CASE NOTES

STAY OF PROCEEDINGS—INTERNATIONAL ARBITRATION ACT 1974

Supreme Court of New South Wales, Unreported,
Cole J
14 August 1992

Aerospatiale Holdings Australia Pty Limited & Anor v Elspan International Limited

This case concerned an action by two plaintiffs against six defendants. It related to the construction of the hanger and associated buildings at Bankstown Airport in Sydney. The plaintiffs alleged against the defendants breach of contract, negligence and breaches of the Trade Practices Act and the Fair Trading Act. There were two agreements, one between one of the plaintiffs and one of the defendants and one between the two plaintiffs and the defendant who was a party to the other agreement.

The first mentioned agreement contained an arbitration clause which provided:

> "Any dispute, controversy or claim arising out of or in connection with this Agreement not settled by agreement between the parties within 30 days of notice by one party to the other of dispute and intention to refer to arbitration shall be referred to arbitration for determination by a single arbitrator to be agreed upon by the Owner and Elspan or failing such agreement by a single arbitrator appointed at the request of either party by the President for the time being of the Institution of Engineers of Australia in accordance with the Commercial Arbitration Act 1986 of New South Wales or any statutory modifications thereof for the time being in force. The costs of any arbitration proceedings shall be borne as the arbitrator may direct".

The arbitration clause in the second agreement was in virtually identical terms.

The defendant who was a party to both agreements applied for a stay of the Court proceedings. Since this defendant was a company incorporated under the laws of Hong Kong and registered there, the International Arbitration Act 1974 (Commonwealth) applied. Under Section 7(2) of the International Arbitration Act, His Honour was required to grant a stay of the proceedings so far as they concerned the defendant applicant (unlike an application for a stay under Section 53 of the Commercial Arbitration Act, His Honour did not have a discretion as to whether or not to grant a stay of proceedings).

Section 21 of the International Arbitration Act provides:

> "If the parties to an arbitration agreement have (whether in the agreement or in any other document in writing) agreed that any dispute that has arisen or may arise between them is to be settled otherwise than in accordance with the Model Law, the Model Law does not apply in relation to the settlement of that dispute".

His Honour held that pursuant to Section 21 the parties had opted out of the Model Law which otherwise would have applied to their dispute. Instead, they had agreed to have their dispute resolved in accordance with the New South Wales Commercial Arbitration Act.

Some of the matters in dispute between the parties to the two arbitration agreements did not fall within the scope of these agreements. Further, the claims against other defendants were not subject to any arbitration agreement.

His Honour was prepared to appoint the arbitrator a special referee pursuant to Part 72 of the Supreme Court Rules to determine these additional matters in dispute which did not come within the ambit of the arbitration clause. He indicated that he had power to fix the hearing of the reference at the same time as the arbitration and conversely under Section 47 of the Commercial Arbitration Act to direct when the arbitration was to be heard.

His Honour indicated that matters to be considered in determining whether or not an arbitrator should be appointed as special referee were the private nature of arbitration proceedings and the intrusion of other parties, the desire to avoid duplication of proceedings and the overlapping of issues.

His Honour was not unduly concerned by the fact that different criteria applied in relation to an appeal from an arbitrator's award and whether or not a referee's report would be adopted.

CONFIDENTIALITY OF ARBITRATION PROCEEDINGS

Supreme Court of Victoria, Unreported,
Marks J
8 December 1992

The Minister for Energy and Minerals v Esso Australia Resources Ltd & ORS

Natural gas from Bass Strait is supplied to the Gas & Fuel Corporation of Victoria and State Electricity Commission of Victoria pursuant to two separate supply agreements. The suppliers of natural gas pursuant to the supply agreements had a tax imposed upon them by the Commonwealth Petroleum Resource Rent Tax Assessment Act 1987. They sought to pass on this tax to Gas & Fuel and the SEC by increasing the price of natural gas. Gas & Fuel and the SEC disputed the suppliers' entitlement to a price increase and each referred the matter to arbitration pursuant to an arbitration agreement contained in the supply agreements. A panel of arbitrators had been appointed for each arbitration but the arbitration had not commenced.