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Year in Review of Arbitration in Australia (2018 - 2019)

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Introduction

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From the quarrelsome Rinehart/Hancock family to Panamanian cargo ships to the Royal Women's Hospital in Melbourne: this year has been full of fascinating Australian arbitration decisions.

From a review of the diverse range of decisions handed down in the 2018-2019 year, we have identified the following key points, which we consider in detail in this Year in Review:

Agreements

1 The High Court has affirmed the longstanding principle that arbitration agreements should be interpreted liberally and 'by reference to the language used by the parties, the surrounding circumstances, and the purposes and objects to be secured by the contract'.

2 In interpreting arbitration clauses, Courts are hesitant to refer disputes to arbitration where the dispute is not within the scope of the arbitration agreement.

Awards

3 A number of decisions relating to the enforcement of arbitration awards were handed down this past year, including decisions highlighting that:

(a) there is a high threshold for parties seeking to set aside an arbitral award by virtue of alleged misconduct on the part of the arbitrator; and

(b) Courts may not enforce an arbitral award if an application to set aside that same award has been filed in the jurisdiction in which the award was made.

Arb-med-arb

4 The Courts were given the rare opportunity to consider the legislative conditions for undertaking arb-med-arb and held that parties must strictly comply; otherwise, they may face significant costs, lengthy delays and ultimately, an unenforceable award.

Family law arbitration

5 In the context of enforcing or setting aside unregistered family law arbitral awards, the Federal Court adopts the grounds for refusing recognition or enforcement set out in the uniform Commercial Arbitration Acts, because the *Family Law Act 1975* (Cth) is silent on this issue.

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Investor-state dispute settlement

6 Australia has signed two free trade agreements in the past financial year, the Indonesia-Australia Free Trade Agreement and the Australia-Hong Kong Free Trade Agreement, although both are yet to come into force as the parties are following their domestic legislative processes to transform the agreements into local law. Both of these international investment treaties contain investor-state dispute settlement provisions.

Agreements

(a) The High Court has affirmed the longstanding principle that arbitration agreements should be interpreted liberally and 'by reference to the language used by the parties, the surrounding circumstances, and the purposes and objects to be secured by the contract'.

(b) In interpreting arbitration clauses, courts are hesitant to refer disputes to arbitration where the dispute is not within the scope of the arbitration agreement.

Handed down on 8 May 2019, the High Court's decision in *Rinehart v Hancock Prospecting Pty Ltd; Rinehart v Rinehart*[3] is possibly the most important judgment of the year in the Australian arbitration space.

Background

Between 2003 and 2010, Mrs Gina Rinehart and her controlled entities entered into various deeds with her children, including her son and daughter, Mr John Hancock and Ms Bianca Rinehart. The general purpose of these deeds was to curb a series of claims and threats of litigation publically made by John Hancock, alleging that Gina Rinehart and her controlled entities had committed a number of financial wrongdoings against her children. Three of these deeds have since become the subject of the current litigation:

(a) the confidential Deed of Obligation and Release entered into by John Hancock in April 2005 (**Deed of Obligation and Release**);

(b) the Hope Downs Deed entered into with Bianca Rinehart and her two sisters in August 2006 (**Hope Downs Deed**); and

(c) a further deed entered into with John Hancock in April 2007 in which he adopted the Hope Downs Deed (**April 2007 Deed**),

(together, the **Deeds**).

The Deeds each contain an arbitration clause. For example, clause 20 of the Hope Downs Deed provides that '*[i]n the event that there is any dispute under this deed'* there is to be a confidential arbitration. Clause 9 of the April 2007 Deed and clause 14 of the Deed of Obligation of Release are arbitration clauses in similar terms.[4]

Notwithstanding the terms of the Deeds, in October 2014, Bianca Rinehart and John Hancock (**Appellants**) commenced proceedings in the Federal Court against Gina Rinehart and various entities controlled by her (the **Respondents**). Amongst others, the Appellants made two significant allegations. First, they alleged the Respondents had mismanaged trust assets and committed other breaches of trust in relation to trusts under which the Appellants were beneficiaries (**Substantive Claims**). Second, the Appellants alleged they were not bound by the Deeds, because their signatures were procured by misconduct and undue influence on the part of Gina Rinehart, Hancock Prospecting Pty Ltd and others. They applied for declarations that the Deeds were void as against them (**Validity Claims**).

[3] (2019) 366 ALR 635.
[4] Clause 14 of the Deed of Obligation and Release refers 'all disputes hereunder' to arbitration.

By interlocutory application, Gina Rinehart sought an order pursuant to section 8(1) *Commercial Arbitration Act 2010* (NSW) (**Act**) that the proceedings (including both the Substantive and Validity Claims) be dismissed or permanently stayed, and referred to arbitration. Section 8(1) provides:

> *A court before which an action is brought in a matter which is the subject of an arbitration agreement must, if a party so requests not later than when submitting the party's first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.*

Primary decision

At first instance, Gleeson J determined that the Validity Claims were not subject to the arbitral clauses in the Deeds. Her Honour interpreted the words 'under this deed' and 'hereunder' restrictively, finding them to be incapable of extending to a dispute as to the underlying enforceability or validity of the deeds themselves.[5] Accordingly, her Honour ordered a separate trial of the Validity Claims, but agreed that the Substantive Claims could be referred to arbitration.[6]

Full Federal Court decision

The Full Federal Court (Allsop CJ, Besanko and O'Callaghan JJ) unanimously overturned Gleeson J's decision, holding that the arbitration clauses in the Deeds should be given a liberal, rather than a narrow interpretation.[7] The Full Court was strongly persuaded by the approach taken by the House of Lords to the construction of arbitral clauses in *Fiona Trust & Holding Corporation v Privalov* [2007] 4 All ER 951 (***Fiona Trust***). In *Fiona Trust*, Lord Hoffman held that the construction of an arbitral clause should:[8]

> '*...start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal.'*

The Full Court construed the arbitral clauses in the Deeds in accordance with the presumption that '*unless the language makes it clear that certain questions [are] intended to be excluded from the arbitrator's jurisdiction'*, the entire dispute should be determined in arbitration.[9] As such, the Full Court had little difficulty in determining that, after starting with the assumption in *Fiona Trust*, a liberal reading of the clause '*any dispute under this deed'* clearly led to a finding that both the Substantive Claims and Validity Claims were within the scope of the arbitration agreement.

High Court

On appeal, the High Court upheld the Full Federal Court's decision, agreeing with their Honours' conclusion, but for different reasons. Notably, the High Court rejected the relevance of *Fiona Trust*, finding it unnecessary to consider the correctness of Lord Hoffman's approach. Instead, the High Court preferred to rely wholly on the construction of the clause '*by reference to the language used by the parties, the surrounding circumstances, and the purposes and objects to be secured by the contract'*.[10]

The High Court noted that a critical object of the Hope Downs Deed was the maintenance of confidentiality about the affairs of the Hancock Group (including a number of companies under Gina Rinehart's control), the trusts, the intra-family dispute and the provisions of the Deeds themselves.[11] This need for commercial confidentiality was underscored by the fact that highly confidential negotiations

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[5] See *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442.
[6] Ibid.
[7] *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442 at 489 [166]-[167], 496 [193].
[8] *Fiona Trust* [2007] 4 All ER 951 at 958 [13].
[9] Ibid.
[10] *Rinehart v Hancock Prospecting Pty Ltd; Rinehart v Rinehart* (2019) 366 ALR 635 [44].
[11] Ibid [46].

were underway amongst the Hancock Group in relation to financing a new joint venture agreement.[12] In this context, the parties were essentially agreeing to avoid public scrutiny threatening to jeopardise their commercial endeavours.[13] Moreover, at the time the Deeds were drafted, the Appellants and the Respondents were aware that disputes were likely to arise in the future.[14] This, in turn, was said by the High Court to indicate that the parties intended to draft an arbitration clause that facilitated a method of dispute resolution of the same level of confidentiality that characterised the Deeds as a whole.[15] In their Honours' words:[16]

> '*It is inconceivable that such a person would have thought that claims of the latter kind, raising allegations such as undue influence, were not to be the subject of confidential dispute resolution but rather were to be heard and determined publicly, in open court.'*

Thus, the High Court rejected the Appellants' appeal, referring the parties to arbitration in respect of both the Validity Claims and Substantive Claims.

Cross-appeal

A second (albeit less publicised) matter in the dispute was the cross-appeal brought by three of the Respondents, Roy Hill Iron Ore Pty Ltd, Hope Downs Iron Ore Pty Ltd and Mulga Downs Iron Ore Pty Ltd (**Cross-Appellants**). The Cross-Appellants sought a stay under section 8 of the Act in respect of claims brought against them by the Appellants, relating to breach of trust and knowing receipt of trust property (being mining tenements) held by the Respondents for the Appellants. The Cross-Appellants, none of which is a party to any of the Deeds, applied to Gleeson J for an order that the claims against them be referred to arbitration. The basis for their request was that each of them was claiming 'through or under' a party to the Hope Downs Deed (Hancock Prospecting Pty Ltd and Hancock Resources Limited), and therefore was a party within the definition of 'party' in section 2 of the Act, which provides:[17]

> '"*party" means a party to an arbitration agreement and includes:*
>
> *(a) any person claiming through or under a party to the arbitration agreement, and…'*

The High Court overturned the decision of the Full Court in allowing the cross-appeal.[18] The majority (Kiefel CJ, Gageler, Nettle, Gordon JJ) reasoned that the Cross-Appellants received the mining tenements with knowledge that they were assigned to them in breach of trust. As such, when the Cross-Appellants sought to contest the claim brought against them by the Appellants on the basis there was no breach of trust, the Cross-Appellants took their stand upon a ground which was available to the Respondents and stood in the same position vis-à-vis the Appellants as the Respondents.[19] In other words, since the Respondents and the Appellants are bound by an arbitration agreement applicable to the claim of breach of trust, this claim should be determined as between the Cross-Appellants and the Respondents in the same way as it is determined between the Appellants and the Respondents.[20] The Cross-Appellants therefore satisfied the definition of 'party' in section 2 of the Act. However, Edelman J dissented, finding that the 'wide and liberal interpretation' given by the majority to the words '*through or under'* was '*antithetical to the global fundamental principle that arbitration is a matter of contract'*, in respect of which the concept of privity of contract ought to be upheld unless the parties agreed otherwise.[21] The majority swiftly rejected Edelman J's approach and references to comparative jurisprudence. Their Honours noted in obiter that despite the international origins of Australia's arbitration legislation, no party

[12] Ibid [45].
[13] Ibid [46].
[14] Ibid [48]
[15] Ibid [48].
[16] Ibid [48].
[17] Ibid [48].
[18] Ibid [60].
[19] Ibid [73].
[20] Ibid [73].
[21] Ibid [85].

made submissions regarding the approach of other jurisdictions and thus, '*attempts to resolve issues raising separate considerations capable of discrete controversy must be eschewed as beyond the boundaries of the resolution of the question of law raised*'.[22]

Conclusion

The High Court's decision in the Rinehart/Hancock dispute highlights the importance of considering and applying the ordinary principles of contract interpretation and construction when drafting an arbitration clause. Potentially limiting words and phrases such as 'under' this deed and 'hereunder' should be treated with additional care to ensure they do not dilute the scope of the clause and lead to litigated proceedings, where the court is likely to publically scrutinise the specific factual context in which the parties negotiated, drafted and signed the contract. Indeed, this is precisely what occurred in the Rinehart/Hancock dispute, despite the parties' initial intentions to keep their disputes away from the public eye.

