence of a 'real or substantial risk' that the award will not be satisfied.[95] Additionally, the applicant need not show that there is something irregular in the nature of the assets, or provide evidence that the respondent acts with the purpose of frustrating the satisfaction of the judgment. However, if shown, these may be 'powerful discretionary considerations' for the Court.[96]

[92] In other words, the WASC must exercise it power to grant a freezing order in accordance with O 52A of the Rules
[93] O 52A of the Rules is then picked up and applied as federal law by s 79 of the *Judiciary Act 1903* (Cth)
[94] *Duro Felguera Australia Pty Ltd v Trans Global Projects Pty Ltd (in liq)* [2018] WASCA 174 [41]
[95] Ibid [43]
[96] Ibid [55]

Considering the all the circumstances of the case, the WA Court of Appeal agreed it was open to the primary judge to infer that there was a danger a prospective arbitral award would be wholly or partly unsatisfied because Duro's assets might be dealt with. Their Honours accepted evidence from TGP that Duro would lend funds to Duro SA, who was in 'significant need for funds' and was in 'financial difficulties'.[97] Stemming from this state of affairs, there was a real and not remote risk that any proceeds from the Samsung Arbitration would be lent to Duro SA, and accordingly:

(a) Duro SA would not have the capacity to repay the loan to Duro at the time when it fell due for repayment; and

(b) Duro's remaining assets would be insufficient to wholly satisfy an arbitral award in favour of TGP.

The Court emphasised that the freezing order was not justified merely because Duro would likely lend the Samsung Award funds Duro SA; the important additional element was the evidence establishing that Duro SA was in a precarious financial position. It was this fact which was held to give rise to a real risk that Duro SA would lack the capacity to repay the loan when Duro needed the money to satisfy an award in favour of TGP. This risk was compounded by Duro's own precarious financial position, and limited presence in Australia. Accordingly, Duro's first ground of appeal was rejected.

Ground 2

The second ground was dealt with in more brevity by the Court. The Court first acknowledged that it should not make an order inconsistent with an arbitration agreement or that usurps the role of the arbitral tribunal.[98] Along these lines, the Court opined that it should exercise its statutory and implied or inherent powers to grant a freezing order in relation to arbitral proceedings sparingly. Nonetheless, their Honours concluded that where an applicant satisfies the onerous requirements for obtaining a freezing order, the Court was entitled to grant a freezing order until 'further order', as there is no reason why the order should only be made until the arbitral tribunal can consider the question. As such, it was open to the primary judge to make the freezing order operate until further order and Duro's second ground of appeal was therefore rejected.[99]

Subpoenas

UDP Holdings Pty Ltd v Esposito Holdings Pty Ltd [2018] VSC 316

Two decisions handed down in the last year are instructive as to the extent of the power of Australian courts to issue subpoenas in relation to arbitral proceedings. First, the case of *UDP Holdings Pty Ltd v Esposito Holdings Pty Ltd*[100] concerned disputes in relation to the sale of a business and whether the seller was in breach of a warranty. The breach in question stemmed from allegations that the business was overcharging one of its biggest customers. The issue had been considered in prior court proceedings, during which two important witnesses gave evidence in relation to the alleged overcharging. In the later proceedings the subject of this present decision, both parties to the arbitration sought to use the two witnesses before the arbitral tribunal (seated in Melbourne). Although the parties acknowledged that the transcripts of the previous court proceedings could have been tendered, it was also clear that the two witnesses needed to be cross-examined. Thus, tendering the transcripts would be insufficient in these circumstances. Taking this into consideration, the Court interpreted section 23 of the IAA, which provides that a Court may issue a subpoena on behalf of an arbitral proceeding if the Court has jurisdiction to do so and:

[97] Ibid [125]
[98] Ibid [150]
[99] Ibid [155]
[100] [2018] VSC 316, [2], [26]

(a) the arbitral tribunal conducting the arbitral proceedings gives permission for the subpoena to be issued;

(b) the Court would issue a subpoena in its own proceedings; and

(c) the issue of the subpoena is reasonable in all the circumstances.[101]

In light of these requirements, the Court held that the arbitral tribunal had clearly granted permission for the Court to issue the subpoenas and the issuance of the subpoenas was reasonable in all the circumstances given the need for cross-examination (amongst other things).

