Commercial Law Association of Australia
Arbitration Conference
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The Court's Role in Supporting Commercial Arbitration and Giving Effect to Arbitration Clauses

Chief Justice Helen Bowskill[1]

1. Court proceedings and arbitration have a common object – which is to facilitate the fair (or just) and expeditious resolution of disputes in a cost effective manner.[2] The aim of arbitration is of course to provide an *alternative* means of dispute resolution, which ought to be quicker and cheaper than court proceedings. In contrast to other means of alternative dispute resolution, it also provides certainty to commercial parties because the arbitrator will decide the dispute – as opposed to assisting the parties to resolve it, as a mediator might be expected to do. And of course privacy or confidentiality considerations may mean that parties to a commercial dispute would prefer to arbitrate, than be affected by the principle of open justice by which courts are defined.[3]

2. So, what of the Court's role in this regard? Well, it's fairly limited, and deliberately so. In fact, it is noted in the parliamentary explanatory notes, that the reason for enacting the current *Commercial Arbitration Act* was

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[1] With thanks to my research assistant, Ms Alicia George, for her assistance in preparing this presentation.

[2] See s 1AC of the *Commercial Arbitration Act 2013* (Qld) (the **Act**) and r 5 of the *Uniform Civil Procedure Rules 1999* (Qld).

[3] See generally the discussion in *Wright Prospecting Pty Ltd v Hancock Prospecting Pty Ltd (No 22)* [2023] WASC 285 of the principle of open justice and the circumstances in which confidentiality orders may be appropriate. This was not an application in the context of an arbitral proceeding but rather in the context of a court proceeding, but reliance was placed on the existence of arbitral proceedings to support an application for interim confidentiality orders (which was dismissed).

to address criticism that arbitration had become "too litigious".[4] Section 5 of the Act expressly provides that "[i]n matters governed by this Act, no court must intervene except where so provided in this Act".

3. Although I acknowledge the lack of rigour in this particular empirical study, a fairly quick search for decided cases in Queensland that have something to do with commercial arbitration seems to show that parliament's efforts in this regard have succeeded: there are many more decisions prior to 2013 arising under the predecessor *Commercial Arbitration Act 1990* than there have been since the new Act was passed over 10 years ago.

4. The first provision of the Act that provides for a role for a court is s 8(1), which provides that:

> "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."

5. Although the Act does not expressly provide for the proceeding to be stayed as a consequence of a referral to arbitration under s 8(1), it has been held in a number of cases that such an order necessarily follows.

6. I had cause to consider the interpretation and application of s 8 in *Bulkbuild Pty Ltd v Fortuna Well Pty Ltd* [2019] QSC 173. It was noted in that case that s 8 differs markedly from the provision which formerly applied, s 53 of the *Commercial Arbitration Act 1990*, which conferred a discretion on the court to stay the proceedings. Section 8 confers no discretion – if the qualifying criteria are established, the court must refer the parties to arbitration.

7. Those qualifying criteria are:

   (a) that the action is brought in a matter which is the subject of an arbitration agreement;

   (b) the party requesting the stay (or the referral to arbitration) must make the request "not later than when submitting the party's first statement on the substance of the dispute"; and

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4 See the explanatory note to the *Commercial Arbitration Bill 2012*.

(c) the court must not find the arbitration agreement is null and void, inoperative or incapable of being performed.

8. Lawyers being lawyers, all of those things have been the subject of argument in various cases.

9. In the case that recently found itself in the Court of Appeal, *Lee v Lin* [2022] QCA 140; [2022] 11 QR 325, the issue was the first of those criteria – whether there was an arbitration agreement, within the meaning of s 7 of the Act.

10. As defined in s 7(1) of the Act, "[a]n ***arbitration agreement*** is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not".

11. The contractual provision in question in *Lee v Lin* included that:

> "[By cl 11(c)] If the parties cannot reach an agreement within 21 days, the parties agree to refer the dispute to the Australian Commercial Disputes Centre (ACDC) <u>for final settlement by a single arbitrator appointed in accordance with the Rules of the ACDC</u>, or by another dispute resolution process suggested by ACDC and accepted by the parties."
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> and
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> "[By cl 11(d)] If the parties have been unable to resolve their dispute through ACDC, either party may commence Court proceedings but not before the expiry of 28 days from the date of referral to ACDC."