Applications for stay of proceedings

On many occasions in the past year, Courts made orders staying proceedings and referring parties to arbitration under both state[23] and federal legislation.[24] However, this was not necessarily the outcome of every decision, as several Courts refused to grant stays where the arbitration agreement in question was inoperative or incapable of being performed. We consider decisions involving both outcomes below.

Degroma Trading Inc v Viva Energy Australia Pty Ltd

In *Degroma Trading Inc v Viva Energy Australia Pty Ltd*,[25] the applicant (**Degroma**) sought an order pursuant to section 7(2) of the *International Arbitration Act* that the whole of proceedings commenced by the respondent (**Viva**) against it be stayed, and the dispute referred to arbitration in London.

Degroma, a company incorporated in Panama, is the registered owner of the Panamanian flagged oil and chemical tanker vessel, the *Diamond-T*. The *Diamond-T* is managed and operated by a Turkish company, Transal Denizcilik Ticaret A.S. (**Transal**). Degroma time chartered the *Diamond-T* to City Marine S.A. (**City Marine**), a Swiss company related to both Degroma and Transal, by charterparty.[26] By operation of the charterparty, City Marine became the disponent owner of the *Diamond-T*.[27] Finally, by voyage charter dated 17 September 2018, City Marine voyage chartered the *Diamond-T* to Viva.[28] The voyage charter was for the carriage of a cargo of Viva's petroleum products from Geelong to Tasmania in October 2018. Clause 33(1) of the voyage charterparty provided:

> '*Subject to the provisions of this clause Charterers may require the master to sign bills of lading for any cargo in such form as Charterers direct.*'[29]

[22] Ibid [78].
[23] See, *Stockco Agricapital Pty Ltd v Sugarloaf Nominees Pty* [2019] NSWDC 12; *First Solar (Australia) Pty Ltd, in the matter of Lyon Infrastructure Investments Pty Ltd v Lyon Infrastructure Investments Pty Ltd* [2018] FCA 1666
[24] *Duro Felguera Australia Pty Ltd v Samsung C&T Corporation (ABN 49 160 079 470 with Republic of Korea Registration Number 110111-0015762)* [2019] WASC 90; *Joban Kosan Co Ltd v Flame SA* [2018] NSWSC 1754.
[25] [2019] FCA 649 (O'Callaghan J).
[26] Britannica: A charterparty is a contract by which the owner of a ship lets it to others for use in transporting a cargo.
[27] A disponent owner controls the commercial operation of a ship and is responsible for deciding the ports of call and the cargoes to be carried: *Degroma Trading Inc v Viva Energy Australia Pty Ltd* [2019] FCA 649 [8].
[28] *Degroma Trading Inc v Viva Energy Australia Pty Ltd* [2019] FCA 649 [11].
[29] A Bill of Lading is a detailed list of a ship's cargo in the form of a receipt given by the master of the ship to the person consigning the goods.

Transal, acting for Degroma, requested that Viva negotiate a bill of lading. It was an owners' bill of lading, to be signed by the Master of the *Diamond-T* (the **Master**) on behalf of Degroma. It contained the following clause 10B:

> '*Any dispute arising out of this Bill of Lading shall be decided by the English Courts to whose jurisdiction the parties hereby agree.*
>
> *Notwithstanding the foregoing, but without prejudice to any party's rights to arrest or maintaining the arrest of any maritime property, either party may by giving written notice of election to the other party, elect to have such dispute referred to the arbitration of a single arbitrator in London in accordance with the provisions of the Arbitration Act 1850, or any sstatutory [sic] modification or re-enactment thereof for the time being in force…'*

Emails passed between the parties, proposing changes to various aspects of the bill of lading, but no changes were proposed in relation to clause 10B.[30] A dispute regarding alleged contamination of the cargo arose between Degroma and Viva, as well as between City Marine and Viva.[31] The vessel was arrested and Degroma was named as the 'relevant person'.[32] Viva commenced arrest proceedings in the Federal Court, alleging that Degroma breached its duty as a bailee, negligence and other claims.[33] However, on 11 December 2018, Degroma gave notice to Viva of its election to commence an arbitration in London against Viva, pursuant to clause 10B.[34]

Degroma applied for a stay of Viva's arrest proceedings pursuant to section 7 *International Arbitration Act 1974* (Cth), which provides at sub-section 7(2):

> '*Subject to this Part, where:*
>
> *(a) proceedings instituted by a party to an arbitration agreement to which this section applies against another party to the agreement are pending in a court; and*
>
> *(b) the proceedings involve the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration;*
>
> *on the application of a party to the agreement, the court shall, by order, upon such conditions (if any) as it thinks fit, stay the proceedings or so much of the proceedings as involves the determination of that matter, as the case may be, and refer the parties to arbitration in respect of that matter.'*

Justice O'Callaghan noted that section 7 applies where '*a party to an arbitration agreement is a person who was, at the time when the agreement was made, domiciled or ordinarily resident in a country that is a Convention country*'.[35] Degroma was incorporated in Panama, which is a convention contracting country for the purposes of section 7.

Degroma contended that the Court should follow the decision of the Full Federal Court in *Hancock Prospecting Pty Ltd v Rinehart*,[36] and permit the London arbitrator to determine whether there is a concluded arbitration agreement between the parties. Degroma heavily relied on the judgment of Allsop

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[30] *Degroma Trading Inc v Viva Energy Australia Pty Ltd* [2019] FCA 649 [21]-[37].
[31] Ibid [40].
[32] Ibid [43]. 'Relevant person', in relation to a martime claim, means a person who would be liable on the claim in a proceeding commenced as an action *in personam*: section 3 of the *Admiralty Act 1988* (Cth).
[33] Ibid [44].
[34] Ibid [45].
[35] Section 7(1) of the *International Arbitration Act 1974* (Cth). Also, a 'Convention country' is defined in section 3 to mean a country (other than Australia) that is the Contracting State within the meaning of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*.
[36] (2017) 257 FCR 442 (another decision related to the High Court of Australia decision discussed earlier).

J in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd*[37] in which his Honour held that 'the requirement that the arbitral clause in a contract or an arbitration agreement be contained in an exchange of letters or telegrams (as contained in Art II(2) of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*) is not a requirement that the contract be formed by the act of signing or the exchange of letters or telegrams.'[38] Degroma contended that this requirement is satisfied because both Viva and Degroma engaged in '*an unambiguous exchange of correspondence attaching drafts of the bill of lading, each of which contained the arbitration agreement contained in clause 10(B)'*.[39]

On the other hand, Viva argued that the bill of lading was not binding and therefore, there was no valid arbitration agreement without a valid bill of lading.

In his decision, O'Callaghan J referred to the Full Federal Court's decision in *Hancock v Reinhart*[40] with approval. His Honour noted that the relevant question was whether the court **should** hear a separate attack on the arbitration agreement (here, whether it was ever brought into existence in the first place) or permit the arbitrator to hear it, by staying its own proceeding. His Honour opined at [65]:

> '*...because of [the respondent's] submission that it will "inevitably" be necessary to determine whether the bill of lading acquired a contractual effect between the parties in order to determine whether an arbitration came into effect, there is little prospect that the question of whether the arbitration has jurisdiction can be determined separately from the question of whether the main agreement (the bill of lading) binds the parties and, if so, what are its terms.'*

Further, the Court opined that Viva's argument that the arbitration agreement could not exist independently of the bill of lading is '*exactly the kind of argument which the doctrine of separability is intended to prevent*'.[41] Indeed, his Honour referred to Lord Hoffman's judgment in *Fiona Trust & Holding Corporation v Pivalow*,[42] in which his Lordship stated that the arbitration agreement and the main contract '*must be treated at having been separately concluded and the arbitration agreement can be invalidated only on a ground which relates to the arbitration agreement and is not merely as a consequence of the invalidity of the main agreement.*'[43] Accordingly, O'Callaghan made orders staying the proceedings and remitting the matter to the arbitrator in London.

Eastern Goldfields Ltd v GR Engineering Services Ltd

In *Eastern Goldfields Ltd v GR Engineering Services Ltd*,[44] Tottle J of the Supreme Court of Western Australia considered an application to determine an arbitrator's jurisdiction.

The plaintiff, Eastern Goldfields Ltd (**Eastern Goldfields**), and the defendant, GR Engineering Services Ltd (**GR Engineering**), entered into a design and construct contract under which GR Engineering agreed to design and carry out refurbishment works on Eastern Goldfields' gold plant. Clause 41 of that contract contained an arbitration agreement.

Disputes arose in relation to Eastern Goldfields' alleged non-payment of GR Engineering's invoices and GR Engineering served a statutory demand for payment on Eastern Goldfields under section 459E *Corporations Act 2001* (Cth). Eastern Goldfields commenced proceedings to set aside the statutory demand. GR Engineering eventually consented to an order setting it aside. GR Engineering then alleged that it reached an agreement with Eastern Goldfields, called the Partial Accord and Satisfaction

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[37] (2006) 157 FCR 45, 84-86.
[38] *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 at [150].
[39] *Degroma Trading Inc v Viva Energy Australia Pty Ltd* [2019] FCA 649 [56].
[40] (2017) 257 FCR 442.
[41] *Degroma Trading Inc v Viva Energy Australia Pty Ltd* [2019] FCA 649 [68].
[42] [2008] 1 Lloyd's Re 254.
[43] Cited with approval in *Hancock v Reinhart* (2017) 257 FCR 442 at 530 [357].
[44] [2018] WASC 224.

Agreement, in which amongst other things, GR Engineering would consent to an order setting the statutory demand aside upon Eastern Goldfields' paying $5 million to GR Engineering, secured by a transfer of shares in Eastern Goldfields' capital held by Investmet Pty Ltd. Under the Partial Accord and Satisfaction Agreement, Investmet Pty Ltd provided an irrevocable guarantee and stated the share transfer was to be held in escrow by the law firm Squire Patton and Boggs. However, Eastern Goldfields did not pay the $5 million to GR Engineering, alleging that the Partial Accord and Satisfaction Agreement was not made or enforceable.