Samsung C&T Corporation, Re [2017] FCA 1169

In contrast, the case of *Samsung C&T Corporation, Re*[102] demonstrates that section 23 of the IAA has been interpreted by the judiciary such that the FCA does not have jurisdiction to allow leave to issue subpoenas in respect of foreign-based arbitral proceedings. That case concerned an arbitration seated in Singapore between Samsung C&T Corporation and Duro Felguera Australia Pty Ltd. The main issue for the FCA was whether section 23 of the IAA allowed an Australian court to issue subpoenas in connection with foreign-seated arbitrations, such as in Singapore. To determine this question, the FCA considered the definition of 'court' in section 22A of the IAA, which defines the term 'court' for the purposes of section 23 as: (a) in relation to arbitral proceedings conducted in a Territory – the Supreme Court of that State; (b) in relation to arbitral proceedings conducted in a Territory – the Supreme Court of that Territory; and (c) in any case – the Federal Court of Australia. Ultimately, the FCA found that the words 'in any case' (in section 22A(c) of the IAA) had a restrictive meaning, to the effect that they limited the FCA's jurisdiction to arbitral proceedings in Australian States and Territories. The FCA's conclusion therefore was that Australian courts can only issue subpoenas in relation to arbitrations seated in Australia and not seated in foreign jurisdictions.

The authors also note that in this particular case, Duro then approach the WASC for the same subpoenas. Martin CJ, who is known as a strong proponent of arbitration, issued the subpoenas sought by Duro.[103] His Honour did not publish reasons for issuing the subpoenas, so we are unable to comment further on his different approach.

These two decisions demonstrate an interesting counterpoint in the interpretation of the IAA by Australian courts. As the law now stands, the FCA precedent is that it will only issue subpoenas in aid of arbitral proceedings seated in Australia, and not in aid of foreign-seated arbitral proceedings. However, this distinction adopted by the FCA in *Samsung C&T Corporation, Re* has received criticism from many arbitration practitioners and commentators, who argue that the approach is contrary to the objectives of the IAA. In light of Martin CJ's decision to issue the subpoenas sought by Duro despite the FCA's decision, it will be interesting to see which approach other Australian courts adopt.

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[101] *UDP Holdings Pty Ltd v Esposito Holdings Pty Ltd* [2018] VSC 316, [7], [8]
[102] [2017] FCA 1169
[103] Jones Day, 'Court Limits Australia's Jurisdiction to Assist International Arbitrations' (2017) <https://www.jonesday.com/files/Publication/30132d4e-fcd6-4b9b-a8e8-14f63e44a20f/Presentation/PublicationAttachment/29945ee5-5771-4b48-a408-24dfcf1debcb/Court%20Limits%20Australia%20Jurisdiction.pdf>

Key point #4:
Arb-med-arb is permitted under Australian legislation, despite not being available in other international jurisdictions. However, parties must strictly observe the legislative conditions for undertaking arb-med-arb, otherwise they may face significant costs, lengthy delays and ultimately, an unenforceable award.

Arb-med-arb

On certain conditions prescribed in the IAA, parties may consensually undertake an 'arb-med-arb' process, in which an arbitrator ceases to act as the arbitrator in order to act as a mediator, and then resumes the role of arbitrator after the mediation.[104] However, as illustrated this year in *Ku-ring-gai Council v Ichor Constructions Pty Ltd,*[105] failure to observe the prescribed IAA conditions can lead to significant costs to parties, lengthy delays and potentially render arbitration awards unenforceable.

