RECENT CASES

Arbitration - Court's Jurisdiction to Deal with Arbitrators' Determination on Pleadings in an Arbitration

South Australian Superannuation Fund Investment Trust v Leighton Contractors Pty Ltd & Ors, South Australian Court of Appeal, 12 November 1990.

The appellant Trust and the respondent builder were engaged in an arbitration initiated by the builder. In the course of the preliminary hearings, the arbitrators had ordered that the builder deliver points of claim. The builder claimed a considerable sum of money and delivered six folders of printed materials setting out details of its claims and supporting information. The issues were complex and the Trust complained to the arbitrators that the points of claim did not constitute proper pleadings and that it could not identify the issues or otherwise prepare for the points of defence ordered to be delivered by the arbitrators.

The Trust submitted a written Application to the arbitrators and the builder lodged written submissions in reply. The application was heard before the arbitrators who gave a written determination rejecting the application and finding that the points of claim produced constituted an adequate pleading.

The Trust applied to the Supreme Court for an order that the arbitrators require more appropriate points of claim to be filed and delivered. The builder filed an application for summary judgment on the grounds that the Supreme Court had no jurisdiction to intervene. A Master of the Court ruled that the Supreme Court had no jurisdiction to intervene. The Trust appealed to the Full Court of South Australia. The Full Court by White J (Mohr J concurring, Bollen J dissenting) held -

1. That on a proper construction of the Commercial Arbitration Act 1986 the Supreme Court does have jurisdiction to review interlocutory orders and rulings of arbitrators in appropriate cases and, in particular, in cases where very large amounts of money and very complex problems are involved calling for pleadings and discovery and a long hearing.

2. The jurisdiction of the Court is found in S47 of the Act aided by the power to remit in S43 together with:
   (a) the legislative intention to elevate and entrench the position of the principles of procedural justice in appropriate arbitration proceedings as evidenced by the definition of 'misconduct' in s.4 includes inter alia 'a breach of the principles of natural justice' as a ground for removal of arbitrators under s44.
   (b) In long costly complex arbitrations, the undesirability of deferring resolutions of questions of law, whether or not such breaches had occurred at interlocutory stages, until after the hearing and handing down of an award outweighs the cost and inconvenience of interlocutory intervention by the Supreme Court - the latter being a lesser evil than the cost, inconvenience and delay involved in the removal of arbitrators for such breaches or the re-hearing of the whole matter after successful appeal against the final award on the ground of such breaches.

3. Misconduct by definition in s.4 includes 'a breach of the rules of natural justice' for which an arbitrator is liable for removal under s.44. A breach of the rules of natural justice would include a ruling by arbitrators in breach of the rules of natural justice.

4. The Court has a supervisory power to make interlocutory orders (s.47) and to remit back to arbitrators for reconsideration (s.43) seriously erroneous procedural rulings made by arbitrators in breach of the principles of natural justice.

5. Natural justice or procedural justice must be complied with at all stages of appropriately long and complex arbitrations including the pleadings stage, with more attention thereto being called upon in long costly and complex arbitrations and any failure to comply can in given circumstances amount to 'misconduct' or, alternatively, may constitute an error of law (s.22) and may lead to the removal of an arbitrator (s.44).

6. Under s.43 the Court may remit back to arbitrators any 'matter' for reconsideration including interlocutory rulings at the pleadings stage of the arbitration, and the power in s.43 relates to interlocutory rulings and orders including remission back for reconsideration arbitrators' rulings which may have been made in serious breach of the principles of natural justice.

7. The remitter back for recommendation of procedural rulings is to be treated as an order to review and not as an appeal from the determination of the arbitrators. Such an exercise of supervisory jurisdiction is not an 'appeal' within the meaning of s.38. It is no more than the exercise of the supervisory power to review and direct reconsideration as authorised by s.43 of the Act. Any direction by the Master to the arbitrators to the effect that the points of claim are not proper or adequate pleadings should include a direction to reconsider the points of claim in the light of his reasons including the reasons of the Full Court. Any failure by the arbitrators to reconsider in a meaningful way might constitute evidence of misconduct and a ground for removal.