On 24 January 2018, on application by Eastern Goldfields, Tottle J (of the Western Australian Supreme Court) ordered that Eastern Goldfields and GR Engineering be referred to arbitration (under clause 41 of the contract) for the determination of disputes between them, pursuant to section 8(1) *Commercial Arbitration Act 2012* (WA).

In March 2018, GR Engineering commenced the arbitration against Eastern Goldfields and the following month, Eastern Goldfields delivered its points of defence, which included a plea that the arbitrator did not have jurisdiction to determine a dispute concerning the Partial Accord and Satisfaction Agreement. Eastern Goldfields then sought the arbitrator's consent to apply to the court under section 27J *Commercial Arbitration Act 2012* (WA) for the determination of jurisdiction question that is characterised as a question of law. Section 27J provides:

> '*(1) Unless otherwise agreed by the parties, on an application to the Court made by any of the parties to an arbitration agreement the Court has jurisdiction to determine any question of law arising in the course of the arbitration.*
>
> *(2) An application under this section may be made by a party only with the consent of —*
>
> *(i) an arbitrator who has entered on the reference; or*
>
> *(ii) all the other parties, and with the leave of the Court.'*

In May 2018, the arbitrator declined his consent and decided that he did have jurisdiction to determine the dispute concerning the Partial Accord and Satisfaction Agreement. Pursuant to section 16(9) *Commercial Arbitration Act 2012* (WA), Eastern Goldfields subsequently requested that the court determine whether the arbitrator had jurisdiction to hear the dispute concerning the Partial Accord and Satisfaction Agreement.[45]

The Court noted that by its application, Eastern Goldfields was seeking to undo at least in part the result it achieved by its application for an order referring the parties to arbitration for the determination of all the claims made by GR Engineering.[46] The questions for the court were:[47]

1 Was the dispute concerning the Partial Accord and Satisfaction Agreement as it relates to Eastern Goldfields and GR Engineering stayed by the order made on 24 January 2018?

2 If it was not stayed, should an order be made staying the dispute and referring it to arbitration?

3 If it was stayed (and referred to arbitration) should an order be made to the effect that the arbitrator does not, in fact, have jurisdiction to determine the dispute?

GR Engineering contended that the dispute concerning the Partial Accord and Satisfaction Agreement had been stayed and referred to arbitration.

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[45] Section 16(9) of the *Commercial Arbitration Act 2012* (WA): If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within 30 days after having received notice of that ruling, the Court to decide the matter.

[46] *Eastern Goldfields Ltd v GR Engineering Services Ltd* [2018] WASC 224 [6]

[47] Ibid [15]

As a starting point, his Honour noted that in his earlier decision staying the proceedings, he held that:[48]

> *'It follows from what I have said that [GR Engineering's] claims against [Eastern Goldfields] should be stayed and [GR Engineering] and [Eastern Goldfields] should be referred to arbitration for the resolution of the disputes between them.'*

His Honour asserted that 'this conclusion did not draw a distinction between the disputes between Eastern Goldfields and GR Engineering about the claims made under the contract on the one hand, and the dispute between them about the claims made under the alleged Partial Accord and Satisfaction Agreement on the other, because no such distinction was drawn by Eastern Goldfields and Investmet'.[49] Thus, the orders of 24 January 2018 clearly resolved the application by Eastern Goldfields in their favour in accordance with their submissions (which drew no distinction between the disputes).[50]

Nevertheless, Eastern Goldfields submitted three arguments as to why the arbitrator lacked jurisdiction to determine GR Engineering's claim based on the alleged Partial Accord and Satisfaction Agreement.

First, Eastern Goldfields submitted that whatever the scope of the arbitration agreement, it ceased to operate in relation to the dispute about the Partial Accord and Satisfaction Agreement, because it was not a dispute arising in connection with the contract, but arising in connection with the Partial Accord and Satisfaction Agreement, which was a settlement agreement. Eastern Goldfields sought to rely on two decisions[51] in which arbitration agreements had been rendered 'inoperative' for the purposes of section 7(5) *International Commercial Arbitration Act 1974* (Cth) (which deals with enforcement), by virtue of the dispute having already been settled. However, Tottle J opined that the principle in those cases did not apply to the present case, because the parties merely agreed to set aside by consent order the statutory demand served by GR Engineering against Eastern Goldfields.[52] Not only did GR Engineering not allege that there was a settlement of all its claims under the contract sufficient to render the arbitration agreement inoperable, it also did not allege its claims based on the invoices particularised in the statutory demand were settled.[53] Thus, the arbitration agreement did not cease to operate by virtue of the Partial Accord and Satisfaction Agreement.

Second, Eastern Goldfields contended the arbitrator lacked jurisdiction because the choice of law and choice of jurisdiction provisions in the deed of guarantee and escrow agreement specified that they were governed by the laws of Western Australia and each party submitted to the non-exclusive jurisdiction of the courts of Western Australia. Eastern Goldfields submitted that these provisions demonstrated that the parties intended any dispute arising out of the guarantee and escrow agreement to be resolved by litigation. Tottle J dismissed this submission, holding:

> *'A non-exclusive jurisdiction clause does not expressly preclude the parties from implementing an arbitration agreement nor does it do so impliedly.*
>
> *… the existence of the choice of law clauses and the non-exclusive jurisdiction provisions are harmonious with the existence of an arbitration agreement.'*

Third, Eastern Goldfields submitted that the dispute about the Partial Accord and Satisfaction Agreement was not within the scope of the arbitration agreement because it was not a bipartite dispute between GR Engineering and Eastern Goldfields, but was a multi-party dispute between GR Engineering, Eastern Goldfields, Investmet and Squire Patton Boggs. Again, Tottle J rejected Eastern Goldfields' argument, finding that the fact that the Partial Accord and Satisfaction Agreement was alleged to be an agreement

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[48] *GR Engineering Services Ltd v Eastern Goldfields Ltd* [2018] WASC 19 [58].
[49] Ibid [21].
[50] Ibid [26].
[51] *Bakri Navigation Company Ltd v Owners for Ship 'Golden Glory' Glorious Shipping SA* (1991) 217 ALR 152; *Shanghai Foreign Trade Corporation v Sigma Metallurgical Co Pty Ltd* (1996) 133 FLR 417.
[52] *GR Engineering Services Ltd v Eastern Goldfields Ltd* [2018] WASC 19 [31].
[53] Ibid [32].

between more than two parties giving rise to multiple obligations did not mean that a dispute between GR Engineering and Eastern Goldfields in relation to Eastern Goldfields' obligation under the alleged agreement is not a difference or dispute between them in connection with the subject matter of the contract for the purposes of the arbitration agreement. To hold otherwise would be to adopt a restrictive approach to the construction of the arbitration agreement, contrary to settled common law.[54]

Accordingly, Tottle J found that the parties were referred to arbitration for the determination of all disputes between them and that the arbitrator had jurisdiction to determine all the disputes, including the claim based on the Partial Accord and Satisfaction Agreement.[55]

Hurdsman v Ekactrm Solutions Pty Ltd

In *Hurdsman v Ekactrm Solutions Pty Ltd,*[56] the applicant was the defendant in an action commenced by the plaintiffs seeking damages for breach of a Share Sale Agreement (**SSA**). The applicant sought an order that the proceedings be permanently stayed on the basis that the parties were bound by an agreement to arbitrate in accordance with the rules of the Singapore International Arbitration Centre (**SIAC**) applying South Australian law, pursuant to clause 28.3 of the SSA, which stated:

> '*If the parties have been unable to resolve the Dispute within the Initial Period, then the parties must submit the Dispute to a mediator for determination in accordance with the Rules of the Singapore International Arbitration Centre (Rules), applying South Australian law, which Rules are taken to be incorporated into this agreement.'*

The clause referred to a mediator and appeared to be more of a mediation agreement than an arbitration agreement. However, the clause required the mediation to be conducted in accordance with the rules of the SIAC, which the Court said:

> *'…is not consistent with an intention to resolve disputes by mediation. This is because there are in fact no rules for mediation prescribed by the SIAC. I note that counsel for the plaintiff did give evidence from the bar table that there are rules of the Singapore International Mediation Centre.*
>
> *[25] For this reason I consider there is some ambiguity in the clause and I have therefore had recourse to some of the pre-contractual negotiations between the parties…*
>
> *[30] Whether clause 28.3 is a mediation clause or not, it was not suggested by either party that mediation was a pre-condition to litigation. The defendant contends that clause 28.3 is an arbitration clause and that arbitration is a pre-condition for litigation. For the reasons I have given, I find that clause 28.3 is not consistent with an intention to determine disputes by arbitration. Furthermore, having considered the clause in its entirety, I find that clause 28.3 is neither this nor that, that is to say it is not quite an arbitration agreement and not quite a mediation agreement.'*

Thus, the Court found that cl 28.3 of the SSA did not constitute a binding arbitration agreement and the application for a permanent stay of the proceedings was dismissed.

US Healthcare Food Group Pty Ltd v Zouky

Similarly, the plaintiff in *US Healthcare Food Group Pty Ltd v Zouky*[57] brought proceedings against the defendants to recover money under two contracts and a guarantee. The defendants filed a conditional notice of intention to defend, disputing the jurisdiction of the District Court of Queensland, and later an

[54] Ibid [36].
[55] Ibid [8].
[56] [2018] SASC 112.
[57] [2019] QDC 58.

application for an order that the proceedings be stayed and referred to arbitration under the *Commercial Arbitration Act 2013* (Qld) or alternatively, the *International Arbitration Act 1974* (Cth).

