REASONS FOR REASONS:
HOW DOES AN ARBITRAL TRIBUNAL REACH A DECISION?

TRUST DISPUTE
NO BAR TO ARBITRATION

SETTLEMENT REMORSE: WHEN WILL A COURT SET ASIDE MEDIATED CONSENT ORDERS?
Welcome to the 15th issue of ReSolution® in which we draw on the experience and knowledge of leading experts in the field to bring you commentary, articles and reviews on topical matters relating to domestic and international dispute resolution. In this issue, we feature mediation. We also look at arbitration of trust disputes, third party funding for International Arbitration in Asia, refusal by PRC Court to enforce an award made under SIAC expedited procedures, India takes a step back when Supreme Court allows employee of a party to act as arbitrator, the position vis-à-vis awards against non-parties to arbitration agreements in Singapore; requirement for reasons in an arbitral award to be sufficiently full in order to discharge tribunal’s mandate to give a reasoned award; and more.

I wish to take this opportunity to thank all our contributors. We are most grateful for the support we receive from dispute resolution professionals, law firms, and publishers, locally and overseas, that allows us to share with you papers and articles of a world-class standard, and to bring you a broad perspective on the law and evolving trends in the delivery and practice of domestic and international dispute resolution.

Contributions of articles, papers and commentary for future issues of ReSolution® are always welcome. I do hope you find this issue interesting and useful. Please feel free to distribute ReSolution® to your friends and colleagues – they are most welcome to contact us if they wish to receive our publications directly.

Wishing you all a safe and enjoyable holiday season and a successful and prosperous New Year from all of us at NZDRC.

Warmest regards,

John Green
EXPERT DETERMINATION FOR ACCOUNTING AND FINANCIAL SERVICES

Model Clause: In the event of any dispute or difference arising out of or in connection with this contract, or the subject matter of this contract, including any question about its existence, validity or termination, the parties must refer that dispute in the first instance to Expert Determination in accordance with the Expert Determination Rules of the New Zealand Dispute Resolution Centre.

To secure the appointment of an expert determiner contact NZDRC at registrar@nzdrc.co.nz nzdrc.co.nz
Fiji’s International Arbitration Act 2017

On 15 September 2017, Fiji passed the International Arbitration Act 2017 (the Act) implementing its commitments under the Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention). The Act only applies to international arbitrations, with the Fiji Arbitration Act 1965 continuing to apply to domestic arbitrations. The enactment of this piece of legislation can only assist to raise the profile and credibility of arbitration in the Asia-Pacific region, which, given New Zealand’s strong connections to the Pacific Island nations and the availability of NZIAC’s administered arbitration services, may also lend itself to the promotion of New Zealand as a key seat of international arbitration in the region.

Scope to make Investor State Dispute Settlement claims narrowed in new iteration of TPP

The APEC summit in Da Nang, Vietnam, was the forum this month for negotiations between the remaining eleven-member countries of the TPP (after the departure of the United States) on the newly-renamed Comprehensive Progressive Trans Pacific Partnership (CPTPP) agreement. Minister for Trade and Export Growth David Parker has welcomed the eleven-member Comprehensive and Progressive Agreement for the Trans-Pacific Partnership (CPTPP) which incorporates the TPP. A Ministerial Statement issued by all eleven Ministers in Da Nang confirmed the core elements of the deal are now agreed, with just four issues requiring further technical work and discussion. David Parker said one of the issues that has caused the Labour government concern was the Investor-State Dispute Settlement (ISDS) clauses as it could allow foreign corporates to sue the New Zealand government in an international tribunal if they felt they had been disadvantaged by New Zealand law or changes to those laws, and gave as an example, a tobacco company potentially suing New Zealand for lost income if tobacco became illegal.

The previous provision that would have allowed overseas investors to sue governments for breach of an investment agreement or an investment authorisation has been suspended. Investors will only be able to sue governments for an alleged breach of the obligations set out in the Investment chapter itself. These are tightly circumscribed to the extent that it would be very difficult to mount a successful action in respect of regulations on matters of public interest such as health or the environment.

On TVNZ’s 12 November 2017 Q&A programme, Mr Parker said “[A]s the text stood, if a big multinational was building a big infrastructure project in New Zealand under contract with the Government and they became dissatisfied and had a dispute, until the narrowing, they could have used these ISDS clauses to take that dispute to an international tribunal - they now no longer can.”
“If they've got a breach of a contract like that, they've got to sue the New Zealand government in the New Zealand courts - just like a New Zealand company would have to,” Mr Parker said.

Mr Parker said consensus around a considerable narrowing of the ISDS clauses has now been achieved, including a "side-deal" with Australia which completely eliminates ISDS clauses between Australia and New Zealand, which makes up 80 per cent of potential CPTPP trade. He says New Zealand will continue to seek similar agreements with the other countries in this new Agreement. In addition, the scope to make ISDS claims has also been narrowed.

**Court of Appeal dismisses challenge from winery owners**

In Resolution Issue No 12 (February 2017) we published an article by Timothy Lindsay and Jay Shaw titled ‘Expert Determination: High Court takes a wine tour’ in which expert determination was discussed in the context of High Court proceedings brought by the trustees of the Greg Hay Family Trust (the Trustees), seeking specific performance (by way of summary judgment) of Peregrine Estate Limited’s (PEL) obligation to buy its shares in Peregrine Wines (PWL), pursuant to a standard form share transfer mechanism in PWL’s constitution at the valuation fixed by the ‘expert’ in accordance with the valuation procedure in PWL’s Constitution.

The High Court upheld the Trustee’s application for summary judgment finding that PEL had no arguable defence and was bound by the valuer’s valuation. His Honour accordingly granted summary judgment and ordered PEL to perform its obligation to buy the Trust’s shares at the valuer’s valuation of $2.62 million.

Associate Judge Mathews rejected PEL’s argument that because the valuer’s “fair value” was substantively wrong on an objective assessment, it could not be binding

The process for fixing fair value if an expert is appointed is intended to be expeditious, final and binding. Unlike an arbitration, there is no right of recourse to the court for error of law in the event that either party is dissatisfied with the price fixed by the expert. However, because the expert undertakes his or her task as an expert, not as an arbitrator, he or she is not immune from suit for negligence. The
The process for fixing fair value if an expert is appointed is intended to be expeditious, final and binding. Unlike an arbitration, there is no right of recourse to the court for error of law in the event that either party is dissatisfied with the price fixed by the expert. However, because the expert undertakes his or her task as an expert, not as an arbitrator, he or she is not immune from suit for negligence. The plain intention is that the parties will be bound by the price fixed by the expert as the fair value of the shares for the purposes of the sale.

After analysing the relevant authorities, the Court observed at [33] that the critical question is always whether the valuation has been carried out in accordance with the terms of the particular contract. Errors on the part of the expert in carrying out the valuation assessment will not invalidate the determination unless the error was one the expert was not entrusted to make.

At [41] the Court observed:

In the present case the expert’s mandate under the constitution was to fix fair value as between the shareholders, not fair market value or current market value. No particular valuation approach was prescribed. Nor were any particular valuation principles specified. The only requirement in the mandate was for the expert to assess the fair value of the particular shares. The parties entrusted the expert to carry out the valuation and agreed to be bound for the purposes of the share transfer by the fair value assessed in the exercise of the expert’s independent skill and judgment, acting honestly and in good faith. If the valuation was carried out incompetently, the affected party would have a remedy against the expert but no right to resist the share transfer at the price fixed.

The Court, while noting that PEL may have grounds to disagree with the valuer’s analysis and conclusion, found that the valuer did not step outside her mandate under the constitution and that Associate Judge Mathews was correct to find that PEL had no arguable defence to the Trustee’s claim. The appeal was dismissed accordingly.

The Peregrine judgments provide important guidance for both the lawyers drafting expert determination clauses in shareholder agreements, and experts themselves in discharging their valuation mandates. To quote the authors of the earlier article “Peregrine highlights the main feature of expert determination, which is its final and binding nature. This means greater commercial certainty for the parties to the process; a faster process by reducing avenues of challenge to excess of mandate; lower costs; and flexibility and certainty over timing. However, it is precisely because of its binding nature that parties should be aware that once a share valuation process is underway, there is little way back—even if there is fundamental disagreement with the valuer’s conclusions.”

A cautionary tale

Once again, the English courts have confirmed that non-payment of an arbitrator’s fees, delaying issue of the award, is not an acceptable excuse to justify missing the deadline to challenge the award under section 69 of the UK Arbitration Act 1996. In Squibb Group v Pole 2 Pole Scaffolding the Court declined to exercise its discretion to extend time for making an application for permission to appeal an award in circumstances where the delay was caused by no reason other than the parties’ failure to pay the arbitrator’s fee leading to a delay in the parties uplifting the award.