The case concerned a construction dispute between the Ku-ring-gai Council (**Council**) and Ichor Constructions Pty Ltd (**Ichor**) which found its way to arbitration. During the arbitration, both parties agreed in writing to engage in what would turn out to be unsuccessful mediation, with the arbitrator assuming the role as the mediator. Following the mediation's conclusion, the parties recommenced arbitration. Ichor, four business days after the conclusion of the hearing, sent a letter 'in protest' claiming that they had not consented when the mediation transitioned back to arbitration.[106] The Council sought orders in the Supreme Court claiming that the arbitration should continue, which was opposed by Ichor.

Section 27D(1) *Commercial Arbitration Act 2010* (NSW) (**Act**) provides that an arbitrator may act as a mediator in proceedings relating to a dispute between the parties to an arbitration agreement (mediation proceedings) if:

> (d) the arbitration agreement provides for the arbitrator to act as mediator in mediation proceedings (whether before or after proceeding to arbitration, and whether or not continuing with the arbitration), or
>
> (e) each party has consented in writing to the arbitrator so acting.

Section 27D(4) of the Act then provides that an arbitrator who has acted as mediator in mediation proceedings that are terminated may not conduct subsequent arbitration proceedings in relation to the dispute without the written consent of all the parties to the arbitration given on or after the termination of the mediation proceedings.

McDougall J, in reaching his decision, was asked to consider the following questions:[107]

1 Did the arbitrator act as a mediator?

2 If the arbitrator did act as a mediator, did the parties give their written consent before the arbitrator resumed the arbitration?

3 If those consent was required and had not been given, had Ichor waived its right to object to the arbitrator resuming the arbitration?

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[104] See section 27D(4) of the *Commercial Arbitration Act 2010* (NSW)
[105] [2018] NSWSC 610
[106] *Ku-ring-gai Council v Ichor Constructions Pty Ltd* [2018] NSWSC 610 [67]
[107] Ibid [3]

Alternatively, was Ichor estopped from asserting that the requirements of s 27D(4) were not met?

On the last day of the arbitration, in an 'off the record' discussion, the arbitrator asked if the parties would consent to his putting forward a settlement proposal. The arbitrator said he would only put a proposal forward 'under the cloak of mediation'.[108] The parties signed written consent to engage the arbitrator as a mediator for the purposes of him putting forward a proposal. The arbitrator clearly intended he would be acting as a mediator in putting forward his proposal, and in doing so was acting in a non-arbitral character. The Council argued that because the arbitrator had not exercised all the functions of a mediator he was therefore not acting as a mediator. McDougall J observed that there was no reason why all the 'features' of a mediation need to be present before there can be a mediation.[109] The arbitrator and the parties had clearly intended to mediate and held that the Act should be construed in such a way which promoted simplicity and certainty of operation.[110] The parties, having engaged in mediation, were therefore obliged to satisfy the precondition of written consent in section 27D(4), before recommencing the arbitration.

McDougall J observed that where written consent is a requirement for something to happen, what is needed is a written expression of consent signed by or otherwise attributable to, the parties whose consent is required.[111] Even though both parties had continued with the arbitration, following the unsuccessful mediation, it was not sufficient to abrogate the requirement. Thus, the court concluded that the arbitrator 'had and has no mandate to continue with the arbitration proceedings following termination of the mediation'.[112]

Council sought to rely on Article 4 of the UNCITRAL Model Law on International Commercial Arbitration (**Model Law**) which provides that a party may waive its right to object by proceeding with the arbitration with knowledge that a requirement under the arbitration agreement had not been complied with. McDougall J noted that Article 4 of the Model Law intentionally requires actual knowledge as it does not contain the phrase 'knows *or ought to* know'. Council submitted that by proceeding with the arbitration, following the unsuccessful mediation, without written consent, Ichor had waiver its right to object. The court disagreed, observing that Article 4 could not operate as the unchallenged evidence of Ichor was that it (including its principal) did not have actual knowledge of the writing requirements of section 27D(4) at the time the arbitration was continued. As such, there was no waiver. The Council also advanced estoppel arguments. McDougall J dismissed these arguments hastily, questioning how a conventional assumption could overcome the need for written consent where neither party was aware of such a requirement. Put another way, absent knowledge of the requirement of section 27D(4), there could no be estoppel.