In July 2017, the plaintiff and second defendant (Zouky for Lebanon S.A.R.L.) entered into a unit purchase agreement, containing an arbitration agreement. The clause provided that if the parties were not able to resolve any '*dispute, claim or controversy arising out of or relating to this agreement or the breach, termination, enforcement, interpretation or validity of this agreement… shall be determined by binding arbitration…by the American Arbitration Association…in Wilmington, Delaware USA.'*

Less than a month later, the plaintiff and the second defendant entered into a loan agreement which contained varied terms to those in the unit purchase agreement. There was no arbitration agreement in the loan agreement, but its clause 7.17 provided that each party irrevocably submitted to the non-exclusive jurisdiction of the Courts of Queensland.[58] Similarly, the guarantee did not contain an arbitration agreement.[59]

A dispute arose between the parties under the loan agreement. The plaintiff alleged that the second defendant failed to repay the amount repayable under the loan agreement, and the first defendant failed to fulfil its guarantee in relation to ensuring the due and punctual payment of the loan debt. Further, the plaintiff alleged that the relief it sought was under the loan agreement, which did not contain an agreement to arbitrate. The defendant submitted that the unit purchase agreement was nevertheless central to the proceedings commenced by the plaintiff and that accordingly, the dispute between the plaintiff and the second defendant could be seen as a dispute relating to that agreement, so it was covered by the arbitration clause and under section 7 *International Arbitration Act 1974* (Cth).[60]

The District Court of Queensland first referred to the Full Federal Court's reasoning in *Hancock Prospecting Pty Ltd v Rinehart*,[61] opining that the expression 'relating to this agreement' is wide enough to encompass disputes or claims touching on the validity of the agreement.[62] However, in this case, '*there was a separate, later agreement involving two of the parties to the unit sale agreement, and an additional party, the first defendant, in relation to a separate transaction, a loan of money, which was made later than the unit sale agreement and was essentially independent of it.*'[63] The Court also attributed weight to the fact that the loan agreement was governed by the law of Queensland, demonstrating that the parties did not intend to 'pick up' the arbitration clause in the earlier agreement, because the arbitrators from Delaware would not easily apply Queensland law.[64] Accordingly, the District Court found that the plaintiff's claim seeking to enforce only the loan agreement and guarantee against the defendants did not involve a '*dispute, claim or controversy arising out of or relating to the unit purchase agreement, or otherwise within the scope of the arbitration clause in that agreement.*[65] In spite of this conclusion, the District Court noted that the wording of the claim and statement of claim could easily lead the defendants into thinking that the plaintiff in part sought to enforce the unit purchase agreement. As such, the defendants' application to stay the proceedings was dismissed subject to the plaintiff making the necessary amendments to its claim to make it clear that the unit purchase agreement was not in dispute.[66]

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[58] *US Healthcare Food Group Pty Ltd v Zouky* [2019] QDC 58 [10].
[59] Ibid [11].
[60] Ibid [12]-[13].
[61] (2017) 350 ALR 658 [156]-[157]. *US Healthcare Food Group Pty Ltd v Zouky* was decided before the High Court handed down *Rinehart v Hancock Prospecting Pty Ltd; Rinehart v Rinehart* (2019) 366 ALR 635. However, the general principles drawn upon by the Queensland District Court from the Full Federal Court's decision in *Hancock Prospecting Pty Ltd v Rinehart* remain good law.
[62] *US Healthcare Food Group Pty Ltd v Zouky* [2019] QDC 58 [23]
[63] Ibid [23].
[64] Ibid [30].
[65] Ibid [32].
[66] Ibid [37].

RW Health Partnership Pty Ltd v Lendlease Building Contractors Pty Ltd

The decision of *RW Health Partnership Pty Ltd v Lendlease Building Contractors Pty Ltd*[67] highlights that a Court will not refer a dispute to arbitration where a dispute does not fall within the scope of the arbitration agreement. The Plaintiff (**RW Health**) was a special purpose entity responsible for the design, construction, commissioning, managing and maintenance of a hospital. It subcontracted a range of its obligations with respect to the hospital to the Defendant (**Lendlease**). The Subcontract included the following dispute resolution provisions:

> *'74 Dispute Resolution*
>
> *74.1 Establishment of panel*
>
> *(a) Any party to a dispute may by notice (Referral Notice) to the other party refer the Dispute to the Panel for resolution. The referral notice must specify in reasonable detail the nature of the Dispute.*
>
> *...*
>
> *(g) If the Panel does not meet, resolve the Dispute or reach unanimous agreement on any matter within the Resolution Period, the Dispute is hereby:*
>
> *(i) referred to expert determination under clause 74.3 [Expert determination] if this Contract expressly provides for that Dispute to be resolved in accordance with expert determination as described in this Contract;*
>
> *(ii) referred to expert determination under clause 74.3 [Expert determination] in the case of Disputes in relation to Compensation; or*
>
> *(iii) referred to an arbitrator under clause 74.4 [Arbitration] in the case of all other Disputes.'*

In March 2018, RW Health gave a referral notice to Lendlease alleging that Lendlease's design and construction of a water system in the hospital was defective, and demanding rectification. The dispute did not resolve by the resolution period stipulated in the Subcontract, so on 14 March 2018, RW Health issued a notice to Lendlease referring the dispute to arbitration or alternatively, to expert determination, under the Subcontract. Due to time pressures, on 15 March 2018, RW Health also initiated (but did not serve at that stage) proceedings in the Supreme Court of Victoria as a precautionary measure if Lendlease refused to arbitrate. On the same day Lendlease replied to the Referral Notice and Referral to Arbitration, asking for an extension of time for the parties to choose an arbitrator. RW Health agreed to this extension and the parties eventually agreed on an arbitrator. Nevertheless, Lendlease filed an appearance in the court proceedings on 11 April 2018 and then sought to have the dispute resolved in court rather than arbitration.

The Court was presented with five issues, which ultimately gave rise to three important questions:

1 Is the dispute 'the subject of an arbitration agreement' within the meaning of section 8 *Commercial Arbitration Act 2011* (Vic)?

2 If no to issue 1, did the parties' correspondence constitute an agreement that the dispute be arbitrated?

[67] [2019] VSC 353.

3 If no to issues 1 and 0, such that there is no arbitration agreement, has Lendlease waived its right under the Subcontract for the dispute to be referred to expert determination, with the result that it is referred to arbitration under clause 74.1(g)(iii) of the Subcontract?

Issue 1 – Section 8(1) *Commercial Arbitration Act 2011* (Vic) provides:

> '*A court before which an action is brought in a matter which is the subject of an arbitration agreement must, if a party so requests not later than when submitting the party's first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.'*

Issue 1 turned on whether the dispute was 'in relation to compensation' as per the wording of clause 74.1(g)(ii), because if not, then it would be referred to arbitration. RW Health contended that the dispute was not in relation to compensation and fell into the category of 'all other disputes', because the expression 'disputes in relation to compensation' should be interpreted narrowly to mean disputes only about the amount of loss or damage.[68] Lendlease argued that the phrase 'in relation to' in clause 74.1(g)(ii) should be given a wide meaning, and it would be wrong for the Court to read it down or substitute the phrase with alternative words (e.g. 'disputes **about** compensation' or '**restricted to** compensation').[69]

The Court noted that dispute resolution clauses are construed using the same traditional principles of contract interpretation as applies to other commercial contracts.[70] In accordance with those principles, his Honour determined that:[71]

> '*On a plain reading of the ordinary English words, in my opinion, a reasonable business person in the position of the parties would understand 'a Dispute in relation to Compensation' as unambiguously including a dispute as to the liability to pay compensation particularly in the context of a dispute in relation to compensation arising out of a building contract. To read the expression as "a dispute in relation to* ***the assessment of*** *Compensation" requires the insertion of the underlined words, which is not justified in the context of the terms of the Contract; and could easily have been added by the parties if it was intended. The phrase "in relation to" is wide in its connotation; and does not warrant reading words of limitation into the expression.'*

Issue 0 – RW Health submitted in the alternative that the parties entered into an ad hoc agreement to arbitrate the dispute, based on the correspondence between the parties in which Lendlease essentially acquiesced to arbitration and agreed on an arbitrator. Lendlease contended that this correspondence did not constitute an arbitration agreement for various reasons, particularly that no arbitrator was actually appointed and no steps were taken in the arbitration. In any case, the parties agreed that, if the dispute was in relation to compensation, then the dispute would have automatically been referred to expert determination under clause 74.1(g)(ii) by 15 March 2018.[72]

The Court agreed that it was indeed common ground the dispute was automatically referred to expert determination under clause 74.1(g)(ii) of the Subcontract.[73] As such, issue 0 turned on whether the parties contracted to terminate the expert determination mechanism under the Subcontract and submit the dispute to arbitration.[74] Having briefly set out the law in respect of contract formation, the Court opined that the relevant correspondence between the parties did not demonstrate any intention to vary the Subcontract.[75] In fact, nothing could be inferred from the correspondence other than that the parties

[68] *RW Health Partnership Pty Ltd v Lendlease Building Contractors Pty Ltd* [2019] VSC 353 [20].
[69] Ibid [31].
[70] Ibid [32].
[71] Ibid [35].
[72] Ibid [43].
[73] Ibid [44].
[74] Ibid [45].
[75] Ibid [49].

were preparing to put steps in place for an arbitration under the mistaken apprehension that arbitration was the appropriate mechanism provided for under the Subcontract for their dispute.[76] Also, any variation to the Subcontract, such as an ad hoc arbitration agreement, was required to be in writing and signed by the parties pursuant to clause 76.2 of the Subcontract, but no such written variation existed.[77] Although clause 76.2 does not prevent an oral variation to the contract, the Court noted that it was relevant to the question of whether a variation was actually agreed.[78]

Issue 3 – RW Health submitted that by its conduct during the month after RW Health produced the Referral to Arbitration, Lendlease waived any right under the Subcontract for the dispute to be the subject of expert determination, by the application of:

(a) waiver by an unequivocal abandonment of a right; and

(b) the doctrine of election.[79]

RW Health submitted that its Referral to Arbitration of 14 March 2018 provided Lendlease an opportunity to assert that the proper dispute resolution method was expert determination and that Lendlease's failure to assert otherwise was significant.[80] Additionally, RW Health contended that Lendlease's correspondence in relation to the arbitration demonstrated that Lendlease abandoned its contractual right to expert determination of the dispute, or constituted an election between alternative and inconsistent rights (being, the right to arbitrate and the right to expert determination).[81] Lendlease submitted that its correspondence did not amount to an unequivocal abandonment of the right to have the dispute determined by an expert, nor was it an election between inconsistent rights.[82] It was alleged that Lendlease's correspondence was consistent with the party preparing to explore the possibility of arbitration without committing to it.[83] Further, the effect of clause 7.1(g) was that on the expiry of the resolution period, the dispute was referred to expert determination, instead of a choice being conferred on the parties. As such, it was alleged Lendlease did not actually have the option of choosing between two alternative rights.[84]

The Court held that each party had a choice to insist on enforcement of clause 74 or to agree to determine it in some other manner.[85] The judge did not consider that choosing to select another procedure for the adjudication of the dispute constituted an election between inconsistent substantive rights, nor did the correspondence (in which Lendlease acquiesced in the preliminary stages of the appointment of an arbitrator) constitute an equivocal election to arbitrate and to not enforce rights under the Subcontract.[86] Moreover, the Court set out the principles of waiver, agreeing that '*waiver is constituted by the deliberate, intentional and unequivocal release or abandonment of the right that is later sought to be enforced*',[87] which results in a change in the relationship of the parties.[88] His Honour held that the correspondence could not constitute a waiver by abandonment, because it did not constitute an unequivocal representation that Lendlease would forgo certain rights:[89]

[76] Ibid [49].
[77] Ibid [49].
[78] Ibid [49].
[79] Ibid [50].
[80] Ibid [51].
[81] Ibid [51]-[52].
[82] Ibid [54].
[83] Ibid [55].
[84] Ibid [56].
[85] Ibid [69].
[86] Ibid [69]-[70]
[87] *Zhang* (2006) 201 FLR 178, 186 [14].
[88] *Verwayen* (1990) 170 CLR 394, 427.
[89] *RW Health Partnership Pty Ltd v Lendlease Building Contractors Pty Ltd* [2019] VSC 353 [71]

> *'There is no reference to the foregoing of rights and a reasonable business person reading the correspondence would infer no more than that the parties believed (wrongful as I have found) that the Contract did require arbitration of the Dispute.*
>
> *Further, the fact that no arbitrator was appointed militates strongly against a conclusion that a 'deliberate, intentional and unequivocal … abandonment of the right' to an expert determination was demonstrated by the Relevant Correspondence.*
>
> *In the circumstances, I do not consider that Lendlease's conduct relevantly changed the relationship of the parties in the manner discussed by Brennan J and Gaudron J, as referred to above.'*

The Court found that there was no agreement between RW Health and Lendlease to arbitrate the dispute. Accordingly, RW Health's summons under section 8(1) *Commercial Arbitration Act 2011* (Vic) was dismissed and dispute proceeded in the Victorian Supreme Court.

