

The Arbitrator's Jurisdiction to Hear Claims for Defamation

Sydney Water Corporation Ltd v Aquaclear Technology Pty Ltd,
unreported, Supreme Court of NSW, Commercial Division, Rolfe J, 7 July 1995.

Standard form building and construction contracts commonly include clauses which provide that disputes arising out of or in connection with the Contract shall or may¹ be referred to arbitration. Notwithstanding the apparent right of election suggested by the use of the word "may", such clauses are held to be agreements to arbitrate as has recently been confirmed by the High Court in *PMT Partners (in liquidation) v Australian National Parks and Wildlife Service*².

The arbitration agreement defines the range of the issues that can be put before the arbitrator for his decision. Commonly used wording defining the arbitrator's jurisdiction includes:

"If a dispute ... arises out of or in connection with the Contract ..."
(AS 2124 - 1986 and 1992)

"If a dispute or difference ... arises in connection with the Contract or the subject matter thereof ..."
(AS 4300 - 1995)

"... disputes or differences arising out of the Contract or concerning the performance or non-performance by either party of his obligations under the Contract ..."
(NPWC3 (1981))

"In the event of any dispute or difference arising ... as to the construction of this Agreement or as to any matter or thing of whatsoever nature arising thereunder or in connection therewith ..."
(JCC-C (1994))

There is a continuing tendency by the courts to construe arbitration agreements widely so as to give the arbitrator wide jurisdiction to settle disputes between the parties. No doubt the policy goal behind this is to alleviate some of the case load from the courts, particularly given the complexity and duration of cases concerning disputes in the building and construction industry.

In considering the extent of the jurisdiction conferred by agreements to arbitrate, the courts have held that an arbitrator has jurisdiction to consider disputes concerning:

- claims under the Trade Practices Act³;
- claims in tort "if there is a sufficiently close connection"⁴ with the Contract;
- rectification of the Contract⁵;
- frustration of the Contract⁶; and
- quantum meruit/unjust enrichment⁷.

To avoid doubt, the agreements to arbitrate in AS 2124 - 1992 and AS 4300 - 1995 expressly provide the arbitrator with jurisdiction to consider claims in tort, under statute, for restitution based on unjust enrichment, and for

rectification and frustration.

However, there can be no general or blanket assumption that jurisdiction will necessarily reside in the arbitrator to consider all disputed issues referred to arbitration - ultimately the wording and construction of the agreement to arbitrate will be determinative.

Defamation

But can an arbitrator consider a claim for defamation?

In a recent matter referred to the Supreme Court of Queensland⁸, the applicant sought a declaration as to the jurisdiction of an independent certifier to consider a claim by the builder of a luxury hotel in which the builder alleged it had been defamed by the owner. The independent certifier was appointed by agreement between the parties and was required to consider disputes requiring a decision under Clause 45 of NPWC3. The claimant builder alleged that the owner and its consultants had failed to act in a professional and responsible manner towards the builder and had made "derogatory comments" to a prospective developer carrying out a reference check on the builder which, it was claimed, had resulted in the builder being removed from the developer's tender short list. Byrne J was of the view that the claim did not have a sufficient nexus with the commercial transaction the subject of the contract and should more appropriately be decided by reference to the Defamation Law of Queensland.

However in *Sydney Water Corporation Ltd v Aquaclear Technology Pty Ltd* (unreported, Supreme Court of NSW, Commercial Division, Rolfe J, 7 July 1995) the court held that the Arbitrator could consider a claim for defamation arising out of or in connection with the contract. The agreement to arbitrate was that contained in the General Conditions of Contract AS 2124-1986 which provides for disputes arising "out of or in connection with the Contract" to be referred to arbitration.

The notice of dispute included, among other claims, a claim by the Contractor for:

"... damage to the reputation of the Contractor caused by the conduct of the Principal ... representing to various parties ... that the Contractor has not carried out its obligations in a competent and workmanlike manner when such was not the fact."

At the first preliminary conference the Principal challenged the Arbitrator's jurisdiction to hear the defamation claim. The Arbitrator rejected this and held that the clause was wide enough to cover such a claim. The Principal then commenced proceedings in the Supreme Court seeking a declaration that the Arbitrator did not have jurisdiction to hear a claim for defamation. Rolfe J found that in the absence of any specificity or particulars, it was difficult for him to determine whether it was a claim

arising out of or in connection with the contract and that he could not agree with the Plaintiff's broad submission to the effect that defamation cannot arise out of or in connection with the Contract.

The Principal then sought leave to appeal to the Court of Appeal. The Court agreed with Rolfe J that in the absence of particularity one cannot say that a claim for defamation is not one that can arise out of or in connection with the Contract. Leave to appeal was refused.