O’Farrell J referred to the principles applicable to the court’s discretion to extend time identified by Popplewell J inTerna v Al Shamsi [2012] EWHC 3283(Comm), the primary factors...
O’Farrell J referred to the principles applicable to the court’s discretion to extend time identified by Popplewell J in Terna v Al Shamsi [2012] EWHC 3283(Comm), the primary factors being:
1. the length of the delay;
2. whether the delaying party was acting reasonably in allowing the time limit to expire; and
3. whether others had contributed to the delay.

Ireland’s Mediation Act
On 2 October 2017, Ireland signed its Mediation Act 2017 (the Act) [link to legislation on NZDRC website] into law, but it is yet to come into force. The Act serves to reinforce existing provisions recognising mediation in the Irish High and Commercial Court, as well as in the Rules of the Superior Courts, providing a requirement for parties to litigation to consider mediation and to confirm to the Courts that they have done so.

A court may invite the parties to the proceedings to consider mediation, whether of its own motion, or on application of a party to the proceedings. The Act provides costs sanctions where parties unreasonably refuse or fail to engage in a mediation process following such an invitation.

The Act excludes disputes that are being investigated or mediated before the Workplace Relations Commission from its scope, however it will apply to other claims arising from the workplace, such as claims for personal injuries or breach of contract.

Family Dispute Resolution – it’s not happening (much)
Nigel Dunlop, one of the FDR Centre’s highly skilled family mediators working in the area of child care and contact disputes has written recently on the FDR mediation process and the reasons why it has seen limited uptake. Read the article by Nigel xx in FDR Centre’s website. You may read Nigel’s full article in the Family Advocate, Volume 19, Issue 1 or read a copy in FDR Centre’s website.

Family Mediation – Why would you try it?

Barbara McCulloch, another of FDR Centre’s highly sought after mediators has also written on the topic of family mediation, setting out the reasons why the mediation process can be so effective for those individuals who find themselves embroiled in highly personal...
English High Court removes arbitrator

In Tonicstar Limited v Allianz Insurance and Sirius International Insurance Corporation [2017] EWHC 2753, the English High Court considered an application under Section 24 of the UK Arbitration Act 1996 for the removal of an arbitrator where the question was whether a barrister was a person “with not less than 10 years’ experience of insurance or reinsurance” for the purposes of a standard form arbitration clause in a reinsurance contract. It was argued that the clause required experience in the business of insurance or reinsurance itself, and not experience of insurance or reinsurance law. The Court decided to remove the arbitrator on the basis that he had experience of insurance and reinsurance law, rather than required experience in the business of insurance and reinsurance.

The Judge considered himself bound by the decision of Mr Justice Morison in Company X v Company Y, an unreported decision of July 2000, having found that it was not obviously wrong. He indicated however, that unless he had been so bound, he may well have decided that the ordinary and natural construction of the phrase did not limit the fields in which experience of insurance or reinsurance could be acquired.

The judgment is of particular interest given that questions of the removal of arbitrators do not often come before the courts because they are, in institutional arbitration, typically decided by arbitral institutions so are not usually public. The decision highlights the importance of the careful drafting of arbitration clauses which specify characteristics of an arbitrator. It also serves as a reminder of the importance of precedent in the English judicial system.

Astro v First Media: the next instalment

In the long-running Astro v First Media dispute, the Court of Final Appeal of Hong Kong has granted First Media leave to appeal (against the Court of Appeal’s decision refusing an extension of time to apply to set aside orders under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards).

• In determining whether to extend time for the purposes of an application to resist enforcement of an arbitral award under the New York Convention, is the fact that the award has not been set aside by the courts of the seat of arbitration a relevant factor?

The appeal is to be heard 12 and 13 March 2018.
COURSES AND WORKSHOPS

Organiser: Resolution Institute

Mediation Training – 5 day training
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Organiser: Legal Wise Seminars

Building and Construction Law Conference
Wellington 3 March 2018
Auckland 17 March 2018

Organiser: Thomson Reuters

2018 Building & Construction Law Conference
Auckland 1 March 2018

Dispute Resolution in the Construction Sector
Auckland 2 March 2018
SETTLEMENT REMORSE: WHEN WILL A COURT SET ASIDE MEDIATED CONSENT ORDERS?

By Karen Ingram and Cecile Bester

Matsen v Superannuation Complaints Tribunal [2017] FCA 765

The recent Federal Court case of Matsen v Superannuation Complaints Tribunal [2017] FCA 765 concerned an application by Mr Matsen to set aside consent orders that had been signed by all parties following settlement being reached during a court-ordered mediation. The Court's decision reinforces the requirements that must be met if a consenting party wishes to set aside a consent order.

Factual background

In the initial proceedings, Mr Matsen appealed a decision of the Superannuation Complaints Tribunal relating to the payment of a death benefit from the superannuation fund of his deceased son. The Tribunal had ordered that the death benefit be distributed amongst Mr Matsen and two other people. Mr Matsen applied for the whole of the benefit to be paid out to him.

Mr Matsen and one of the other beneficiaries attended a court-ordered mediation in March 2016, with a Registrar of the Federal Court acting as mediator. During the course of the mediation, there was no direct contact between the mediating parties, as the mediator carried offers between them. Mr Matsen did not have legal representation during the mediation. The matter settled at the mediation, with the parties agreeing to distribute the benefit between them. Short minutes of order were signed, reflecting the agreement they had reached. The remaining parties (the third former beneficiary and the trustee of the superannuation fund) subsequently signed the short minutes of order.

In June 2016, the matter came back before the Court. Mr Matsen claimed that he no longer agreed to the short minutes of order (which had, by that time, been signed by all parties). As a result, the Court stood the matter over without making any orders.

In July 2016, the matter was again before the Court. On that date, Mr Matsen told the Court that he consented to the short minutes of order, even though he had been unwell and that influenced his decision to consent. However, there was no medical evidence to corroborate that he had been unwell. Mr Matsen also told the Court that he had "obtained some legal counsel" since the matter was last before the Court. On those bases, the Court made the signed orders by consent. The consent order was entered into the Court's records.

Mr Matsen’s application to set aside the consent orders

In October 2016, Mr Matsen applied to the Court to set aside the consent orders made in July 2016. Mr Matsen claimed that the mediation was unfair, because he was unwell on the day and was not "up to the task" of negotiation. He was "locked in a most unsuitable room" and was in pain. He was unrepresented at the mediation, and considered that this had also left him at a disadvantage. He felt that the mediator had pressured him to continue the process. Further, he felt it was not appropriate that there was no "face to face" contact between him and the
Further, he felt it was not appropriate that there was no "face to face" contact between him and the other mediating party. Ultimately, Mr Matsen claimed that he had only signed the short minutes of order to enable him to leave the mediation and the Federal Court building.

When can a consent order be set aside?
Justice Perry considered the relevant principles for setting aside or varying orders, being rule 39.05 of the Federal Court Rules 2011 (Cth), as well as the threshold set by the High Court in Harvey v Phillips (1956) 95 CLR 235.

Rule 39.05 lists the circumstances in which the Court can vary or set aside a consent order after it has been entered, including where there was an error arising from an accidental slip or omission, or the party in whose favour it was made consents to changing the order. None of the circumstances applied to the present case.

The threshold in Harvey v Phillips provides that a consent order is similar to a contract: it must not be set aside unless there is some basis on which it can be said to be void, such as misrepresentation, undue influence, or mistake. A party cannot seek to have a consent order set aside merely because of a change of heart, or a perceived bad bargain.

How did the Court address the application?
Justice Perry considered the facts and found that, although the mediation may not have met Mr Matsen's expectations, there was no basis on which to set aside the consent order. Her Honour noted that it was neither unusual nor inappropriate for a mediation to have no "face to face" contact between the parties. Further, there was no medical evidence that Mr Matsen had been too unwell to consent.

Justice Perry observed that Mr Matsen's allegation of being physically detained and pressured by the Registrar was, at its highest, an argument that Mr Matsen had only settled the dispute and signed the short minutes of order under duress from the Registrar. Her Honour stressed the seriousness of this allegation, and noted that it would need to be proved to the standard of "reasonable satisfaction".

Justice Perry pointed to the "inherent unlikelihood" of the allegations, particularly given that the Registrar was an independent officer of the Court with no vested interest in the outcome of the mediation. Her Honour observed that Mr Matsen's complaints likely related to his subjective feelings given the subject-matter of the dispute, rather than the existence of any improper conduct. The Registrar's attempts to encourage Mr Matsen to resolve the issues at the mediation, rather than proceed to litigation, might have been perceived as pressuring him to consent to the orders, but they were not improper.