Awards

A number of decisions relating to the enforcement of arbitration awards were handed down this past year, including decisions highlighting that:

(a) there is a high threshold for parties seeking to set aside an arbitral award by virtue of alleged misconduct on the part of the arbitrator; and

(b) Courts may not enforce an arbitral award if an application to set aside that same award has been filed in the jurisdiction in which the award was made.

Largely drawing upon general principles and settled law, Australian Courts handed down a number of decisions enforcing, or refusing to enforce, arbitral awards in the past year.[90] However, the following two decisions are particularly of note due to their novel factual circumstances: the first involving an application to enforce an award made at the same time as an application to set aside the award in the jurisdiction in which it was made, and the second involving an insolvent award debtor.

Mitchell Water Australia Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd

The parties in *Mitchell Water Australia Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd*[91] were signatories to a subcontract containing an arbitration agreement. McConnell Dowell initiated arbitration in accordance with that arbitration agreement on 15 December 2014. The arbitration was conducted between May and December 2016 pursuant to *Commercial Arbitration Act 2013* (Qld) (CAA (Qld)) and the arbitral seat was Brisbane, Queensland. However, the hearings took place before the arbitrator in the County Court building in Melbourne.

The Arbitrator delivered his initial award on 6 December 2017 and then a supplementary award on 24 December 2017 (together referred to as the '**December Award**'). On 27 December 2017, Mitchell Water paid McConnell Dowell the amounts payable in the December Award, less an amount equalling Mitchell Water's security, which McDonnell Dowell continued to hold.

On 12 January 2018, Mitchell Water issued a request (**Request**) pursuant to section 33(5) of the CAA (Qld), which provides that:

> '*(5) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within 30 days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award.'*

The Request concerned Mitchell Water's alternative claim for its direct costs of delay (**Alternative Delay Costs Claim**). The basis for the Request was that the December Award did not address the Alternative Delay Costs Claim, but made all the requisite legal and factual findings to make out that claim.

On 16 March 2018, the Arbitrator issued his determination, refusing the Request on the basis that section 33(5) of the CAA (Qld) did not apply (**Determination**).[92] However, the Arbitrator did not go on

[90] See e.g. *Mi v Li* [2018] ACTCA 66.
[91] [2018] VSC 753.
[92] The Victorian Supreme Court's judgment does not explain the Arbitrator's reasoning as to why section 33(5) did not apply.

to determine the issue of whether his mandate continued in respect of the Alternative Delay Costs Claim. Subsequently, various correspondence passed between the parties, in which McConnell Dowell argued that the Arbitrator was *functus officio*. Around this time, Mitchell Water also paid McConnell Dowell the amount remaining due under the December Award (previously held back until payment of Mitchell Water's security).

On or about 7 June 2018, the Arbitrator published another ruling, which concluded that the Arbitrator's mandate continued in respect of the Alternative Delay Costs Claim (**Mandate Determination**) and that he would proceed to determine the claim.

On 2 July 2018, McConnell Dowell filed an application under section 16(9) of the CAA (Qld) (**section 16(9) Application**), which states:

> *'If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within 30 days after having received notice of that ruling, the Court to decide the matter.'*

The section 16(9) Application challenged the Mandate Determination and sought an order from the Queensland Supreme Court that the arbitral tribunal did not have jurisdiction to make any additional award. McConnell Dowell filed the section 16(9) Application in the Queensland Supreme Court, because the seat of the arbitration was Brisbane. However, McConnell Dowell chose not to prosecute the section 16(9) Application until after the Arbitrator determined the Alternative Delay Costs Claim.

On 29 October 2018, the Arbitrator made a further award on the Alternative Delay Costs Claim in favour of Mitchell Water (**Additional Award**). Subsequently, McConnell Dowell sought to prosecute the section 16(9) Application in the Queensland Supreme Court. It also applied to amend the application to include an order setting aside the Additional Award under section 34(2)(a)(iii) of the CAA (Qld),[93] on the basis that the Arbitrator had no jurisdiction to make the Additional Award. Around this time, Mitchell Water applied under section 35 *Commercial Arbitration Act 2011* (Vic) (**CAA (Vic)**) to enforce the Additional Award in the Victorian Supreme Court. In response, McDonnell Dowell sought an adjournment of Mitchell Water's application pursuant to:

(a) section 36(2) of the CAA (Vic), which provides: '*if an application for setting aside or suspension of an award has been made to a court referred to in subsection (1)(a)(v), the Court may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the party to provide appropriate security*'; or alternatively,

(b) the Court's inherent or general power to control its own proceedings, on the basis that McDonnell Dowell had issued an application to set aside the Additional Award in Queensland.

However, Mitchell Water submitted that there was no basis upon which section 36(2) of the CAA (Vic) was enlivened, because the section 16(9) Application in the Queensland Supreme Court was not an application for 'setting aside' for the purposes of section 36(2) of the CAA (Vic). Justice Croft dealt with the application in three stages.

In the first stage, Croft J dismissed Mitchell Water's argument that there was no basis upon which section 36(2) of the CAA (Vic) was enlivened. His Honour opined that the provisions of section 36(2) CAA (Vic) were drafted broadly and descriptively and as such, supported an application under section 16(9)

[93] Section 34(2)(a)(iii) of the *Commercial Arbitration Act 2013* (Qld) provides that 'an arbitral award may be set aside by the Court only if the party making the application furnishes proof that the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside'.

CAA Qld.[94] His Honour went on to consider the origins of the CAA (Vic) and international authorities on the definition of 'award' from Canada and New Zealand,[95] noting that section 36(2) of the CAA (Vic) functions as a mechanism:[96]

> '*…to avoid a multiplicity of proceedings in various state and territory courts and the risk of inconsistent findings and any compromising or erosion of the effective exercise of jurisdiction under their particular state or territory arbitration legislation; viewed in the context of the Australian national scheme of uniform commercial arbitration.'*

In this context, his Honour opined that the expression 'setting aside' must be read as indicating both an application under section 16(9) and 34 of the CAA (Qld).[97] In any case, his Honour also clarified that even if he was not of the view that section 36(2) of the CAA (Vic) extended to include an application under section 16(9) of the CAA (Qld), then he would nevertheless be satisfied that the inherent jurisdiction of the Court should be exercised in favour of an adjournment to allow the section 16(9) Application to proceed in the Supreme Court of Queensland (as the court of the arbitral seat).[98]

In the second stage, Croft J distinguished the Mandate Determination and the Additional Award and considered whether a finding by the Victorian Supreme Court in respect of the latter would encroach on McConnell Dowell's ability to challenge the former in Queensland. His Honour found that the Mandate Determination, which involved the determination of a 'preliminary question', was unlike the Additional Award in that did not result in the handing down of an award on the merits.[99]

As the Mandate Determination would not likely be considered an 'award' for the purposes of section 36(1)(a)(iii) of the CAA (Vic), McConnell Dowell would not be able to apply to the Victorian Supreme Court to have the award set aside. Thus, the extent to which the jurisdictional issue was determined in the Mandate Determination, McConnell Dowell was shut out from challenging the arbitrator's lack of jurisdiction in the enforcement proceeding.[100] Going a step further, Croft J opined that even though the Victorian Supreme Court could not rule on whether the arbitral tribunal was correct in making its Mandate Determination, its findings on the Additional Award might encroach upon McConnell Dowell's ability to challenge the Mandate Determination in the Queensland Supreme Court.[101] As such, his Honour held:[102]

> '*It is for these reasons, and because McConnell Dowell contends that it may be shut out from prosecuting its s16(9) application in the Supreme Court of Queensland if the Enforcement Application proceeds before the hearing and determination of the section 16(9) application; hence, the Enforcement Application in this Court should be adjourned.'*

Next, Croft J turned to the discretionary factors elucidated by Gross J in *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corp*,[103] such as whether the application before the court is brought bona fide and not simply by way of delaying tactics; whether the application before the court has at least a real prospect of success; and the extent of the delay occasioned by an adjournment and any resulting prejudice.

His Honour was persuaded that McConnell Dowell's section 16(9) Application was both bona fide and had real prospects of success. At first glance, it was evidently appropriate that McConnell Dowell applied to amend the section 16(9) Application in the Queensland Supreme Court, because it was the relevant court under the provisions of section 36(1)(a)(v) of the CAA (Vic) (being, the court of the State… in which…

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[94] *Mitchell Water Australia Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2018] VSC 753 [15].
[95] Ibid [25].
[96] Ibid [16].
[97] Ibid [17].
[98] Ibid [20].
[99] Ibid [26].
[100] Ibid [28].
[101] Ibid [29].
[102] Ibid [31].
[103] [2005] EWHC 726 (Comm), [15].

that award was made).[104] Further, Croft J considered that the setting aside application could be heard and determined in February 2019 and that a short delay until that date was not unreasonable.[105] McConnell Dowell also undertook to '*diligently prosecute its section 16(9) application and that it was also ready, willing and able to provide security for the full amount of the Additional Award*'.[106]

Thus, in view of his Honour's findings in the above three stages, Croft J ultimately found that McConnell Dowell's case was sufficiently arguable for the purposes of the adjournment application. Accordingly, the Victorian proceedings were adjourned pending the outcome of McConnell Dowell's application in the Queensland Supreme Court.