12. At first instance, it was held that the provision was <u>not</u> an arbitration agreement because it did not require the parties to submit to arbitration, it did not require that the "single arbitrator" engage in an arbitration, it contemplated other dispute settlement methods being agreed upon by the parties and, by cl 11(d), it contemplated the possibility that the parties would be unable to resolve their differences through ACDC.

13. The Court of Appeal disagreed, and found that cl 11(c) was an arbitration agreement. In reaching that conclusion, the words "for final settlement" in cl 11(c) were construed as meaning "to finally determine or end the

dispute between the parties". As Dalton JA, with whom Morrison JA and Kelly J agreed, said, at [4]:

> "… Commercial contracts must be construed in a business-like way. In addition to this general principle, I am cognisant of the dicta in *Mulgrave Central Mill Company Ltd v Hagglunds Drives Pty Ltd*:[5]
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> > 'This is an area of the law where the making of subtle verbal distinctions is not to be encouraged, and where it is desirable that standard conditions and uniform legislation should, as far as possible, be given the same meaning in jurisdictions throughout Australia.' – per McPherson JA.
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> And further, to similar effect that,
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> > 'The paramount object of the [Commercial Arbitration Act] is 'to facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense' (s 1AC(1)).'"

14. In relation to the fact that cl 11(c) contemplated that once the parties had approached the ACDC they might, by further agreement, employ a dispute resolution process other than arbitration, her Honour also said, at [5]:

> "… The possibility for this further agreement does not detract from the fact that, unless and until such an agreement is made, the parties have agreed to refer their disputes to the ACDC for arbitration."

15. The clause in *Lee v Lin* was distinguished from the clause in a case called *Jemena Gas Networks (NSW) Ltd v AGL Energy Ltd* [2017] NSWCA 266, which provided that in the event of a dispute, "each party expressly agrees to endeavour to settle the Dispute by mediation… before having recourse to arbitration or litigation". That clause was an agreement to mediate before taking other steps; it merely recognised that arbitration and litigation were options if mediation failed. In contrast, cl 11(c) obliged the parties, if they could not settle their dispute by discussion, to have it determined by the award of an arbitrator – and it was therefore an arbitration agreement.

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[5] [2022] 2 Qd R 514 at 525 [13] per McPherson JA.

16. *Cheshire Contractors Pty Ltd v Civil Mining & Construction Pty Ltd* [2021] QCA 212; [2021] 9 QR 114 is another case about whether there was an "arbitration agreement". The argument in that case was that in order to meet the definition of "arbitration agreement" within the meaning of s 7(1) of the Act, the agreement had to, *itself*, "define" the legal relationship between the parties. That argument was rejected, both at first instance and on appeal. As was explained in the decision, clearly there must *be* a defined legal relationship – in the sense of an identifiable legal relationship giving rise to legal remedies – but it strains the language of s 7(1) to construe the words as requiring that the arbitration agreement itself must define that legal relationship.

17. The earlier case, *Bulkbuild Pty Ltd v Fortuna Well Pty Ltd* [2019] QSC 173, considered another of the qualifying criteria. In that case, the parties agreed the proceeding was an action "in a matter which is the subject of an arbitration agreement" and that the request had been made at an appropriate time, but disagreed about whether the arbitration agreement was "incapable of being performed". The argument that it was *not* was that there was a risk of different factual findings in relation to the plaintiff's claims against multiple defendants, depending upon the forum in which the dispute was resolved (arbitration for one and court proceedings for the other two). That argument was rejected, on the basis that it did not render the agreement "incapable of being performed", even if it might be inconvenient. Although, it was a discretionary factor taken into account in considering whether to *also* stay the proceedings as against the other two defendants (who were not parties to the arbitration agreement).