Ultimately, Justice Perry found that it was not necessary to determine the allegation of duress. Her Honour held that, even if Mr Matsen had felt pressured during the mediation in March, he subsequently agreed to the consent orders being made in July. He also obtained legal advice in the period following the mediation and before the consent orders were made. Mr Matsen did not allege to the contrary during the hearing of his application.
Conclusion
This decision recognises the binding nature of consent orders made by the Court after settlement during a mediation. It clarifies that, although a mediation may not always be conducted in the way that a certain party expects, this is no basis for overturning an agreement reached during mediation and subsequently endorsed by court order. For a court to set aside consent orders after they have been entered, a party must prove that one of the circumstances provided by the relevant Court Rules applies, or that the bargain between the parties should be regarded as void or voidable.

From a mediator’s perspective, the decision confirms that it is appropriate for a mediator to encourage parties to participate in a mediation process in preference to litigation, and that this will not necessarily constitute undue pressure or duress.

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NZDRC’S EXECUTIVE DIRECTOR RUNS NEW YORK MARATHON TO RAISE FUNDS FOR

NZDRC's Catherine Green has recently completed the NY Marathon for a second year in a row, to raise funds for Catwalk - Spinal Cord Injury Research Trust.

"After running New York last year with the Catwalk team, I couldn’t wait to sign up again. Not only is this an amazing event to be involved in from a personal perspective, it is a fantastic way to get behind a truly deserving cause. The work Catwalk is doing to raise funds to support the ongoing scientific research into finding a cure for spinal cord injury is extremely important and it is an honour and a privilege to be a part of their efforts"

The Catwalk team of almost 30 members was lead by David Pretorius whose daughter was left paralysed from the waist by a car accident in 2010. The CatWalk Trust is committed to a world where spinal cord injury will not mean paralysis for life and so far has raised $176,474.85.

STARTLING STATISTICS

- The majority of SCI occur in young males between 35-45 who are at the peak of their productivity
- 40% of SCI in New Zealand are a result of motor vehicle accidents
- The average cost of care for each high level tetraplegic is NZ$ 212,00 per year

For further information or to donate visit www.catwalk.org.nz
I recall one of my colleagues on the WHRS Tribunal once saying: “so we have to give reasons for reasons” the answer then and the answer now remains the same – yes!

In a judgment just handed down in Ngāti Hurungaterangi v Ngāti Wahiao [2017] NZCA 429 (26 September 2017), the Court of Appeal set aside the award made by the arbitral tribunal saying the reasons given were so inadequate and inconsistent that they fall short of discharging the panel’s mandate to give a reasoned award.

This is only the second time the Court of Appeal has considered the obligation to give reasons. The first was in Casata v General Distributors Ltd, in which the Court noted, in the context of an unsuccessful challenge to an arbitrator’s determination on a rent review, that elaborate reasons were not required for each and every component of an award; and that an expert arbitral panel was entitled to express a conclusory preference for one side’s experts over another.

In Ngāti Hurungaterangi v Ngāti Wahiao the Court has made it clear that while the reasons stated for findings by an arbitral tribunal may not need to be as extensive as may be expected of a formal judgment, they must be sufficiently full for the parties to understand the pathway taken by the arbitral tribunal to reach the result.

Background
In the late nineteenth century, the Crown acquired from Māori certain ancestral lands near Rotorua known as Whakarewarewa and Arikikapakapa.

In 2008, immediately following a critical report by the Waitangi Tribunal, the Crown agreed to return the lands to Ngāti Hurungaterangi, Ngāti Taetoe me Ngāti Te Kahu o Ngāti Whakaue (Ngāti Whakaue) and those hapū comprising Tuhourangi Ngāti Wahiao (Ngāti Wahiao).

However, Ngāti Whakaue and Ngāti Wahiao were unable to agree on which of them was entitled to the lands. Each claimed exclusive beneficial ownership. They were unable to settle their differences and an arbitral panel was later convened pursuant to the Trust Deed to determine the competing rights of beneficial ownership according to mana whenua.

The arbitral tribunal held hearings over 13 sitting days between November 2012 and May 2013. The competing iwi were represented by legal counsel. Extensive evidence was called of both an oral and documentary nature.

The tribunal’s interim decision was delivered a month later on 7 June 2013 and adopted in whole as the final award delivered on 14 November 2014. The arbitral tribunal’s reasons for its finding that the three Ngāti Whakaue hapū, the three Ngāti Wahiao hapū and the beneficiaries of the Trust were eligible to be final beneficiaries but that the Tuhourangi Tribunal Authority was not, were contained in five paragraphs under the heading ‘Conclusion’. Ngāti Whakaue was dissatisfied and challenged the award in the High Court for error of law. In 2014 the Court of Appeal granted Ngāti Whakaue special leave under art 5(6) of sch 2 to the Arbitration Act 1996 to bring an appeal to the High Court on a number of questions of law.
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Ngāti Whakaue was dissatisfied and challenged the award in the High Court for error of law. In 2014 the Court of Appeal granted Ngāti Whakaue special leave under art 5(6) of sch 2 to the Arbitration Act 1996 to bring an appeal to the High Court on a number of questions of law.

High Court proceedings
Moore J heard Ngāti Whakaue’s substantive appeal and its separate challenge to the award for breach of natural justice. Ngāti Whakaue’s primary challenge was to the adequacy of the tribunal’s reasoning. Moore J’s judgment captures the essence of Ngāti Whakaue’s complaint as being directed to:

[87] ... the ascertainment of the applicable law (including statute, common law and tikanga), the identification and interpretation of the principles under the Deed and the identification of those facts which the Panel was required to take into account in reaching its decision.

Moore J subjected the issue as to whether the award satisfied the panel’s obligation deriving from art 31(2) of sch 1 to the Arbitration Act and cl 15.8 of the Second Schedule to the Trust Deed to state the reasons on which the award is based, to a thorough analysis. His Honour concluded by a fine margin that the arbitral tribunal properly discharged its legal duty notwithstanding the Judge’s acknowledgment at [120] of the paucity of the panel’s reasons. Moore J ultimately dismissed this ground of the panel’s inadequate reasons and all other grounds of Ngāti Whakaue’s appeal, but later granted the iwi leave to appeal on approved questions of law. The first of which is at the heart of Ngāti Whakaue’s appeal, namely whether the panel’s reasons were adequate.

Decision on appeal
On appeal, the Court of Appeal held that whether the panel’s reasons were adequate could only be determined against the unique and complex cultural, legal and legislative background to the dispute that informs the nature and extent of the panel’s obligation to give reasons.

The Court went on to set out in detail the historical origins and nature of the parties’ competing claims leading to the relevant Native Land Court decisions and the Waitangi Tribunal’s criticisms of the Crown’s acquisition process. It then reviewed the Crown’s response to the Tribunal’s report and summarised the terms of the Vesting Act and the Trust Deed, which provide the legal foundation for the appeal.

The arbitral tribunal’s reasons for its finding...
The Court went on to set out in detail the historical origins and nature of the parties’ competing claims leading to the relevant Native Land Court decisions and the Waitangi Tribunal’s criticisms of the Crown’s acquisition process. It then reviewed the Crown’s response to the Tribunal’s report and summarised the terms of the Vesting Act and the Trust Deed, which provide the legal foundation for the appeal.

The arbitral tribunal’s reasons for its finding were contained in five paragraphs under the heading ‘Conclusion’. The Court said at [59]: We must determine whether the award as a whole, but these passages in particular, satisfied the panel’s obligation deriving from art 31(2) of sch 1 to the Arbitration Act and cl 15.8 of the Second Schedule to the Trust Deed to state the reasons on which the award is based. Moore J subjected this issue to a thorough analysis, concluding “by a fine margin” that the panel properly discharged its legal duty. The question is whether that equivocal conclusion can be justified having regard to the Judge’s own earlier acknowledgment of the paucity of the panel’s reasons.

Citing the English Court of Appeal’s decision in Flannery v Halifax Estate Agencies Ltd the Court’s analysis of the obligation to give reasons and the purpose of the duty at [60] and [61] is worthy of restatement here in full:

[60] Article 31(2) of sch 1 to the Arbitration Act marked an important legislative development by requiring that an arbitral award “shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given”. Neither its predecessor, the Arbitration Act 1908, nor the common law imposed an obligation to deliver a reasoned award. Its introduction in 1996 along with a range of other new measures incorporated the provisions of the UNCITRAL Model Law on International Commercial Arbitration, recognised the increasing significance of arbitration as a means of formal dispute resolution and aligned more closely the arbitral and judicial functions and our statutory code with international practice. Compliance with the obligation is now mandatory unless the parties specifically agree otherwise. The Law Commission earlier reported “strong support for such a change” to New Zealand’s arbitral jurisdiction.

[61] The purpose of the arbitral obligation to give reasons merits restatement. Within the arbitral framework for determining competing rights and obligations, the reasons explain how the adjudicator progressed from a particular state of affairs to a particular result. The reasons are the articulation of the logical process employed by a person whose particular skills, expertise or qualification the parties have chosen to decide their dispute. The reasons expose to the parties the disciplined thought pattern of the specialist adjudicator, thereby dispelling any suggestion of arbitrariness. A requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not.