Hyundai Engineering & Steel Industries Co Ltd v Two Ways Constructions Pty Ltd

In *Hyundai Engineering & Steel Industries Co Ltd v Two Ways Constructions Pty Ltd*[107], the applicant (**Hyundai**) commenced proceedings in the Federal Court of Australia pursuant to section 8(2) *International Arbitration Act 1974* (Cth), which provides that 'a foreign award may be enforced in a court of a State or Territory as if the award were a judgment or order of that court'. Specifically, Hyundai sought orders that 'the Final Award dated 9 March 2018 of Mr Alvin Yeo registered in the Singapore International Arbitration Centre Registry of Awards as Award Number 024 of 2018 on 13 March 2018 and notified to the parties by the Registrar of the Court of Arbitration of the Singapore International Arbitration Centre upon or about that date be enforced as a judgment of this court.'[108]

The directors of the respondent company (**Two Ways**) appointed voluntary administrators on 4 September 2018. Consequently, the proceedings brought by Hyundai were automatically stayed by virtue of section 440D *Corporations Act 2001* (Cth). Hyundai applied for leave to proceed with the enforcement proceedings pursuant to section 440D(1)(b) *Corporations Act 2001* (Cth), which provides:

> *'During the administration of a company, a proceeding in a court against the company or in relation to any of its property cannot be begun or proceeded with, except*
>
> *...*
>
> *(b) with the leave of the court and in accordance with such terms (if any) as the court imposes.'*

In the Federal Court's decision, O'Callaghan J adopted the comments of Hammerschlag J in *Larkden Pty Ltd v Lloyd Energy Systems Pty Ltd*[109], which stipulate that applications of this sort must be commenced with an assumption that leave is only rarely granted. His Honour noted that he had previously ordered under section 8(8) *International Arbitration Act 1974* (Cth) that the enforcement proceedings be adjourned to 30 November 2018 for further mention, conditional on Two Ways providing security for the award. However, Two Ways never provided such security.[110] Two Ways' failure to provide this security was relevant, because according to the O'Callaghan J, if the Court had known at the time of making its previous orders that Two Ways would not provide the security, it would have proceeded to hear and determine the proceedings.[111] His Honour also opined that Hyundai should not be worse off as a result of the respondent's failure to do so.[112] Accordingly, O'Callaghan J granted Hyundai leave to proceed in the enforcement proceeding.

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[104] *Mitchell Water Australia Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2018] VSC 753 [15].
[105] Ibid [43].
[106] Ibid [44].
[107] [2018] FCA 1427.
[108] *Hyundai Engineering & Steel Industries Co Ltd v Two Ways Constructions Pty Ltd* [2018] FCA 1427 [2].
[109] (2011) 285 ALR 207.
[110] *Hyundai Engineering & Steel Industries Co Ltd v Two Ways Constructions Pty Ltd* [2018] FCA 1427 [9].
[111] Ibid [15].
[112] Ibid [16].

Structural Monitoring Systems Ltd v Tulip Bay Pty Ltd

In *Structural Monitoring Systems Ltd v Tulip Bay Pty Ltd,*[113] the Western Australian Supreme Court dismissed an application to set aside an arbitral award on the ground of alleged misconduct pursuant to sections 42 and 44 now repealed *Commercial Arbitration Act 1985* (WA) (**1985 Act**).[114] An arbitration agreement was contained in clause 17 of an agreement between Structural Monitoring Systems Ltd (**SMS**), Tulip Bay Pty Ltd (**Tulip Bay**) 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 Bay and Mr Davey under the Agreement. Tulip Bay and Mr Davey then commenced proceedings in the Western Australian District Court and obtained default judgment. Tulip Bay 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 Western Australian Supreme Court to set aside the statutory demand against it.

In accordance with the Agreement, SMS appointed an arbitrator (Mr Philip George Clifford), Tulip Bay 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. Pursuant to sections 42 and 44 of the 1985 Act, SMS then commenced proceedings against Tulip Bay and Mr Davey, seeking orders setting aside the award on the ground of misconduct, said to be constituted by:

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

(b) excessive delay in the delivery of the award; and

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

Martin CJ delivered his Honour's primary decision on 22 December 2017, in which he found in favour of Tulip Bay and Mr Davey on each ground. SMS appealed Martin CJ's decision and the same three grounds above constituted SMS's three grounds of appeal from the primary decision.

In relation to the first ground and in the court of first instance (Western Australian Supreme Court), SMS's primary argument alleged that SMS was denied an opportunity to respond to submissions made by Tulip Bay 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.[115] The parties were not required to make any submissions on the 22 issues, but were advised they could if they wished. 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 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'.[116] Accordingly, SMS' failure to deal with those matters could not be attributed to any conduct on the part of the arbitrators, Tulip Bay or Mr Davey.[117] Upon appeal by SMS, the Western Australian Court of Appeal affirmed this conclusion, opining

[113] [2017] WASC 379
[114] The repealed Act applies to arbitrations commenced prior to the commencement of the *Commercial Arbitration Act 2012* (WA).
[115] *Structural Monitoring Systems Ltd v Tulip Bay Pty Ltd* [2017] WASC 379, [91]-[92]
[116] Ibid [95]-[96]
[117] Ibid [95]

that SMS had not demonstrated any error on the part of the primary judge in relation to his Honour's conclusions.[118]

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 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.[119] However, none of the parties could adduce any persuasive authorities in support of their claims, and SMS admitted that although a claim for excessive delay supported a claim for denial of procedural fairness, 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. On appeal, the Court of Appeal noted that '*even where inordinate delay is found to constitute misconduct, it remains necessary to consider whether the misconduct is such as to justify setting aside the award.*'[120] Their Honours agreed with Martin CJ in refusing to exercise their discretion to set aside the award, holding that there was there was no basis for apprehending that the delay gave rise to a miscarriage of justice or prejudiced SMS.[121] Additionally, the Court of Appeal criticised SMS for failing to apply to remove the arbitrators at the time of the delay, rather than waiting until the award adverse to its interests was delivered.[122]

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 that, although Mr Lord ultimately agreed with the award, did he '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.[123] 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.*'[124] 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.[125] 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.[126] 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.[127] 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.

On appeal, the Court of Appeal upheld SMS's challenge to Martin CJ's finding of fact on this question,[128] on the basis that His Honour failed to consider a number of critical features in the history of the

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[118] *Structural Monitoring Systems Ltd v Tulip Bay Pty Ltd* [2019] WASCA 16 [82].
[119] *Structural Monitoring Systems Ltd v Tulip Bay Pty Ltd* [2017] WASC 379 [109]
[120] *Structural Monitoring Systems Ltd v Tulip Bay Pty Ltd* [2019] WASCA 16 [91]
[121] Ibid 16 [94]
[122] Ibid [96]
[123] *Structural Monitoring Systems Ltd v Tulip Bay Pty Ltd* [2017] WASC 379 [139]
[124] Ibid [139]
[125] Ibid [140]
[126] Ibid [142]
[127] Ibid [144]
[128] *Structural Monitoring Systems Ltd v Tulip Bay Pty Ltd* [2019] WASCA 16 [103]

matter.[129] Their Honours construed Mr Lord's agreement with the award as being '*the product of an attempt by him, after the event, to rectify his failure to have engaged in the arbitration process prior to that time.*'[130] Although Mr Lord claimed to have read the reasons, he gave no indication that he had independently considered the evidence and the submissions.[131] As such, the Court of Appeal held that Mr Lord failed to independently consider the evidence and submissions of the parties, which constituted a 'mishandling of the arbitration' and a breach of the rules of natural justice, which the definition of misconduct in the 1985 Act[132] expressly included.[133] However, this conclusion did not result in the award being set aside, because in the particular circumstances, the Court of Appeal found that there had not been a substantial miscarriage of justice or that SMS was unjustly prejudiced. Their Honours considered that the terms of the award were agreed by a majority of the arbitrators, the reasons in the award were comprehensive and thorough and there was no reason to doubt the correctness of the critical aspects of the arbitrators' decision.[134] Accordingly, their Honours were satisfied that Mr Lord's misconduct did not bear on the outcome of the case and therefore, refused to exercise their Honours' discretion to set aside the award.[135] SMS's appeal was consequently dismissed.

Even with the conclusion of the above appeal, Tulip Bay and SMS did not stay away from the courts for long. Another dispute relating to royalties arose and on 12 April 2019, Tulip Bay nominated an arbitrator. Under the arbitration agreement between the parties, SMS had 30 days to nominate its own arbitrator, but it did not do so. Accordingly, the deadline for SMS to nominate an arbitrator passed and various correspondence passed between the parties, in which SMS objected to Tulip Bay's attempt to engage a panel of three arbitrators to proceed in another arbitration against SMS. In *Tulip Bay Pty Ltd v Structural Monitoring Systems Ltd*[136] Tulip Bay applied to the Western Australian Supreme Court, seeking that the court appoint an arbitrator, pursuant to section 11(4)(a) of the *Commercial Arbitration Act 2012* (WA) (**2012 Act**),[137] which provides:

> *'Where, under an appointment procedure agreed on by the parties –*
>
> *(a) a party fails to act as required under the procedure; …*
>
> *any party may request the Court to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.'*

Also relevant was section 11(6) of the 2012 Act, which provides:

> '*The Court, in appointing an arbitrator, is to have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator.'*

SMS contended that the Court ought not to make any orders other than programming orders to a special appointment some time off so that the matters in ostensible dispute over the nomination of an arbitration can be argued even further, on the basis of future anticipated evidence. In particular, SMS contended that Tulip Bay's application amounted to a potential abuse of process or should be dismissed by virtue of *Anshun* estoppel, which prevents parties from re-agitating claims which should have been pursued in former proceedings.[138] His Honour held that this argument was perfectly capable of being determined by

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[129] Ibid [105]
[130] Ibid [111].
[131] Ibid [111].
[132] Now repealed.
[133] *Structural Monitoring Systems Ltd v Tulip Bay Pty Ltd* [2019] WASCA 16 [115]-[116]
[134] Ibid [123]-[127].
[135] Ibid [128].
[136] [2019] WASC 223.
[137] The *Commercial Arbitration Act 2012* (WA) applied in this case as the arbitration would be commenced after the commencement of the 2012 Act.
[138] *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589.

a fresh arbitral panel.[139] Indeed, his Honour found that none of SMS's assertions constituted any jurisdictional obstacle impeding the court from granting Tulip Bay's request.[140]

The Court then considered who ought to be appointed as arbitrator, taking into consider section 11(6) of the 2012 Act set out above. His Honour was persuaded to appoint Mr Todd Shand, who had qualifications in chemistry, law and intellectual property, over a local barrister who was put forward by SMS. His Honour justified his decision as follows:[141]

> '*...a combination of diverse expertise is desirable in this arbitral panel. There is already the significant legal expertise delivered through the existing appointment of the Hon John Chaney SC, as regards contractual construction and interpretation issues. Bearing in mind the foreshadowed patent lapse arguments and product nexus considerations which may arise in the overall consideration concerning products and the other scientific considerations which could arise in the overall evaluation, I am, with no disrespect to Mr Ellis, presently more persuaded, particularly by reference to s 11(6), to accept SMS's fall-back request and so, to appoint Mr Todd Shand as the second arbitrator.'*

The Western Australian Supreme Court appointed Mr Shand and the parties are likely making their way through the arbitral process again.