[108] Ibid [31]
[109] Ibid [40].
[110] Ibid [45].
[111] Ibid [56].
[112] Ibid [97]

Key point #5:
Arbitration is available to parties as an alternative to family court proceedings, although it is currently limited to financial and property disputes and faces a number of barriers to more extensive take-up. It remains to be seen whether Australia will retain its current, restrictive approach, or whether it will broaden the scope of family law arbitration as has recently been done in the United Kingdom.

Family Law arbitration

Arbitration is available as an alternative to family court proceedings in relation to financial and property matters under the *Family Law Act 1975* (Cth) (**FLA**). It was first introduced to the FLA through the *Courts (Mediation and Arbitration) Act 1991* (Cth), and those original provisions were significantly improved by the *Family Law Amendment (Shared Parental Responsibility) Act 2005* (Cth). Currently, Part II div 4 of the FLA, Part 10.3 r 10.14(2) of the *Family Law Rules 2004* (Cth) and Part 5 of the *Family Law Regulations 1984* (Cth) enable parties involved in family disputes to utilise arbitration as a 'non-court based family service'.

Section 10L of the FLA defines 'arbitration' as 'a process (other than the judicial process) in which parties to a dispute present arguments and evidence to an arbitrator, who makes a determination to resolve the dispute'. Family law arbitrators are entitled to charge for their services under FLA s 10N and are afforded the same protection and immunity as a judge of the Family Court in performing their arbitral duties.[113] Regulation 67C of the *Family Law Regulations 1984* outlines the matters that cannot be arbitrated, which in essence, include all family disputes except for those concerning financial and property matters. Importantly, the Regulations also set out who can act as an arbitrator. [114] To arbitrate disputes under the FLA, an arbitrator must be an Australian legal practitioner who is either: (a) accredited as a family law specialist by a State or Territory legal professional body; or (b) a person with at least 5 years experience and at least 25% of their work over that period was in relation to family law matters. Further, family law arbitrators must have completed specialist arbitration training conducted by a tertiary institution or a professional association of arbitrators, and have their name included on a list of arbitrators maintained by the Australian Institute of Family Law Arbitrators and Mediators on behalf of the Law Council of Australia.

Although arbitration is available to parties for resolving financial and property disputes in family law, its rate of utilisation in comparison to other family law dispute resolution options is relatively low. There are several issues likely to be contributing to the limited take-up of family law arbitration in Australia. First, financial and property disputes may be arbitrated. It may not be convenient for parties to divide their issues into different forms of dispute resolution, particularly where it leads to further costs. This leads to the second issue, namely the persistent and pervasive view amongst parties (and some practitioners) that the cost of arbitration is highly prohibitive, although it is widely argued by proponents of family law arbitration that this need not necessarily be so. Indeed, the former Chief Justice of the Family Court of Australia, the Hon Diana Bryant AO, has stated that, 'the decision to pursue litigation over arbitration once mediation and negotiation have failed is likely to be a false economy — a quick and well organised arbitration could cost significantly less, at the end of the day, than what parties will ultimately spend on legal fees in running protracted litigation'.[115] Third, although practitioners are required by the FLA to ensure their clients are aware of arbitration and other ADR processes when advising on family law issues, practitioners have indicated that they believe parties are often confused about what arbitration is, unsure of its benefits and how it differs from traditional litigation or mediation. Fourth, a perceived barrier that may be discouraging parties from engaging in family law arbitration are the current legislative restrictions on challenging an award. Under section 13J of the FLA, parties can only apply for a review of the award on questions of law, which significantly lessens the scope for courts to correct obviously unjust or inequitable arbitral decisions. This lack of appeal feature of arbitration is typically embraced by parties and practitioners involved in

[113] *Family Law Act 1975* (Cth) s 10P
[114] *Family Law Regulations 1984* (Cth) reg 67B
[115] Keynote address of the Hon Chief Justice Diana Bryant AO, 'Arbitration in Family Law' (2016) <https://www.ciarb.net.au/TheCIArbAustraliaNewsDecember2016.pdf> page 74

commercial arbitration. However, given the more personal nature of family law disputes, it is understandable that the lack of appeal rights may be seen as a negative feature in family law arbitration.