The Court observed that the nature and extent of the duty to give reasons for an award will be contextual, and necessarily imports a degree of flexibility according to the circumstances, including the subject matter being arbitrated, its significance to the parties and the interests at stake. There is no qualitative measure of adequacy. The reasons are not required to
including the subject matter being arbitrated, its significance to the parties and the interests at stake. There is no qualitative measure of adequacy. The reasons are not required to meet a minimum criterion or extent — or to satisfy the curial standard — except that they must be coherent and comply with an elementary level of logic of adequate substance to enable the parties to understand how and why the arbitrator moved in the particular circumstances from the beginning to the end points. They must engage with the parties’ competing cases and the evidence sufficiently to justify the result. They must be the reasons on which the award is based; if they do not satisfy these requirements, they are not reasons.

**Decision**
The interim award issued by the arbitral panel on 7 June 2013 and adopted as the final award on 14 November 2014 was set aside. The Court found that the five paragraphs constitute the only section of the panel’s award which might arguably be said to provide reasons for its decision. The Court said it is perhaps telling that the panel headed the section as its conclusion as the reasons are essentially conclusory in nature, and to the extent that they purport to explain the result, they are so inadequate and inconsistent that they fell short of discharging the panel’s mandate to give a reasoned award. The Court found the reasons were not commensurate with the importance of the subject matter and the panel’s conclusion.

**Conclusions and implications**
Any decision by an arbitral tribunal is made by applying the appropriate legal principles to the preferred evidence. What is required first, is a clear identification and formulation of issues which serves as an organised framework for the arbitral reasoning process (while it is not mandatory, arbitrators frequently request the parties to submit a list of issues for that purpose). The decision must be reached on an adequate factual foundation. That will involve weighing or evaluating the positions of relative evidential strength and identifying the evidence relied upon to reach the decision. While the arbitral tribunal is effectively ‘master of the facts’ and exclusively entitled to decide ‘the admissibility, relevance, materiality, and weight of any evidence’, such evidentiary discretion does not absolve the arbitral tribunal from stating why it preferred certain evidence, and what that evidence was, and why it disregarded other evidence. The reasons expose to the parties the disciplined thought pattern of the specialist adjudicator, thereby dispelling any suggestion of arbitrariness. Drawing analogies with the judicial process can be diversionary. The reasons may not necessarily be as extensive as may be expected of a formal judgment - the standard required will be dictated by the context. The reasons must be sufficiently full for the parties to understand the pathway taken by the arbitral tribunal, and be set out in such a manner as to provide a logical and coherent explanation of adequate substance to enable the parties to understand why the tribunal reached the decision.

By John Green

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Aggrieved claimants may sometimes seek to extend their claims not only to the company that agreed to arbitrate disputes – but also to that company's shareholders or ultimate controlling person(s). Such efforts are usually driven by commercial realities – while the company may be insolvent, or asset-light and liability-heavy, the shareholders or ultimate controlling person(s) may have substantial assets. Even if these parties have not signed the arbitration agreement in question, it may still be possible to join them by "piercing the corporate veil" of the signatory company.

Singapore courts have recognized a tribunal's authority to join shareholders to an arbitration by piercing the corporate veil. In fact, Singapore courts have already enforced awards against parties who did not expressly sign the arbitration agreement. However, these cases have only involved awards rendered by tribunals seated outside of Singapore. Nonetheless, the Singapore courts reasoned that so long as the supervisory court of the seat has not set aside the award, Singapore courts will be inclined to enforcing the award. However, insofar as arbitrations seated in Singapore are concerned, there appears to be no reported decision where the Singapore courts considered the issue of whether to set aside an award in which the arbitral tribunal had exercised its power to pierce the corporate veil. Recently, the Delhi High Court in *Sudhir Gopi vs Indira Gandhi National Open University O.M.P. (COMM) 22/2016*, engaged in this analysis – ultimately deciding to set aside an arbitration award because the Delhi High Court found that the tribunal did not have sufficient grounds to pierce the corporate veil in order to join the shareholders in question.

Below, we discuss the factors a Singapore court may consider when deciding whether to set aside an award in which the arbitral tribunal had exercised its power to pierce the corporate veil. Notably, the Singapore court's considerations may differ in cases where the tribunal has joined shareholders (on the grounds of the "alter ego" doctrine) versus when it has joined a company (on the grounds that the company is part of a "group of companies").

### A. Joining non-signatory shareholders or individuals

Subject to the precise terms of the arbitration agreement, Singapore courts recognize that tribunals have jurisdiction to "pierce the corporate veil" and join parties who have not explicitly signed an arbitration agreement, on the basis of the *alter ego* doctrine.
1. Who can be considered an *alter ego* of the signatory?

"Piercing the corporate veil" refers to the situation where the company's separate legal personality can be disregarded, and the individual shareholders can be made personally liable for the acts of the company. When the company is used as an extension or *alter ego* of its controller to carry out his own business, the corporate veil can be pierced so as to impose liability on the controller under the contract and the arbitration agreement. In Singapore, both courts and arbitral tribunals have the power to join companies or individuals who are not formally signatories to the arbitration agreement, if they are involved in some material way in the underlying transaction or project. In fact, non-signatories may be considered a party to the arbitration via piercing of the corporate veil on the basis of the *alter ego* doctrine.

In *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd and another* [2006] 3 SLR(R) 174 (*Aloe Vera of America*), the arbitration agreement was entered into between *Aloe Vera of America Inc (AVA)* and *Asianic Food (S) Pte Ltd (Asianic)*. However, it was the shareholder of Asianic, Mr Chiew Chee Boon (Mr Chiew) who had signed the contract containing the arbitration agreement on behalf of the Asianic. A dispute arose between AVA and Asianic, and AVA commenced arbitration proceedings against both Asianic and Mr Chiew.

Here, the arbitral tribunal found that Mr Chiew was "at all material times the president, a director and shareholder of Asianic and that Asianic was undercapitalised, failed to honour corporate formalities and was the alter ego of Mr Chiew", and rendered a final award ordering both Asianic and Mr Chiew to pay AVA damages. When AVA sought to enforce the arbitration award in Singapore, Mr Chiew sought a declaration that he was not a party to the arbitration agreement.

The Singapore High Court found that whether a person is an *alter ego* of a company is an issue which can in an appropriate case be decided by arbitration. In holding that Mr Chiew was a party to the arbitration agreement, the arbitrator was acting within his jurisdiction, as it was an accepted principle of arbitration law that an arbitral tribunal has jurisdiction to determine whether a particular person is party to an arbitration agreement. In this regard, if the tribunal had properly decided its jurisdiction under the law of Arizona, which was the governing law of the arbitration agreement, and the supervisory court in Arizona did not overrule the tribunal's finding, then the Singapore Court which is called to enforce the award is not entitled to look into the merits of the case. The Singapore High Court eventually upheld the assistant registrar's decision to grant AVA leave to enforce the arbitration award.

2. What laws apply to determine whether the non-signatory is an *alter ego* of the signatory?

Generally, the party seeking to join shareholders of a company who are non-signatories to the arbitration agreement has to demonstrate that piercing of the corporate veil will be appropriate under the laws of incorporation of the signatory company. However, the issue is that the definitions of *alter ego* vary materially across different jurisdictions, and are applied in various contexts. Thus, this raises an additional factor which parties should take into account before entering into arbitration agreements.
Some jurisdictions appear to be more open to piercing the corporate veil, while other jurisdictions appear to be less willing to do so. For instance, U.S. Courts appear to have been more prepared than courts in other jurisdictions to apply an *alter ego* analysis, so as to subject a non-signatory to an arbitration agreement to the arbitration proceedings. In contrast, the English Courts appear to have been more hesitant to apply the *alter ego* doctrine in a similar context. This difference was recognised in the U.S. case of *FR 8 Singapore Pte Ltd v Albacore Maritime Inc and others* 794 F. Supp. 2d 449 where the plaintiff, FR 8 Singapore Pte Ltd (FR 8), commenced an action against the defendant, Albacore Maritime, and three other non-signatories to the arbitration agreement, to compel the non-signatories to arbitrate FR 8's claim in London as *alter egos* of Albacore Maritime.

In deciding whether to grant FR 8's motion, the District Court of New York noted that the U.S. federal common law of piercing the corporate veil is more favourable compared to English law. Nonetheless, the Court found that U.S. federal common law was not applicable as the contract between FR 8 and Albacore Maritime expressly provided for English law as the choice of law. Ultimately, the Court decided that based on English law, there were no grounds for the corporate veil to be pierced so as to compel the non-parties to arbitrate the FR 8's claim as *alter egos* of Albacore Maritime. FR 8's motion was dismissed accordingly.

B. Joining a company under Group of Companies doctrine

Parties may also attempt to join an associated company that is a non-signatory to the arbitration agreement under the group of companies doctrine.

