

Case Notes:

Manningham City Council v Dura (Australia) Construction Pty Ltd [1999] 3 VR 13.

Arbitration agreement, what constitutes, reference to negotiation, litigation and arbitration, earlier notice to litigate, effect on reference to arbitration.

This case concerned the interpretation of cl 13.03 of the standard Building Works Contract (JCC-D 1994). That clause provides for disputes to be resolved first by negotiation. If negotiation fails either party may give notice referring the dispute to "arbitration or litigation". It was argued that this was not an arbitration agreement and that once a party had given notice referring the dispute to litigation, the right to have the matter arbitrated was no longer open.

The Court held that because the agreement made provision for arbitration it is an arbitration agreement within the meaning of the *Commercial Arbitration Act* 1984 (Vic) despite the fact that it also recognised the possibility of litigation. Even though notice of litigation had been given, the arbitration agreement remained on foot and entitled a party to give a notice of arbitration. If this were not the case the parties would be encouraged to engage in a tactical race for choice of forum at the expense of the negotiation period.

Leung v Hungry Jack's Pty Ltd [2000] V ConvR 64,348

Leave to appeal arbitrators Award, Retail Tenancies dispute (Victoria)

The arbitrator had made an interim award concerning his jurisdiction to hear a dispute between the landlord and tenant, a necessary pre-condition to which was that the lease was a lease of retail premises within the meaning of the *Retail Tenancies Act* 1986 (Vic). The appellant brought this application to the Supreme Court alleging that the Arbitrator had no jurisdiction to make the interim award.

The Court held that the appellant had not met the requirements of s 38 (5) of the *Commercial Arbitration Act* 1984 (Vic). There was no evidence that the arbitrator made an error of law or that his determination of the questions of law involved raised would add substantially to the certainty of commercial law. Also, without there having been an adjudication on the rights of the parties it could not be said that the award "substantially affected" the rights of the appellant or the respondent.