

## NPWC3 - Clause 45 Time Limits - Extension of Time - Interrelationship Between Section 48 of the Uniform Commercial Arbitration Act and Clause 45

*Australian National Parks and Wildlife Service v PMT Partners Pty Ltd (In Liquidation)*, unreported, NT Supreme Court, Full Court, Martin CJ, Mildren J, Gray AJ, 7 July 1994.

**In *Australian National Parks and Wildlife Service v PMT Partners Pty Ltd (In Liquidation)*, the court considered whether the power to extend time under section 48 of the uniform Commercial Arbitration Act applies to time fixed by clause 45 (a) and (b) of NPWC3.**

In doing this, the court was required to interpret the meaning of two phrases - "in relation to an arbitration" and "the matter at issue shall be determined by arbitration".

On 15 August 1990, Australian National Parks and Wildlife Service ("ANPWS") entered into an NPWC3 contract with the respondent, PMT Partners, to carry out road work in the Uluru National Park.

ANPWS rejected some of the work as defective and directed that it be reconstructed. Differences arose between the parties about the justification for the rejection and the cost of the consequential delays and extra work.

PMT made a submission that the superintendent rejected because it was made outside the time stipulated by clause 45 of NPWC3. PMT applied to the Court to determine that the power to extend time under section 48 of the *Commercial Arbitration Act* 1985 (NT) extends to times fixed by clause 45 (a) and (b) of the contract. The trial judge granted PMT's application. However, ANPWS appealed.

The trial judge found that the dispute arose on 12 August 1991, and was begun by the superintendent's rejection of a claim made by PMT on 4 June 1991. Following the rejection of its claim, PMT submitted the dispute to the superintendent by a letter dated 27 August 1991. The letter was served in accordance with the contract. The trial judge's findings meant that the submission to the superintendent was made beyond the 14-day period stipulated in the contract.

Under clause 45, once a dispute has arisen, the contractor must submit the matter in issue to the superintendent within 14 days. The superintendent must give his decision to the contractor as soon as practicable. If the contractor is dissatisfied with the superintendent's decision, clause 45 (b) provides that the contractor "may" submit the matter in dispute to the principal.

Section 48 provides that the Court has power, on the application of a party to an arbitration agreement, to "extend the time appointed by or under this Act or fixed by the agreement or by an order under this section for the doing of an act or taking a proceeding in or in relation to an arbitration".

The Court held that it is only when, and if, the contractor chooses to give notice to the principal requiring the dispute to be referred to arbitration that "the matter at issue shall be determined by arbitration" (clause 45) and that the contractor has taken a step "in or in relation to an arbitration" (section 48).

For the same reasons, the Court held that the provisions of clause 45 (a) and (b) do not constitute an arbitration

agreement within the definition in section 4 of the *Commercial Arbitration Act*. The right to arbitrate only arises if and when appropriate notice is given within the time stipulated.

The Court also considered whether clause 45 (b) amounts to an arbitration agreement within the meaning of section 4 of the *Commercial Arbitration Act*. The Court noted that although this question is not settled, it seems clear that once the principal is required by the clause to refer the dispute to arbitration, there is an "arbitration agreement" within the meaning of section 4.

Accordingly, whether the power contained in section 48 of the Act extends to the time limit fixed by clause 45 (a) and (b) of the NPWC3 depends on the proper construction of section 48 and clause 45.

The Court noted that to be an act "in relation to an arbitration", the act must be shown to be more than an act that may or may not turn out to be a step towards an arbitration.

The expression "in relation to" is very wide, but the essential component is that there must be two subject matters that are to some extent connected. This component seems to be missing when one considers the step required by clause 45 (a) or (b). In the Court's view, it cannot be said that the act required by clause 45 (a) is an act "in relation to an arbitration".

Martin CJ noted that the provisions of clause 45 (a) and (b) are but steps that may be taken by a contractor who wishes to have any disputes or differences decided. They may be decided at any stage of that process. It is only when the contractor has exhausted those avenues that the option of proceeding to arbitration as provided for in the reminder of the agreement is available.

Clause 45 (a) and (b) is not just intended to enable disputes or differences to be decided. It is also intended to refine the matters at issue and avoid arbitration until that has been achieved. The time limits set under clause 45 (a) and (b) are not "in relation to an arbitration" (section 48) but in relation to the other procedures by which disputes or differences might be decided.

The appeal was allowed.

- **Reprinted with permission from Phillips Fox's Focus.**

### Editorial Note:

It is understood that leave to appeal from this decision has been granted by the High Court.