It is common for corporate organizations to structure their business by incorporating numerous subsidiary companies that share a common source of control. In such cases, it may be possible to argue that the companies function as a "group of companies" or a "single economic entity". While arbitral tribunals seem to have the power to pierce the corporate veil so as to join shareholders to the arbitration, such powers do not extend to situations involving a group of companies thought to be a single economic entity.

Unlike the situation of piercing the corporate veil, the Singapore Courts do not recognise that arbitral tribunals have the jurisdiction to join associated companies to the arbitration agreement. In *Manuchar Steel Hong Kong Ltd v Star Pacific Line Pte Ltd* [2014] 4 SLR 832, the Singapore High Court found that the single economic entity concept has very little traction in the international arbitration community, especially outside jurisdictional issues (such as whether a company within the group is part of the group for the purposes of jurisdiction). Similarly, in the English case of *Peterson Farms Inc v C & M Farming Ltd* [2004] EWHC 121 (Comm), the English Court rejected the "group of companies" doctrine, and found that the tribunal had no jurisdiction to award damages suffered by the group companies who were not parties to the arbitration agreement.

One of the possible explanations why the courts hesitate to join associated companies under the doctrine of group of companies may be because the doctrine requires the arbitral tribunal to discern the subjective intentions of the parties, and enquire as to whether parties intended for the scope of the arbitration agreement to extend to the associated company. This seems to be stretching the notion that an arbitral tribunal has the power to decide its own jurisdiction a step too far.

C. Will Singapore courts ultimately set aside awards against a non-signatory party?

Singapore is seen as a pro-arbitration jurisdiction. As such, party autonomy plays a central role in any tribunal or court's consideration. The starting point of all arbitrations is an agreement to arbitrate, and a party cannot be forced to arbitrate against its will or without its consent. In fact, this was recently affirmed by the Singapore Court of Appeal in *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2016] 1 SLR 373, where the Court held that an arbitral tribunal's jurisdiction is based on the consent of the parties, as manifested in the arbitration agreement.
will or without its consent. In fact, this was recently affirmed by the Singapore Court of Appeal in *Tomolugen Holdings Ltd and another v Silica Investors Ltd* and other appeals [2016] 1 SLR 373, where the Court held that an arbitral tribunal’s jurisdiction is based on the consent of the parties, as manifested in the arbitration agreement.

While it has been well-established that Singapore courts are deferential to the courts of the place of the seat of arbitration when enforcing an award, it remains to be seen whether Singapore courts will take a different approach when deciding on whether the arbitral tribunal should pierce the corporate veil so as to join a non-signatory party to the arbitration, when Singapore is the seat of the arbitration.

D. Implications for Businesses
If you are being joined as a party to the arbitration agreement, please seek legal advice. This is to ascertain your rights and position and address the issue of whether the arbitral tribunal indeed has jurisdiction to allow such joinder, despite the lack of your express consent. As explained above, whether the arbitrator has jurisdiction to pierce the corporate veil will depend on the laws of incorporation of the signatory company. This may in turn raise complex choice of law issues. If an award has already been rendered against you even though you are a non-signatory to the arbitration agreement, it may be possible to set aside the award or challenge the enforcement of the arbitration award.

If you intend to join a party to an arbitration that has not explicitly signed the arbitration agreement, it is prudent to consider whether (a) the laws of incorporation of the company being joined would support such a position and (b) whether the laws of the seat of arbitration support the position that arbitral tribunals have the jurisdiction to pierce the corporate veil.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

**About the author**

*Dentons Rodyk has a host of experts in arbitration and associated litigation – including enforcement of awards and setting aside proceedings, and we are available to answer any questions you might have regarding this and other issues.*

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**Background**

The matter involved an interesting proposition of law in dealing with a challenge raised by Era Infra before the Delhi High Court in two separate petitions filed against Aravali Power under Section 14 and 11(6) of the 1996 Act, *inter alia*, on the grounds of apprehension of bias and justifiable doubts as to the independence and impartiality of the nominated arbitrator appointed as per the arbitration agreement between the parties. The Delhi High Court allowed both petitions holding that Section 12 of the 1996 Act even prior to the amendment in 2015, maintained the neutrality of arbitrators and emphasised appointment of independent and impartial arbitrators so that the arbitration procedure is fair and unbiased.

In the present case, Aravali Power awarded a contract to Era Infra for construction work of permanent township for Indira Gandhi Super Thermal Power Project at Jhajjar. The relevant portion of the arbitration agreement contained in the contract stipulated as under:

“56. Arbitration:-

... shall be referred to the Sole Arbitration of the Project In-charge of the Project concerned of the owner, and if the Project In-charge is unable or unwilling to act, to the sole arbitration of some other persons appointed by the Chairman and Managing Director, NTPC limited (Formerly National Thermal Power Corporation Ltd) willing to act as such Arbitrator. There will be no objections, if the Arbitrator so appointed is an employee of NTPC Limited (Formerly National Thermal Power Corporation Ltd), and that he had to deal with the matters to which the contract relates and that in the course of his duties as such he had expressed views on all or any of the matters in disputes or difference. The Arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason as aforesaid at the time of such transfer, vacations of office or inability to act, Chairman and Managing Directors, NTPC limited (Formerly National Thermal Power Corporation Ltd.), shall appoint another person to act as Arbitrator in accordance with the terms of the contract...”

Era Infra vide letter dated 29 July 2015 sought appointment of an arbitrator, being a retired judge of the High Court, for adjudication of
EMPLOYEE OF A PARTY ALLOWED AS ‘ARBITRATOR’ IN PROCEEDINGS... - CONT.

Era Infra vide letter dated 29 July 2015 sought appointment of an arbitrator, being a retired judge of the High Court, for adjudication of disputes which had arisen between the parties on account of delay in completion of the contract by disputing the arbitration agreement, *inter alia*, on the ground that “nobody can be a judge in his own cause” and sought reference to an independent tribunal. Aravali Power, while refuting the contentions raised by Era Infra, proceeded to appoint its chief executive officer as the sole arbitrator on 19 August 2015. Accordingly, the parties appeared before the sole arbitrator on 7 October, 2015 and thereafter Era Infra on 4 December, 2015 sought extension of time to file its statement of claim. However, Era Infra did not raise any dispute regarding the appointment or continuation of the arbitration proceedings. According to the record, the sole arbitrator granted one month’s time, as prayed for.

On 12 January, 2016, Era Infra sought to challenge the appointment of the arbitrator and raised an objection regarding constitution of the arbitral tribunal. The sole arbitrator ruled on his jurisdiction and rejected Era Infra’s contention on the ground that it had participated in the arbitral proceedings on 7 October, 2015 without raising any protest. Era Infra was then intimated to attend proceedings in the arbitration scheduled to be held on 16 February 2016. Era Infra however, approached the Delhi High Court by filing petitions as aforesaid, seeking termination of the mandate of the arbitrator and for appointing an independent arbitrator.

The Delhi High Court by its common judgment and order dated 29 July 2016 set aside the appointment of the arbitrator primarily on the grounds that “justice should not only be done but it must also seen to be done” and that appointment of the CEO as arbitrator is likely to give rise to justifiable doubts as to his neutrality. The Delhi High Court directed Aravali to suggest names of three panel arbitrators from different departments to Era Infra who could thereafter choose any one of them to be the arbitrator in the matter. It was directed that in the event of failure by Aravali Power to suggest the names of panel arbitrators, Era Infra would be at liberty to revive the petitions, in which case the Court would appoint a sole arbitrator from the list maintained by Delhi International Arbitration Centre. It was also observed that the arbitrator was CEO of Aravali Power and was previously involved in cases/contract works similar to the one involved in the present case and it could not be disputed that the decisions of part cancellation were taken at the highest level of Aravali Power. In the circumstances, the Delhi High Court found that the apprehension entertained by Era Infra was reasonable and not a vague or general objection.

In the above background, Aravali Power preferred a Special Leave Petition before the Supreme Court of India challenging the said order dated 29 July 2016 passed by the Delhi High Court on the ground that the appointment of the arbitrator was completely in tune with Clause 56 of the GCC and there was no occasion for the Delhi High Court to exercise any power or jurisdiction and that the 1996 Act contemplated clear and definite procedure for challenging the arbitrator, and even if such challenge were to fail the remedy under Section 13 of the 1996 Act was specific and of different nature. To the extent the Delhi High Court had directed Aravali Power to submit three names from its panel of arbitrators from which list Era Infra was to select the sole Arbitrator, Aravali Power challenged that part of the judgment by filing SLP (Civil) Nos.503-504 of 2017.