The situation in England and Wales provides an interesting contrast to the Australian jurisdiction. Arbitration is utilised in the UK to a much greater extent in the context of family law, particularly with the introduction of the Family Law Arbitration System in 2012 and later, the Children in Family Law Arbitration Scheme in 2016. Both financial remedy disputes and custody disputes can be arbitrated in the UK. The introduction of custody disputes to arbitration has led to the implementation of detailed rules and guidelines for ensuring that family law arbitration safeguards the safety of parties, particularly children. For example, the arbitrators must decide the substance of the dispute in accordance with the key welfare principle set out in section 1 of the *Children Act 1989* (UK). The welfare principle requires that safeguarding is a fundamental element of any child planning dispute resolution whether conducted via the Court or by alternative dispute resolution. There are two aspects to safeguarding in a custody dispute: first, providing for the physical and emotional safety of the child concerned and the parties in the immediate time frame of the dispute; second, taking appropriate care not to make an order or provision that will put the child concerned or the parties at avoidable future risk. As such, there are limits on when arbitration can be utilised to resolve custody disputes. To determine when it is appropriate to use arbitration, amongst other things, parties must have completed a safeguarding questionnaire and obtained basic disclosure from Disclosure Scotland (which provides criminal records for Scottish residents, as well as English and Welsh residents through its Disclosure and Barring Service). In reviewing this information, arbitrators are discouraged from conducting arbitral proceedings in situations involving domestic violence, drug and/or alcohol misuse and mental illness.

It remains to be seen the direction that Australia will take with family law arbitration; whether we will continue to limit arbitration in family law to financial and property disputes, or whether it will continue to grow in influence in Australia and eventually broaden its scope as has been done in the UK.

Key point #6:
The current LNP Government has shown its support for the increasing use of ISDS in free trade agreements and other treaties (such as the new Peru-Australia FTA and amended Singapore-Australia FTA). However, whether or not Australia continues in this direction is uncertain due to the highly politicised nature of ISDS and the frequent turnover of leaders and governments in Australia.

Trade agreements and ISDS

Investor state dispute settlement (**ISDS**) is a mechanism found in free trade agreements and investment treaties that provides foreign investors with the right to access an international tribunal to resolve investment disputes through arbitration. It differs from traditional dispute settlement to the extent that it provides an extra mechanism enabling investors to bring their claims against a host state that is a party to the relevant treaty. As such, if a country breaches its investment obligations, an investor can apply to have their claim determined by an independent arbitral tribunal. In this way, ISDS promotes protection for Australian companies investing abroad against sovereign or political risk. However, ISDS is heavily debated in Australia because although it provides protection for Australian companies investing abroad, it also gives foreign corporations increased legal rights to make claims against the Australian government.

Indeed, ISDS has a checkered political past, heavily influenced by the ever-changing Australian political landscape. In a 2011 Trade Policy Statement, the Gillard Australian Labor Party (**ALP**) Government categorically declared that Australia would not agree to the inclusion of ISDS in future bilateral and regional trade agreements. However, in 2013, the new Abbott Liberal–National Coalition (**LNP**) Government retreated from that policy by including an ISDS regime in the Korea–Australia Free Trade Agreement (concluded on 5 December 2013), and the China–Australia Free Trade Agreement (concluded on 17 June 2015). More recently, the Turnbull LNP Government agreed to implement ISDS in the Trans Pacific Partnership (TPP-11) and other free trade agreements. However, the ALP maintains its stance against ISDS and has indicated that it will reconsider the ISDS provisions currently in place in Australia's free trade agreements if it wins the May 2019 election. Former High Court Chief Justice Robert French has also criticised ISDS, noting that ISDS arbitral tribunals have no independent judiciary, effective review or appeals process, despite the fact that they may issue awards which 'significantly impact on national economies and on regulatory systems within national states'.[116]