[139] *Tulip Bay Pty Ltd v Structural Monitoring Systems Ltd* [2019] WASC 223 [14].
[140] Ibid [16].
[141] *Tulip Bay Pty Ltd v Structural Monitoring Systems Ltd* [2019] WASC 223 [33].

Arb-med-arb

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.

The decision in *Ku-ring-gai Council v Ichor Constructions Pty Ltd*[142] by the New South Wales Court of Appeal is a reminder of the strict approach courts take when construing prescriptive legislative requirements. The term 'arb-med-arb' describes the process where an arbitrator ceases to act as an arbitrator in order to act as a mediator in arbitration proceedings and then later continues in their mandate as an arbitrator, following mediation.

In our 2017-2018 Year in Review, we summarised the New South Wales Supreme Court's decision at first instance. In that decision, McDougall J held that an arbitrator had no mandate to continue arbitration proceedings following his acting as a mediator in the same proceedings, where he had failed to obtain the written consent of all parties to do so.

Since our last Year in Review, the Ku-ring-gai Council (**Council**) filed an application for leave to appeal this decision and Ichor Constructions Pty Ltd (**Ichor**) filed a notice of motion to dismiss the Council's application as incompetent on the basis that under the *Commercial Arbitration Act 2010* (NSW) (**CAA (NSW)**), the primary decision was final. The New South Wales Court of Appeal dismissed the application as incompetent and made a costs order against Council for both costs of the Council's application and Ichor's objection to competency.

We repeat the facts of this case here for convenience and remind everyone of the expensive lesson learned by these parties to follow the letter of the law when it comes to arb-med-arb.

Background facts

This case concerned a construction dispute between Council and 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 Ichor had not consented when the mediation transitioned back to arbitration.[143] The Council sought orders in the Supreme Court claiming that the arbitration should continue, which was opposed by Ichor.

Section 27D(1) of the CAA (NSW) 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:

(a) 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

(b) each party has consented in writing to the arbitrator so acting.

Section 27D(4) of the CAA (NSW) 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.

[142] (2019) 364 ALR 728.
[143] *Ku-ring-gai Council v Ichor Constructions Pty Ltd* [2018] NSWSC 610 [67].

McDougall J, in reaching his decision, was asked to consider the following questions:[144]

(a) did the arbitrator act as a mediator;

(b) if the arbitrator did act as a mediator, did the parties give their written consent before the arbitrator resumed the arbitration;

(c) if those consents were required and had not been given, had Ichor waived its right to object to the arbitrator resuming the arbitration; and

(d) alternatively, was Ichor estopped from asserting that the requirements of section 27D(4) were not met?

Was the arbitrator acting as a mediator?

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'.[145] 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.[146] 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.[147] The parties, having engaged in mediation, were therefore obliged to satisfy the precondition of written consent in section 27D(4), before recommencing the arbitration.

Was written consent obtained?

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.[148] Even though both parties had continued with the arbitration, following the unsuccessful mediation, without written consent, it was not sufficient to abrogate the requirement.

Had Ichor waived its right to object?

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 waived 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.

[144] ibid [3].
[145] ibid [31].
[146] ibid [40].
[147] ibid [45].
[148] ibid [56].

Did estoppel arise?

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.

Appeal

The appeal in this matter was heard on 13 September 2018 and the decision of the New South Wales Court of Appeal, written by Bathurst CJ with whom Beazley P and Ward CJ in Eq concurred, was handed down on 5 February 2019.[149]

Before the Court of Appeal could determine whether the application for leave to appeal was incompetent, they were first asked to determine whether the power for the Supreme Court to hear and determine the proceedings at first instance arose under section 14(2) or section 17J of the CAA (NSW).

Section 14 of the Act provides for situations where an arbitrator becomes in law or in fact unable to perform his or her functions or otherwise fails to act. Section 14(2) gives the courts the power to determine any controversy in relation to an arbitrator's failure or impossibility to act and section 14(3) provides that a decision by the court under section 14(2) that is within the authority of the court is final.

On the other hand, section 17J gives the court authority to order interim measures.

Chief Justice Bathurst concluded that a decision on whether the mandate of the arbitrator had been terminated was not an interim measure but fell within the ambit of whether an arbitrator was unable to perform under section 14(1) of the CAA (NSW).[150] Accordingly, the court at first instance was operating under section 14(2) when it determined the arbitrator's mandate had been terminated. It followed, that the question for the court of appeal was whether the primary decision was final pursuant to section 14(3) of the CAA (NSW).[151]

Chief Justice Bathurst first noted that the words '*within the authority of the* court' in section 14(3) contemplated a review of a decision under section 14(2) for jurisdictional error but commented that only a limited form of review should be available.[152]

Following an analysis of the text, context and purpose of section 14(3), Bathurst CJ adopted the construction that promotes the paramount object of the Act stated in section 1C, namely, to '*facilitate the fair and final resolution of commercial disputes by impartial tribunals without unnecessary delay or expense*'. Bathurst CJ observed that appeals on the issue of whether an arbitrator was unable to act would only delay the process. The application for leave to appeal was held to be incompetent and dismissed on that basis.[153]

Bathurst CJ did comment that, in any event, he would not have granted leave to appeal as '*the application did not raise any matter of general importance or principle*'.[154]

Council was ordered to pay Ichor's costs of the application, including the objection to competency.

[149] *Ku-ring-gai Council v Ichor Constructions Pty Ltd* (2019) 364 ALR 728.
[150] Ibid [65].
[151] Ibid [66]-[67].
[152] Ibid [71].
[153] Ibid [74].
[154] Ibid [79].

Family law arbitration

In the context of enforcing or setting aside unregistered family law arbitral awards, the Federal Court adopts the grounds for refusing recognition or enforcement set out in the uniform Commercial Arbitration Acts, because the *Family Law Act 1975* (Cth) is silent on this issue.

Arbitration is available as an alternative to family court proceedings in relation to financial and property matters under the *Family Law Act 1975* (Cth) (**Family Law Act**). It was first introduced to the Family Law Act 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 division 4 of the Family Law Act, Part 10.3 rule 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'. Regulation 67C of the *Family Law Regulations 1984* (Cth) outlines the matters that cannot be arbitrated, which in essence, include all family disputes except for those concerning financial and property matters.

In 2018-2019, two cases involved an application to either enforce or set aside an arbitral award dealing with family law matters. Judge Harman of the Federal Circuit Court of Australia (sitting in Parramatta, New South Wales) heard both applications and handed down the following judgments:

(a) *Braddon v Braddon*;[155] and

(b) *Pavic v Pavic*.[156]

Braddon v Braddon involved a property dispute between a husband and wife who were separated, but not divorced. The parties sought, by consent, that their dispute be referred to arbitration, pursuant to section 13E of the Family Law Act. The arbitration took place on 27 November and 18 December 2017, and the arbitral award was delivered on 22 January 2018. That same day, Ms Braddon's legal representatives sent a copy of the award to judge's chambers for registration by filing in the Registry. The award was registered on 1 March 2018. Also on that day but after the registration had occurred, an application from Mr Braddon was received by the Court, although it was not filed until 7 March 2018. Mr Braddon's application sought relief on the basis that there was an error of law in the award and requested that the award be set aside, or reviewed and reversed.[157] The Federal Circuit Court's power to review and set aside registered awards is enshrined in sections 13J and 13K of the Family Law Act. In accordance with that section, Mr Braddon alleged that the award was infected with the following errors:[158]

> '*(a) the Arbitrator did not determine the dispute in accordance with the law;*
>
> *(b) inadequate reasons were given; and*
>
> *(c) the award was 'unreasonable or plainly unjust'.*

Judge Harman swiftly rejected Mr Brandon's first ground, on the basis that no submission was put as to what error of law was allegedly made by the arbitrator.[159]

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[155] (2018) 59 Fam LR 234.
[156] [2018] FCCA 3386.
[157] *Braddon v Braddon* (2018) 59 Fam LR 234 [34].
[158] Ibid [80].
[159] Ibid [92]-[93].

As to Mr Braddon's second ground, Judge Harman opined that the appropriate standard by which he should approach the adequacy of the arbitrator's reasons was: 'All that is necessary is that the arbitrators should set out what, on their view of the evidence, did or did not happen and should explain succinctly why, in light of what happened, they have reached their decision and what that decision is.'[160] Applying this threshold, the Court was satisfied that the 'essential rationale' of the arbitral award was sufficiently clear and that the reasons 'adequately and tolerably' explained the basis for the arbitral award made and the justice and equity of the award.[161] For example, Mr Braddon submitted that, at paragraph 86 the award, the arbitrator stated that it was 'just and equitable to make an award', but gave no reasons for this statement.[162] However, the judge opined that the tolerable reasons were provided for the arbitrator's conclusion in the preceding 85 paragraphs.[163]

Judge Harman also rejected Mr Braddon's third ground that the award was 'unreasonable or plainly unjust', holding that he was satisfied that outcome arrived at in the award was supported by unchallenged findings of fact and within a reasonable exercise of discretion.[164] Importantly, his Honour pointed out that Mr Braddon was not accepted as a credible witness or an 'accurate historian'.[165] Accordingly, the judge was satisfied that the arbitrator was '*tolerably clear in establishing how the outcome embodied in the Arbitral Award has been arrived at'*.[166] The arbitral award in *Braddon v Braddon* was thus affirmed and Mr Braddon's appeal dismissed.[167]

The second and later decision handed down by Judge Harman, *Pavic v Pavic*,[168] also involved a dispute relating to property adjustment. In that case, the wife objected to the arbitral award, which had not yet been registered. Notably, Harman J pointed out that the grounds for objecting to the registration of an arbitral award are not defined in the Family Law Act, so it was necessary to consider what grounds might be raised as appropriate or permissible bases for objection. His Honour highlighted that the consideration of grounds for objecting to the registration of an award is clearly separate to any consideration of the grounds for review or to set aside the award once registered.[169]

His Honour was satisfied that the reference within the CAA (NSW) to 'recognition and enforcement' of awards is directly referable to registration of an award under the Family Law Act. Section 36 of the CAA (NSW) provides that a Court may refuse to recognise or enforce an arbitral award on a number of grounds, including:

(a) incapacity of a party;

(b) that the arbitration agreement is not valid under the law to which the parties are subjected – in this case, the Family Law Act;

(c) that a party against whom the award is invoked was not given proper notice of the appointment of the arbitrator;

(d) the award deals with a dispute not contemplated or falling within the terms of submission to arbitration;

(e) the composition of the arbitral tribunal was not in accordance with the agreement of the parties; and

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[160] *Bremer Handelsgesellschaft mbH v Westzucker GmbH (No 2)* [1981] 2 Lloyd's Rep 130.
[161] *Braddon v Braddon* [(2018) 59 Fam LR 234 [113].
[162] Ibid [115].
[163] Ibid [116].
[164] Ibid [129].
[165] Ibid [130].
[166] Ibid [134].
[167] Ibid [137].
[168] [2018] FCCA 3386.
[169] *Pavic v Pavic* [2018] FCCA 3386 [19].