In dissenting Bollen J could not accept the suggestion that the arbitrators had in any way "misconducted themselves' as alleged in the appellant's statement of claim.

The arbitrators had determined that the points of claim

'were in proper form'. They had exercised their rights under s.14 of the Act. The points of claim did not have to be in the form of a statement of claim in the Court.

By s.47 the Court has power to 'step into the arena' of the arbitration and make interlocutory orders. However, the interlocutory order which was sought from the Court had really been refused by the arbitrators. The hearing concerning the points of claim had been concluded. S47 does not now give the Court the jurisdiction to step in and make an order opposed to the ruling of the arbitrators.

This Court, like the High Court of Judicature in the U.K., can now intervene in an arbitration only when a Statute say so. *Exormisis Shipping S.A. v Oonso* (1975) 1 Ll.L.R. 432 at 434 *Bremer Vulkan v South India* (1981) 1 Ll.L.R. 253 at 258-259. The arbitrators found the points o claim were satisfactory. Some of the complaints about the form of the points of claim were 'matters for a Request of Particulars' and the builder's points of claim were properly pleaded and 'in accordance with our orders' and the Court should not intervene.

Comment

Even though the courts could be relied upon to distinguish genuine applications for reviews on the grounds of some alleged breach of procedural justice those occasions where unscrupulous applicants seek a review for no better reason than to gain time remains a matter of grave concern.

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Arbitration - Enforceability of Arbitration Clauses: the Meaning of "may"

Brunswick N.L. v Sam Graham Nominees Pty Ltd, unreported, Supreme Court of Western Australia, Rowland J, 19 January 1990

There has long existed a statutory right to a stay of court proceedings where the parties to a dispute have entered into a valid agreement to arbitrate. In Australia there is substantially uniform legislation in this area, but there has been inconsistency in its application between different States. In New South Wales, courts appear more willing to have disputes referred to arbitration than in Victoria and Western Australia, which show a more conservative approach.

Under the relevant Victorian legislation six conditions must be satisfied in order for a stay of proceedings to be granted. They are:

- the parties are parties to a valid arbitration agreement;
- court proceedings have commenced;
- those proceedings concern a matter covered by the arbitration agreement;
- there is no sufficient reason against referring the matter to arbitration;
- the applicant was and is ready and willing to do all things necessary for the proper conduct of the arbitration; and
- a stay will not be granted without leave of the court if the applicant has taken a step in court proceedings other than filing an appearance.

These requirements have recently been applied in the context of the standard form of building sub-contract in use in Victoria. The arbitration clause in this agreement seems intended to apply to almost any dispute that may arise between the parties to the contract.

The main difficulty with the enforceability of the clause is its use of the phrase "either party *may* give to the other notice in writing" to refer any dispute to arbitration. It has been argued that the use of "may" in this context means that a stay will not be granted where court proceedings are begun before notice of the dispute is given as provided under the arbitration clause because a binding arbitration agreement does not exist prior to the giving of notice. Taking this approach, a number of Victorian cases draw what might be described as a fine distinction between an agreement to submit disputes to arbitration, and an agreement to submit disputes to arbitration at the option of either party.

The main disadvantage of this approach is that parties are inhibited from fully exploring a negotiated settlement - each party is encouraged to "jump first" either in issuing a notice of dispute to start arbitration, or in commencing court proceedings.

A different approach was taken by Rowland J in the Supreme Court of Western Australia in the case of *Brunswick N.L. v Sam Graham Nominees Pty Ltd* where a clause using the word "may" in this context was seen to satisfy the requirement that an arbitration agreement exists between the parties. Stating the policy behind this approach, the judge said that the court would be slow to construe the provision so that a contractual right which exists could be lost simply because one party, knowing that dispute exists and a claim is being made, can defeat that contractual entitlement.

This decision was later reversed by the Full Court. Although largely overturned on other grounds, Justice Ipp (with whom the other judges agreed) said that "... prior to the election of either party to submit a dispute to arbitration [there was] no obligation to submit such disputes to arbitration."

The conclusion seems to be that, in Western Australia and Victoria at least, there remains a definite preference against enforcing agreements that limit access to the Courts. Any ambiguity in such agreements will, it seems, be construed against enforceability.

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