At present, the Australian Government considers whether to insert ISDS provisions into free trade agreements on a case-by-case basis, in light of what it deems to be in the national interest. As at October 2018, Australia currently has ISDS provisions in six free trade agreements:

(a) China–Australia Free Trade Agreement;

(b) Korea–Australia Free Trade Agreement;

(c) Australia–Chile Free Trade Agreement;

(d) Singapore–Australia Free Trade Agreement;

(e) Thailand–Australia Free Trade Agreement; and

(f) ASEAN–Australia–New Zealand Free Trade Agreement.

[116] Chief Justice RS French AC, 'Investor-State Dispute Settlement – A Cut Above the Courts, Supreme and Federal Courts Judges' Conference (2014) <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj09jul14.pdf>

Australia also has ISDS provisions in 20 bilateral investment treaties with Argentina, China, Czech Republic, Egypt, Hong Kong, Hungary, Indonesia, Laos, Lithuania, Mexico, Pakistan, Papua New Guinea, Peru, Philippines, Poland, Romania, Sri Lanka, Turkey, Uruguay and Vietnam.

The have been several instances in which Australian-based companies have used ISDS in proceedings against other countries to protect their investments overseas. To date, there has only been one ISDS tribunal hearing against Australia, in which Philip Morris Asia unsuccessfully challenged Australia's tobacco plain packaging legislation at great cost to the Australian taxpayer. In December 2015, the arbitral tribunal unanimously agreed with Australia's position that the tribunal had no jurisdiction to hear Philip Morris Asia's claim, and that Philip Morris Asia's initiation of the arbitration constituted an abuse of rights, because Philip Morris' restructuring, undertaken after it was aware of the proposed plain packaging reforms, was undertaken for the main and determinative, if the not sole, reason of bringing its claim under the Hong Kong-Australia Bilateral Investment Treaty.[117]

Peru-Australia Free Trade Agreement

Australia and Peru signed the Peru-Australia Free Trade Agreement (**PAFTA**) on 12 February 2018. Both countries are currently in the process of enacting the agreement within their domestic systems so that it can enter into force. Amongst other things, the PAFTA contains ISDS provisions which allow a claimant to submit a dispute against the State party (i.e. Australia or Peru) to arbitration if it is not resolved within six months of consultation and negotiation.[118]

Agreement to Amend the Singapore-Australia Free Trade Agreement

Australia ratified a revision to the Singapore-Australia Free Trade Agreement (**SAFTA**) on 19 October 2017, which allows Australians registered as foreign lawyers and working locally in Singapore (and working in foreign law practices in Singapore) to participate in international commercial arbitration proceedings in Singapore by:

1 representing any party in arbitration proceedings; and

2 giving advice, preparing documents or giving any other assistance in relation to arbitration proceedings, except for the right of audience in Singapore court proceedings.[119]

The amendment also seeks to alter the ISDS provisions so that they permit government regulation in the public interest. Notable articles implementing this intention are Articles 20 and 22 of Chapter 8 (Investment) of the SAFTA which provide:

> '*Article 20: Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives.*'
>
> '*Article 22: No claim may be brought under this Section in respect of a tobacco control measure of a Party.*'

The inclusion of these provisions are not surprising following the Australian Government's recent experience in the Philip Morris arbitration.

[117] Award on Jurisdiction and Admissibility (2017) [584]
[118] PAFTA Chapter 8, Section B
[119] Agreement to Amend the Singapore-Australia Free Trade Agreement, Annex 4-I(B) – Singapore's reservations to Chapter 7 and Chapter 8, page 32

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