(f) the award has not yet become binding on the parties under the law under which the arbitration was conducted.

Judge Harman opined that the above grounds '*are a good starting point for understanding what might be appropriate bases to object to registration of an arbitral award*'.[170] He went on to conclude that, having regard to the facts, none of the above grounds could be a basis for objection to the registration of the award in this case.[171]

His Honour then went on to consider whether the award itself contained any errors of law. His Honour referred to section 13K(2) of the Family Law Act, which states that following as bases upon which the Court may set aside an award:

(a) the award was obtained by fraud (including non-disclosure of a material matters);

(b) the award is void, voidable or unenforceable;

(c) in the circumstances that have arisen since the award was made it is impracticable for some or all of it to be carried out; or

(d) the arbitration was affected by bias or there was a lack of procedural fairness in the way in which the arbitration process, as agreed between the parties and the arbitrator, was conducted.

The first main argument involved various claims that the arbitrator failed to take into account or appropriately deal with the credit card debts between the parties. The parties jointly submitted a statement of agreed facts, which conceded that the substantial credit card debts were to be treated as matrimonial debts.[172] Thus, Harman J rejected Mrs Pavic's arguments, primarily on the basis that the credit card debts were taken into account in the manner in which the dispute was presented to the arbitrator and that it was nevertheless an agreed fact that all credit card debts were to be treated as debts of the marriage.[173]

Mrs Pavic also submitted that the arbitration failed to properly apply section 79(2) of the Family Law Act, which states: '*The court shall not make an order under this section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order.'* However, this submission was rejected as follows:[174]

> '*The majority of reasons given are connected with and arise from the joint facts of the parties as submitted to the arbitrator. The wife could not be heard to complain that the husband's credit card debts should be treated differently to the wife's when, at paragraph 32 of schedule 1, the parties present to the arbitrator, as an agreed fact, that the credit card liabilities are to be treated as debts of the marriage and thus debts to which both parties have contributed and for which both parties should, to some extent, (although in this case disproportionately as the husband's debt is greater) be liable.'*

Thus, Harman J was not satisfied that any attack upon the arbitral award by way of objection to its registration, review of the arbitral award consequent upon its registration, or its setting aside for the grounds suggested, could arise in this case.[175] Accordingly, his Honour proceeded to register the award.

[170] Ibid [30].
[171] Ibid [33].
[172] Ibid [77].
[173] Ibid [85].
[174] Ibid [104].
[175] Ibid [106].

Investor-state dispute settlement

Australia has signed two free trade agreements in the last financial year, the Indonesia-Australia Free Trade Agreement and the Australia-Hong Kong Free Trade Agreement, although both are yet to come into force while the parties are following their domestic treaty-making processes. Both of these international investment treaties contain investor-state dispute settlement provisions.

Trade agreements and ISDS mechanisms

In 2018-219, Australia entered into two free trade agreements, the first with Indonesia and the second with Hong Kong. Both agreements contain an investor-state dispute settlement (**ISDS**) mechanism. Australia is currently in the process of enacting both agreements by adopting them into Australian legislation.

Indonesia-Australia Free Trade Agreement

On 4 March 2019, the Australian Minister for Trade, Tourism and Investment signed the Indonesia-Australia Comprehensive Economic Partnership Agreement (**IA-CEPA**) with the Indonesian Minister for Trade in Jakarta, Indonesia.[176] The IA-CEPA complements and expands on several provisions of the ASEAN-Australia-New Zealand Free Trade Agreement.

Under the IA-CEPA, Indonesia has agreed to grant Australian companies a much greater degree of ownership in various sectors. For example, Australian investments up to 100% will be allowed in 3, 4 and 5-star hotels, and up to 67% ownership in sectors including (but not limited to) contract mining services, elderly care facilities, wastewater management and large hospitals.[177]

The IA-CEPA establishes an ISDS mechanism in chapter 14 which allows for an investor-state dispute to be submitted to arbitration.

Interestingly, the IA-CEPA expressly excludes claims in relation to a measure that is designed and implemented to protect or promote public health. The inclusion of these provisions is undoubtedly a consequence of the Australian Government's experience in the Philip Morris arbitration, which was commenced by Philip Morrison against Australia under the 1993 Agreement between Australia and Hong Kong for the Promotion and Protection of the Investments and reportedly costs the Australian taxpayer approximately $12 million to defend.

Hong Kong-Australia investment agreement

On 26 March 2019, Australia and Hong Kong signed the Australia-Hong Kong Free Trade Agreement (**A-HKFTA**) and the associated Investment Agreement. Upon the entry of the A-HKFTA into force, the 1993 Agreement between Australia and Hong Kong for the Promotion and Protection of Investments will be terminated.

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[176] Department of Foreign Affairs and Trade, 'IA-CEPA text and associated documents' <https://dfat.gov.au/trade/agreements/not-yet-in-force/iacepa/iacepa-text/Pages/default.aspx> accessed 9 July 2019.

[177] See Annex II: Indonesia's Schedule to Annex II of the IA-CEPA.

Similar to the IA-CEPA, the ISDS mechanism in the A-HKFTA excludes certain claims in the following terms:[178]

> '*No claim may be brought… in respect of the following measures of Australia: measures comprising or related to the Pharmaceutical Benefits Scheme, Medicare Benefits Scheme, Therapeutic Goods Administration and Office of the Gene Technology Regulator.'*

No claim may be brought… in respect of a Party's control measures of tobacco products (including products made or derived from tobacco), cigarettes, imitation smoking products, and other smoking products such as Electronic Nicotine Delivery Systems and Electronic Non Nicotine Delivery Systems including electronic cigarettes.[179]

As with the IA-CEPA, the A-HKFTA clearly reflects the lessons learned by the Australian Government following the Philip Morris arbitration.

Additionally, the Investment Agreement seeks to ensure transparency of the arbitral proceedings, by requiring the host State to provide all of the arbitral documents (including the notice of arbitration, pleadings, transcripts and the award) to the non-disputing State party and to the public.[180] The Investment Agreement provides that hearings are open to the public (subject to certain provisions for the protection of information that is in a State's essential security interests).[181] This reference to transparency recognises that Australia is a signatory to the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration.

Investor-State disputes

Tethyan Copper Company Pty Ltd

Australia and Pakistan are parties to a bilateral investment treaty (signed in 1998), which contains an ISDS mechanism. Using that mechanism, an Australian mining company, Tethyan Copper Company Pty Ltd (**Tethyan**), brought an investment claim against Pakistan, after Pakistani officials rejected Tethyan's application to convert an exploration licence into a mining lease over a copper and gold deposit in Reko Diq, Balochistan. Tethyan sought monetary damages and on 12 July 2019, the Tribunal (constituted of Klaus Sachs, Stanimir Alexandrov and Leonard Hoffmann) rendered its award, ordering Pakistan to pay Tethyan Copper $US4.087 billion in compensation for Pakistan's breaches of its obligations under the bilateral investment treaty. Pakistan was also ordered to pay Tethyan Copper's share of the costs of the arbitration, being $US2.5 million and Tethyan Copper's legal fees in the amount of almost $US60 million.

On 9 August 2019, Tethyan Copper filed a petition to enforce the arbitral award in the United States District Court for the District of Columbia.

Churchill Mining PLC and Planet Mining Pty Ltd

On 6 December 2016, an ICSID Tribunal (comprised of Professor Gabrielle Kaufmann-Kohler, Michael Hwang SC and Professor Albert Jan van den Berg) rendered its award in the dispute between Churchill Mining PLC and Planet Mining Pty Ltd (**Claimants**) against the Republic of Indonesia. The claim was brought under the UK-Indonesia Bilateral Investment Treaty and the Australia-Indonesia Bilateral

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[178] Investment Agreement, Section C.
[179] A "control measure" of a Party includes measures with respect to production, consumption, importation, distribution, labelling, packaging, advertising, marketing, promotion, sale, purchase or use, as well as fiscal measures such as internal taxes and excise taxes, and enforcement measures, such as inspection, recordkeeping and reporting requirements. 'Tobacco products' means products under Chapter 24 of the Harmonised System, including processed tobacco, or any product that contains tobacco, that is manufactured to be used for smoking, sucking, chewing or snuffing.
[180] Investment Agreement art 30.
[181] Investment Agreement art 30.

Investment Treaty for damages arising out of the Indonesian Government's revocation of the mining licenses that facilitated the East Kutai Coal Project in East Kalimantan. The Tribunal found that that serious fraud tainted the East Kutai Coal Project with the record containing 34 forged documents including ten mining licences. The Tribunal found that the seriousness of the fraud was compounded by Churchill and Planet's lack of diligence evidenced by their lack of supervision of the licencing process.

Accordingly, the Tribunal concluded that all of the Claimants' claims were inadmissible. It was further ordered that the Claimants bear all arbitration costs and must reimburse 75% of Indonesia's legal expenses. On 31 March 2017, the Claimants submitted an application for annulment of the 6 December 2016 award on the basis that the Tribunal departed from a fundamental rule of procedure, manifestly exceeded its powers and failed to state its reasons.[182] However, by a press release dated 19 March 2019, Churchill Mining PLC announced that the ICSID Annulment Committee (comprised of Judge Dominique Hascher, Professor Dr Karl-Heinz Böckstiegel Ms Jean Kalicki) had dismissed the application and ordered that Churchill Mining PLC must bear the costs of the annulment proceedings.[183]

[182] ICSID Case No. ARB/12/14 and ARB/12/40, Application for Annulment (31 March 2017) paragraph [4] <https://www.italaw.com/sites/default/files/case-documents/italaw8620.pdf >.
[183] Churchill Mining PLC press release dated 19 March 2019 < http://www.churchillmining.com/library/file/CHL%20Annulment%20Proceedings%20Dismissed%2019March19.pdf>.

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