Judgment

The Supreme Court, at the very outset, observed that the parties invoked arbitration on 29 July, 2015, the arbitrator was appointed on 19 August, 2015 and the parties appeared...
Judgment

The Supreme Court, at the very outset, observed that the parties invoked arbitration on 29 July, 2015, the arbitrator was appointed on 19 August, 2015 and the parties appeared before the arbitrator on 7 October, 2015, well before 23 October 2015 i.e. the date on which the 2015 Amendment was deemed to have come into force. It was prima facie held that the statutory provisions that would therefore govern the present controversy are those that were in force before the 2015 Amendment came into effect. The Supreme Court further relied on the judgment in the matter of Indian Oil Corporation Ltd. and Others v. Raja Transport Private Ltd.[2] while holding that the fact that the named arbitrator happens to be an employee of one of the parties to the arbitration agreement has not by itself, before the 2015 Amendment came into force, rendered such appointment invalid and unenforceable. It was observed that the sole arbitrator undoubtedly was an employee of Aravali Power but so long as there is no justifiable apprehension about his independence or impartiality, the appointment could not be rendered invalid and unenforceable.

The Supreme Court while discussing the judgment passed in the matter of Northern Railway Administration, Ministry of Railway, New Delhi v. Patel Engineering Company Ltd.[3], along with various other judgments, observed and held that referring the disputes to the named arbitrator, by way of an arbitration agreement, shall be the rule. The Chief Justice or his designate will have to merely reiterate the arbitration agreement by referring the parties to the named arbitrator or named arbitral tribunal. Ignoring the named arbitrator/arbitral tribunal and nominating an independent arbitrator shall be the exception to the rule, to be resorted for valid reasons.

The Supreme Court also discussed the judgment passed in the matter of Voestalpine Schienen GMBH vs. Delhi Metro Rail Corporation Limited[4] and distinguished the same by observing that this was the only decision in which the invocation of arbitration was after the 2015 Amendment but the same would not apply to the facts of the present case.

In light of the rival contentions, the Supreme Court held as under:

- Except the decision of this Court in Voestalpine Schienen GMBH (supra) referred to above, all other decisions arose out of matters where invocation of arbitration was before the 2015 Amendment came into force. Voestalpine Schienen GMBH (supra) was a case where the invocation was on 14 June, 2016 i.e. after the 2015 Amendment and the observations in para 18 clearly show that since “the arbitration clause finds foul with the amended provisions”, the Court was empowered to appoint such arbitrator(s) as may be permissible.
- The ineligibility of the arbitrator was found in the context of amended Section 12 read with Seventh Schedule (which was brought in by the 2015 Amendment) in a matter where invocation for arbitration was after the 2015 Amendment had come into force. It is thus clear that in cases prior to the 2015 Amendment, the law laid down in Northern Railway Administration (Supra), as followed in all the aforesaid cases, must be applied, in that, the terms of the agreement ought to be adhered to and/or given effect to as closely as
down in *Northern Railway Administration (Supra)*, as followed in all the aforesaid cases, must be applied, in that, the terms of the agreement ought to be adhered to and/or given effect to as closely as possible.

- The jurisdiction of the Court under Section 11 of 1996 Act would arise only if the conditions specified in clauses (a), (b) and (c) are satisfied. The cases referred to above show that once the conditions for exercise of jurisdiction under Section 11 (6) were satisfied, in the exercise of consequential power under Section 11(8), the Court had on certain occasions gone beyond the scope of the concerned arbitration clauses and appointed independent arbitrators. What is clear is, for exercise of such power under Section 11(8), the case must first be made out for exercise of jurisdiction under Section 11 (6) of the 1996 Act.

In view of the above, the Supreme Court allowed the appeal filed by Aravali Power and held that:

- Observations of the High Court show that the exercise was undertaken by the High Court, “in order to make neutrality or to avoid doubt in the mind of the petitioner” and ensure that justice must not only be done and must also be seen to be done.

- In effect, the High Court applied principles of neutrality and impartiality which have been expanded by way of the 2015 Amendment, even when no cause of action for exercise of power under Section 11(6) had arisen.

- The procedure as laid down in Section 12 of the 1996 Act prior to the 2015 Amendment mandated disclosure of circumstances likely to give rise to justifiable doubts as to independence and impartiality of the arbitrator. It is not the case of Era Infra that the provisions of Section 12 of the 1996 Act in un-amended form stood violated on any count. The provision contemplated clear and precise procedure under which the arbitrator could be challenged and the objections in that behalf under Section 13 of the 1996 Act could be raised within prescribed time and in accordance with the procedure detailed therein. The record shows that no such challenge was raised within the time and in terms of the procedure prescribed.

- As a matter of fact, Era Infra had participated in the arbitration and by its communication dated 4 December 2015, had sought extension of time to file its statement of claim.

- Accordingly, it was held that the Delhi High Court was clearly in error in exercising jurisdiction in the present case and it ought not to have interfered with the process and progress of arbitration. Therefore, the challenge raised by Aravali Power was accepted and the contentions raised by Era Infra were rejected.

**Comment**

The judgment delivered by the Supreme Court comes as a step back in implementing the true nature and spirit of the 1996 Act particularly with the advent of the 2015 Amendment and is conservative in approach in the light of the judgment of the Supreme Court in the *Voestalpine Case (Supra)*.

The primary reason for allowing the employee of a party to continue as the nominated arbitrator by the Supreme Court is the distinction sought to be drawn with the pre-2015 Amendment period as compared to the post-2015 Amendment period. However, the Supreme Court ignored the legal position that existed even prior to the 2015 Amendment in as much as the principles of independence and impartiality were embedded in the provisions contained in Section 12 read with Section 11(8) of the 1996 Act even prior to the 2015 Amendment. The 2015 Amendment clarified the position by emphasising specific categories under Schedule V and VII of the 1996 Act.

Even on facts, the Supreme Court has ignored the factual findings of the Delhi High Court that though the CEO of Aravali Power was not the Engineer-in-Charge or the day-to-day in-charge of the work which was to be performed by Era Infra, but those who were responsible for such
Even on facts, the Supreme Court has ignored the factual findings of the Delhi High Court that though the CEO of Aravali Power was not the Engineer-in-Charge or the day-to-day in-charge of the work which was to be performed by Era Infra, but those who were responsible for such day-to-day work ultimately reported to the CEO. Therefore, the CEO had a controlling influence in Aravali Power against whom Era Infra sought to assert claims. In view of the above, circumstances existed for Era Infra to have justifiable doubts as to the independence and impartiality of the tribunal or that the arbitration procedure would be fair and unbiased.

Independence and impartiality are the touchstone of any adjudication process and more so in an arbitration process, where it is an alternative dispute resolution mechanism created by agreement between the parties. The endeavour of the legislature and the judiciary in the recent past has been to promote faster dispute redressal through mechanisms like – arbitration as compared to tardy and cumbersome Court process. Therefore, the role of fairness, independence and impartiality of the tribunals are indispensable. In view of limited judicial interference in the adjudication and post-adjudication stage, it is quintessential that there is a fair and unbiased adjudication.

Apprehension of bias or justifiable doubts to the independence and impartiality of arbitral tribunals are to be resolved at the very outset rather than leaving it to a challenge at a later stage so as to avoid multiplicity of judicial proceedings, which has been one of the primary objectives of alternative dispute resolution. The whole scheme behind ensuring independence and impartiality of an arbitrator is to provide the necessary confidence and relief to contesting parties involved in the process of dispute resolution by resorting to the machinery of alternative disputes redressal. This becomes more important when a private party is contracting with a dominant government undertaking or a public sector undertaking (PSU), where the private party has minimal negotiating powers. In view of settled legal position, such government undertakings/PSUs may strive to defend claims of the private contracting parties on merits rather than resorting to technical pleas.

Though the arbitration proceedings which have commenced post 2015 Amendment will continue to reap the benefits of the order passed in *Voestalpine (Supra)*, the arbitration proceedings which commenced pre-2015 Amendment are bound to receive a differential treatment in this regard. The above judgment also dilutes the directives, with respect to procedure of appointment of arbitrators especially in cases of various Government agencies/PSUs, as laid in another recent judgment of the Hon’ble Supreme Court dated 03 July 2017 passed in *TRF Limited v. Energo Engineering Projects Limited*[5]. A party, left with no choice or freedom of selection of an independent and impartial arbitral tribunal under the 1996 Act, will be left at the mercy of such an arbitral tribunal without any effective recourse to seek a fair, unbiased and reasonable adjudication of its disputes.

*The content of this document does not necessarily reflect the views / position of Khaitan & Co but remain solely those of the author(s).*

**End Notes**

1- Civil Appeal Nos. 12627 - 12628 of 2017  
2- (2009) 8 SCC 520  
3- (2008) 10 SCC 240  
4- (2017) 4 SCC 665  
5- (2017) 8 SCC 377
EMPLOYEE OF A PARTY ALLOWED AS ‘ARBITRATOR’ IN PROCEEDINGS... - CONT.