The matter returned to the Arbitrator, the defamation claim was fully particularised and the Arbitrator determined by way of an Interim Award that the claim clearly did arise out of the Contract and that he consequently had jurisdiction to consider it.

However, the matter did not rest there and the Principal sought leave to appeal against the Interim Award. The matter again came before Rolfe J and in respect of the Arbitrator's jurisdiction he said:

"... one does not say the defamation claim may not be pursued simply because it is unusual for it to be pursued in arbitration proceedings ..."; and

"There is a reasonable case ... for concluding that many of the building and construction issues ... decided by arbitration will be relevant to a consideration of ... the defamation claim ..."; and

"Once the case is pleaded or otherwise particularised in the way the Arbitrator requires, what he must decide ... is whether the defamation claim, or any part of it, arises out of or in connection with the contract ..."

By way of assistance in assessing whether or not a defamation claim arises out of or in connection with the contract, His Honour quoted with approval, the test for claims in tort formulated in *"The Playa Larga"*⁹ (and more recently followed in the *"Angelic Grace"*¹⁰) where the Court of Appeal held that:

"... a tortious claim does arise out of a contract ... if there is a sufficiently close connection between the tortious claim and a claim under the contract. In order that there should be a sufficiently close connection, ... the claimant must show either that the resolution of the contractual issue is necessary for a decision on the tortious claim, or, that the contractual and tortious disputes are so closely knitted together on the facts that an agreement to arbitrate on one can properly be construed as covering the other."

The decision in *Sydney Water Corporation Ltd v Aquaclear Technology Pty Ltd* is of interest in that it confirms not only the arbitrator's jurisdiction to hear claims in tort but specifically includes defamation within those boundaries. It continues the approach taken by the Courts of construing the agreement to arbitrate widely so as to allow the arbitrator to consider a wide range of claims - subject always to the form of words used by the parties in the agreement.

It should also provide a reminder to Principals, their employees and agents¹¹ of the potential risks of making comments to others, either written or oral, which assert that a company is unfit to conduct a particular undertaking¹², accuse it of mismanagement or attack its financial

position.¹³ In the highly competitive contracting industry such comments can result in injury to a Contractor's commercial reputation and may be defamatory.

Footnotes

1. AS 4300 - 1995 Clause 47: "shall be"
AS 2124 - 1986 Clause 46.2: "may"
NPWC3 [1981] Clause 45 paragraph 3: "may"
(Note: AS 2124 - 1992 and JCC standard conditions provide for disputes to be referred to arbitration or litigation.)
2. 131 ALR 377. This case dealt with Clause 45 of NPWC3. Note also decision of the NSW Court of Appeal in *ABB Power Plant Ltd v Electricity Commission of NSW* (unreported) Feb. 1995 in which the Court held that the use of the word "may" in Clause 46 of AS 2124-1986 did not allow the dissatisfied party to elect to litigate rather than arbitrate, a finding to which the High Court referred with approval.
3. *QH Tours Limited v Ship Design and Management (Australia) Pty Limited* [1991] 33 FCR 227; *State of NSW v Coysa Constructions Pty Ltd* [1993] 10 BCL 152.
4. *Empresa Exportadora de Azucar v Industrias Azucareras Nacionales SA* (The "Playa Larga" and "Marble Islands") [1983] 2 Lloyds Reports 171 and approved in *"Angelic Grace"* [1995] 1 Lloyds Reports 87 at 89; *Sydney Water Corporation v Aquaclear Technology Pty Ltd* (unreported) 1995 Supreme Court NSW, Comm. Div, Rolfe J.
5. *Drennan v Picket* [1983] 1 QdR 445 and *Kathmer Investments Proprietary Limited v Woolworths Proprietary Limited* [1970] 2 S.A. p498.
6. *Codelfa Constructions Pty Ltd v State Rail Authority of NSW* [1982] 149 CLR 337.
7. *Codelfa Constructions Pty Ltd v State Rail Authority of NSW* [1982] 149 CLR 337.
8. Supreme Court of Queensland No 882/93 of 25.6.93 Byrne J (in Chambers).
9. [1983] 2 Lloyds Reports 171 at 182. (See full title at Footnote 4 above.)
10. [1995] 1 Lloyds Reports 87 at 89.
11. *Colonial Mutual Life Assurance Society Ltd v Producers & Citizens Co-operative Assurance Co of Australia Ltd* [1931] 46 CLR 41.
12. *Australian Ocean Line Pty Ltd v West Australian Newspapers Ltd* [1985] 58 ALR 549 at 592.
13. *Mirror Newspapers Ltd v World Hosts Pty Ltd* [1979] 141 CLR 632 at 638-9.

Other References

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* Papers presented to Institute of Arbitrators General Arbitration Course 1995.

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