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TRUST DISPUTE NO BAR TO ARBITRATION

By Albert Monichino QC & Adam Rollnik

Arbitration – scope of arbitration agreement – whether a dispute as to an alleged breach of trust constitutes a “matter” within the scope of an arbitration agreement – proper approach to construction of arbitration agreement – whether the arbitration agreement incapable of being performed – application for stay of proceedings under s 8 of Commercial Arbitration Act 2012 (WA)

Fitzpatrick v Emerald Grain Pty Ltd [2017] WASC 206

The plaintiffs (the Growers), comprised 47 grain growers in WA. They commenced proceedings in the Supreme Court of Western Australia in connection with contracts between each of them and the defendant (Emerald) in relation to the placement of grain produced by the Growers into a pool of grain held by and sold by Emerald. The precise characterisation of the contracts, and whether they gave rise to a trust relationship, whereby Emerald held funds received from the sale of the grain on trust for each grower, was one of the main matters in dispute.

Each of the contracts contained an arbitration clause which stated, relevantly:

Any dispute or claim arising out of, relating to or in connection with these Terms and Conditions, a Pool Contract[ ] or delivery of Commodities to a Pool, including any question regarding the existence of a contract, the validity or its termination, and which cannot be resolved between the parties, shall be resolved by arbitration in accordance with the GTA Dispute Resolution Rules[ ] in force at the commencement of any arbitration.

[Emphasis added]

In the Court proceedings, the Growers sought, among other things, an order for payment to each Grower of their entitlement, and relief pursuant to the Trustees Act 1962 (WA), including the appointment of a new trustee to administer the Trust. Emerald applied for orders to stay the court proceedings and to refer the parties to arbitration pursuant to s 8 of the Commercial Arbitration Act 2012 (WA) (CAA) which provides, inter alia, as follows:

8. Arbitration agreement and substantive claim before court (cf. Model Law Art 8)

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement must, if a party so requests not later than when submitting the party’s first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

This section is based on Article 8 of the UNCITRAL Model Law on International Commercial Arbitration (which forms part of the International Arbitration Act 1974 (Cth)). The same provision is found in the domestic Arbitration Acts enacted in each State and Territory including the Commercial Arbitration Act 2011 (Vic). Accordingly, the relevance of this case extends beyond Western Australia. Chief Justice Martin identified the matters in issue (at [41]), in connection with s 8 in this case, as follows:

(a) What is the scope of the arbitration agreement?

(b) Do the proceedings include a matter or matters which are within the scope of the arbitration agreement?

(c) Is the arbitration agreement incapable of being performed?
(b) Do the proceedings include a matter or matters which are within the scope of the arbitration agreement?
(c) Is the arbitration agreement incapable of being performed?

Scope of the arbitration agreement

The Court held that the terms of an arbitration agreement are to be construed by the principles that apply to the construction of commercial contracts generally, that is, the terms must be construed objectively and by ascertaining what a reasonable businessperson would have understood the words to mean by reference to the text, context (the entire text of the contract as well as any contract, document or statutory provision referred to in the text of the contract) and purpose. Importantly, his Honour said at [45]:

However, the commercial objectives ordinarily attributed, objectively, to rational businesspeople will generally require the court to adopt a broad, liberal and flexible approach to the construction of an arbitration agreement, to the extent that such an approach is consistent with the words used by the parties.

His Honour went on to consider the effect of the words used in the arbitration agreements to denote the necessary connection with the subject matter of the dispute, namely: “arising out of”, “relating to” or “in connection with”. In relation to each of these the Court said (among other things):

(a) Arising out of: “is sufficiently broad to include disputes with respect to the existence of the relevant contract”: [48];
(b) Relating to: “is a term of the widest import which should not, in the absence of compelling reasons, be read down”: [49];
(c) In connection with: “should be construed widely so as to include claims which do not arise out of or pursuant to the relevant contract, but nevertheless have a sufficient degree of connection with that contract”: [50].

Chief Justice Martin concluded at [51] that:

[A]n ordinary businessperson would understand the arbitration agreement to extend to, and embrace, a very wide ambit of disputes or claims having at least some degree of connection with, or relationship to, the substantive agreement between the parties [...] [emphasis added]

Do the proceedings involve a “matter” which is the subject of the arbitration agreement?

Next, Martin CJ held that if one or more of the disputes or controversies to be determined in the course of the Court proceedings is a dispute or controversy which can be determined pursuant to the arbitration agreement (the burden of which rests on the applicant for the stay, on the balance of probabilities), then section 8 of the CAA is engaged.

One of the arguments advanced by the Growers as to why the proceedings should proceed in Court was that, on a proper construction of the arbitration agreements, they should not be construed as attributing an intention that claims by growers based on an alleged breach of trust should be resolved by arbitration. In rejecting this argument, the Court said (among other things) that:

• the arbitration agreements are expressed in the widest possible terms;
• the fact that the arbitration agreements do not extend to all persons with an interest in the dispute does not mean they should not be enforced by the Court;
• whether Emerald is a trustee of the proceeds of sale, and if so, whether Emerald is in breach of trust, is clearly a dispute arising out of, relating to, or in connection with the Growers’ agreements with Emerald,

and so, unless the arbitration agreement is incapable of being performed (discussed below), the proceedings must be stayed and the parties must be referred to arbitration.

Are the arbitration agreements incapable of being performed?

Finally, the Growers submitted that the nature of the issues raised in the proceedings with respect to the proper administration of the trust, the relief sought with respect to the removal of Emerald as trustee, and the appointment of another trustee in place of Emerald, were not arbitrable, and therefore the arbitration agreements were incapable of being performed (within the meaning of s 8(1) of the
Are the arbitration agreements incapable of being performed?

Finally, the Growers submitted that the nature of the issues raised in the proceedings with respect to the proper administration of the trust, the relief sought with respect to the removal of Emerald as trustee, and the appointment of another trustee in place of Emerald, were not arbitrable, and therefore the arbitration agreements were incapable of being performed (within the meaning of s 8(1) of the CAA). The Growers also submitted that the dispute was not arbitrable because all necessary and appropriate parties could not be joined to the dispute.

The Court noted that the doctrine of non-arbitrability is recognised by Australian law and has been described as:

resting on the notion that 'some matters so pervasively involve public rights, or interests of third parties, which are the subjects of the uniquely governmental authority, that agreements to resolve such disputes by "private" arbitration should not be given effect'

However, the Court confirmed that it is only in extremely limited circumstances that a dispute that the parties have agreed to refer to arbitration will not be arbitrable. The Court said that the equitable rights in issue in this case depended entirely on the construction of the relevant contracts and in those circumstances the possible characterisation of those rights as equitable did not mean the disputes were not arbitrable.

The Court also held that it is well established that the fact that:

• an arbitrator cannot grant all the relief a court is empowered to grant does not mean that the dispute is incapable of arbitration (and whether the arbitration agreement empowers the arbitrator to grant all the relief which a court might have granted is best determined by the arbitral tribunal); and

• the fact that a “matter” (the subject of proceedings falling within s 8 of the CAA) may affect the interests of others, who are not party to the arbitration agreement, does not result in the “matter” being non-arbitrable.

Accordingly, Martin CJ stayed the proceedings and referred the parties to arbitration.

Comment

This case is important for at least two reasons. First, it reinforces the Courts’ preparedness to hold parties to their arbitration agreements. Second, the Court made it clear that a broad, liberal and flexible approach should be adopted in construing arbitration agreements. This approach will help to ensure that parties to disputes who have agreed to arbitrate will be held to their agreement, thereby ensuring that Australia remains an attractive jurisdiction for arbitration.

End Notes

1- A pool contract is a contract between wheat growers on the one hand and the operator of a grain commodity pool on the other, whereby wheat growers pool their wheat with wheat grown by others in order to form large exportable parcels, which are then sold by the operator on behalf of the wheat growers.

2- The dispute resolution rules of Grain Trade Australia.

3- Relying on Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104, 116 [46]-[47].

4- At [90], referring to Pipeline Services WA Pty Ltd v ATCO Gas Australia Pty Ltd [2014] WASC 10 at [80] and GB Born, International Commercial Arbitration (Kluwer Law International, 2009) 768.

5- Section 16 of the CAA and Article 16 of the UNCITRAL Model Law.

6- John Holland Pty Ltd v Kellogg Brown & Root Pty Ltd [2015] NSWSC 451 at [72].
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Adam has a broad commercial dispute resolution practice, with particular expertise in construction law disputes, corporations, employment law, insolvency, retail tenancy, misleading conduct, tort, contract, and franchising disputes.
The English High Court recently considered its jurisdictional power in support of arbitral proceedings under section 44 of the Arbitration Act 1996 to order the sale of cargo as goods ‘the subject of the proceedings’.

Background
In early 2016, PDVSA Petróleo S.A (‘PDVSA’) entered into a time charter agreement with Dainford Navigation Inc. (‘Dainford’). The charter was for the transport of crude oil by PDVSA on board Dainford’s vessel the “Moscow Stars”, and was one of 14 charters between PDVSA and other companies within a state-owned Russian shipping group. Dainford alleged repeated failures by PDVSA to pay time charter hire since January 2016, culminating in an outstanding balance of approximately US $4.5 million by October 2016. As a result of PDVSA’s continual non-payment of charter hire, between October and November 2016 Dainford gave notice twice of its exercise of a lien over the cargo on board the Moscow Stars. In December 2016 and January 2017, PDVSA made payments towards the hire, but these were insufficient to clear the substantial arrears. With charter hire overdue and cargo still on the vessel, PDVSA continued to accrue the charter rate of US $29,000 per day as further debt owing to Dainford. No further payments by PDVSA were made.

Dainford commenced arbitration in London pursuant to the parties’ agreement in an attempt to recover the US$7.7 million it claimed was owing. Incurring the usual costs of running the vessel while it remained moored subject the lien, Dainford sought and obtained permission from the arbitral tribunal under section 44 of the Arbitration Act 1996 to apply to the High Court for an order for sale of the cargo. Dainford sought payment from the proceeds given the cargo had been on board the Moscow Stars for over nine months and there were no reasonable prospects of resolution. Eleven other companies in the same state-owned Russian group also had similar claims against PDVSA.

In referring Dainford’s application to the High Court, the arbitral tribunal determined that their power to “preserve goods” under section 38 of the United Kingdom’s Arbitration Act 1996 did not extend so far as to order the sale of goods. PDVSA opposed the application.

At the time the High Court considered the application, the arbitral tribunal had not determined the award.

Mangatu then sought leave to appeal to the Court of Appeal against that judgment, on grounds including that the judgment failed to identify any error of law in the damages award, and wrongfully concluded that the arbitrator had pre-determined damages. Mangatu also sought
The Court ultimately determined that the cargo was ‘goods the subject of the proceeding’, and exercised its jurisdiction to order the sale of the cargo. In reaching its decision, the Court considered three defences advanced by PDVSA in support of dismissing Dainford’s application:

1. The court did not have power under s 44(2)(d) of the Arbitration Act 1996 to order the sale of cargo, as the cargo was not the “subject” of the arbitral proceedings.
2. Even if there was such a power, the cargo was not perishable and there was no other good reason requiring a quick sale as required by the scope of CPR 25.1(c)(v).
3. In any event, the exercise of such a power was inappropriate in the circumstances.

English authorities had not previously discussed the interpretation of goods the “subject of proceedings”. So in considering whether the cargo was the ‘subject’ of the arbitration proceedings, the Court considered a previous Singaporean decision under a reciprocal provision of the International Arbitration Act 2002. In Five Ocean Corporation v Cingler Ship Pte Ltd [2015] SGHC 311 the Singaporean High Court ordered the sale of cargo in similar circumstances, holding that the cargo in question was the “subject matter” of the proceedings as it formed the subject matter (i.e. the lien) of the claims for freight.

The Court acknowledged that section 44 did not confer power to make orders for sale as a form of independent relief, but that it also should not be read too narrowly. Males J considered there was sufficient nexus for goods to be “subject” of proceedings where a contractual lien is being exercised over a defendant’s goods as a security for a claim which is being advanced in an arbitration. The Court concluded that it did have power to order a sale pursuant to section 44, but that it must first consider whether that power should be exercised as a matter of discretion. The Court’s discretion relates to making an order under CPR 25.1 for “the sale of relevant property which is of a perishable nature or which for any other good reason it is desirable to sell quickly.” Given the goods (crude oil) were clearly not perishable, the Court’s discussion focussed on its broader discretion to consider other good reasons for a quick sale. Dainford submitted that in the absence of an order, the cargo would remain on board the vessel for many more months and that it would be inevitably prejudiced by ongoing missed opportunities for hire and continuing to incur operation expenses for the vessel. PDVSA maintained its position that sale was unnecessary, claiming that Dainford’s five month delay in making the current application (from when the tribunal gave permission) meant that any apparent urgency for sale could have been avoided.

However, in a change of position attempting to maintain control of what seemed to be rapidly becoming an inevitable outcome, PDVSA also made a late offer during proceedings to sell the cargo itself and pay the proceeds into escrow.

Given any order for sale would be made before the issue of the arbitral therefore depriving
However, in a change of position attempting to maintain control of what seemed to be rapidly becoming an inevitable outcome, PDVSA also made a late offer during proceedings to sell the cargo itself and pay the proceeds into escrow. Given any order for sale would be made before the issue of the arbitral therefore depriving PDVSA of its ownership of goods against its will, the Court carefully considered its discretion. Despite PDVSA’s offer to undertake sale of the cargo itself, the Court considered that without a formal order for sale, previous history between the parties indicated there was a substantial risk that the situation of impasse would drag on indefinitely. The Court also took PDVSA’s last minute offer as an indication of its recognition that the only viable option was for the cargo to be sold.

In making an order for the sale of the cargo, the Court referred the security of damages back to the arbitral tribunal, pending their decision, and also noted that any dispute as to the terms of sale would need to be referred back to court for consideration.

Comment
This decision provides welcomed commentary on the interpretation of cargo as goods 'the subject of proceedings' pursuant to section 44(2) Arbitration Act 1996. The decision also demonstrates the application of frameworks included in legislation such as the Arbitration Act 1996 to support arbitral proceedings. However, the application of the decision to broader goods and in different factual scenarios remains to be seen. Males J made clear that this decision related only to goods owned by the defendant, deliberately excluding application to goods owned by a third party not a party to the arbitration.

ABOUT THE AUTHOR
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Sarah graduated from the University of Otago with a Bachelor of Laws. She then worked as a graduate law clerk at the New Zealand Dispute Resolution Centre, and now is a solicitor at Kensington Swan.
The parties to the arbitration were the seller and buyer of iron ore. On 29 October 2014, they entered into a sales contract which appended the “globaORE Standard Iron Ore Trade Agreement”. The “globaORE Standard Iron Ore Trade Agreement” contained a clause providing for arbitration under the SIAC Rules then in force and with a three-member tribunal in Singapore.

On 14 January 2015, the seller commenced SIAC arbitration against the buyer and applied for the expedited procedure under the 2013 SIAC Rules. The buyer opposed the application of the expedited procedure and insisted that three arbitrators be appointed pursuant to the arbitration agreement. In the absence of party agreement, the Vice Chairman of SIAC appointed a sole arbitrator for the expedited procedure. The buyer refused to participate in the arbitration and an award was rendered in favour of the seller on 26 August 2015 (the Award).

The Shanghai Court upheld the buyer’s argument. It found that the expedited procedure under the 2013 SIAC Rules did not exclude other means of composing a tribunal, nor empower the Chairman of SIAC to compel parties to accept a sole arbitrator despite their agreement to a three-member tribunal. Despite the fact that the arbitration agreement explicitly provided for a three-member tribunal and the buyer had expressly objected, SIAC appointed the sole arbitrator and went ahead with the expedited procedure. The Shanghai Court held that the appointment of the sole arbitrator violated the parties’ arbitration agreement. The court refused to enforce the award under Article V(1)(d) of the New York Convention. In support of its decision, the Shanghai Court emphasised that party autonomy is the foundation of arbitration proceedings.
Commentary

The Shanghai Court’s decision was vetted by the PRC Supreme People’s Court (SPC), by virtue of the “reporting system” (under which lower courts must report any decision to refuse enforcement of a foreign arbitral award to the SPC for scrutiny). Therefore, the decision is significant and will be referred to as precedent for future decisions of PRC courts. The SPC has indicated a strong intent to safeguard party autonomy in such cases.

SIAC’s purported power to appoint a sole arbitrator in expedited proceedings, despite the parties having agreed a three-member tribunal, was also considered by Singapore High Court in AQZ v ARA [2015] SGHC 49. This was an application to set aside an arbitral award. A similar argument was raised by the applicant, i.e. that the arbitration should not have been conducted before a sole arbitrator (appointed, in this case, under the expedited procedure in the 2010 SIAC Rules (4th Edition)), since the parties had expressly agreed to arbitration before three arbitrators. The Singapore High Court rejected this argument and upheld SIAC’s appointment of a sole arbitrator. The court adopted a “commercially sensible” construction of the arbitration agreement and decided that, by adopting the 2010 SIAC Rules into their contract, the parties had recognised the SIAC President’s power and discretion to appoint a sole arbitrator where the expedited procedure applied. The Shanghai Court, supported by the SPC, clearly takes a different view from the Singapore High Court.

SIAC has amended its latest rules (2016, 6th Edition), to prevent the same conflict from arising. Article 5.3 of the new rules provides: “[B]y agreeing to arbitration under these Rules, the parties agree that, where arbitral proceedings are conducted in accordance with the Expedited Procedure under this Rule 5, the rules and procedures set forth in Rule 5.2 shall apply even in cases where the arbitration agreement contains contrary terms” (emphasis added).

The Shanghai Court has not released its decision to the public. The information on the decision is derived from third party sources. We will update this post if the decision becomes available.

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John Green
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