18. Whilst for the most part a reference in the Act to the court is a reference to the Supreme Court,[6] for the purposes of s 8 the relevant court is the "court before which [the] action is brought". That might include QCAT.[7]

19. In *One Sector Pty Ltd v Panel Concepts Pty Ltd* [2021] QDC 54, a decision of the District Court, Judge Barlow KC considered another of the qualifying criteria under s 8 – the timing of the request for referral.

20. In this case, the plaintiff, opposed the referral to arbitration, first, on the basis that there was no arbitration agreement. That argument was rejected. The plaintiff next argued that the defendant's request was made too late. That argument was put on the basis that the first occasion on

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6 See the definition of "the Court" in s 2 and also s 6(1) of the Act.

7 See *Subway Systems v Ireland* [2014] VSCA 142 at [44]-[45] per Maxwell J, at [91] per Beach J, Kyrou AJA dissenting, at [115]. See also *WLK Management Pty Ltd v Body Corporate for The Persse Villas CTS 27758* [2023] QCAT 458 at [29]-[38].

which the defendant sought to refer the dispute to arbitration was after it had successfully applied to have a default judgment against it set aside. In support of that application, the defendant's solicitor swore an affidavit in which he set out his instructions about the dispute. The plaintiff said that comprised the defendant's "first statement on the substance of the dispute", and so the request for referral, coming after that, was too late.

21. In dealing with that argument, Judge Barlow KC considered a number of cases from other jurisdictions in Australia as well as New Zealand. That of course is appropriate because the Queensland legislation is adopted from, and intended to give effect to, the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration and, as expressly provided in s 2A(1), in the interpretation of the Act, "regard is to be had to the need to promote, so far as practicable, uniformity between the application of [the] Act to domestic commercial arbitrations and the application of the provisions of the Model Law". So, decisions from other jurisdictions in relation to the interpretation of equivalent provisions are both relevant and persuasive.[8]

22. After considering those cases, Judge Barlow KC said this:

> "[34] One might ordinarily think that the phrase 'first statement on the substance of the dispute' would be referring to a formal document that makes a claim in court proceedings or responds in detail to the claim. The phrase is used in the Model Law because it applies to many countries with different procedural requirements. In the Australian context, one might consider that it refers to such documents as a statement of claim and a defence, or perhaps an affidavit supporting an originating application. In contrast, one might think, a short description of the bases of defences available in an affidavit to set aside a default judgment might not constitute such a statement. This is particularly so when courts have decided that a plaintiff's application for, or opposing, an interim injunction, which must include evidence setting out the factual basis for the application, does not comprise such a statement.
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> [35] However, the almost unanimous weight of authorities in which equivalent provisions have been considered is to the effect that a party who submits to a court's jurisdiction in a

8 *Cheshire Contractors Pty Ltd v Civil Mining & Construction Pty Ltd* [2021] 9 QR 114 at [18].

> proceeding concerning the subject matter of an arbitration agreement and, in that proceeding, makes some statement of the nature of its claim or defence, except where a proposed claimant invokes a court's jurisdiction and power to grant interim relief, is thereafter prevented from seeking a stay under s 8 or its equivalents."

23. As Judge Barlow KC went on to say, the defendant could have applied to set aside the default judgment, on the basis it was irregularly entered (that is, without engaging in the substance of any defences), and at that same time sought a stay. It did not do that. Rather, it sought to set aside the judgment, outlining the defences it sought to rely on, and sought an order for the filing of a defence. That was enough to comprise a "first statement on the substance of the dispute" and so the application for a stay was too late.

24. The third argument was that, even apart from that, the defendant's application, by which it not only sought to set aside the default judgment but also sought an order for the filing of a defence, constituted an election to defend the litigation in the court proceeding, rather than by arbitration. Although it was not necessary to decide that point, the judge considered it had merit – so that argument lives to fight another day perhaps.

25. More broadly, the *Commercial Arbitration Act 2013* makes provision for various functions to be performed by a court in the context of an arbitration. In a general sense, the Act provides for these functions to be performed by the Supreme Court (s 6(1)); but they may be performed by the District Court, if either the arbitration agreement provides for that or the parties to an arbitration agreement agree in writing to that (s 6(2)).

26. For example, under s 9 and s 17J of the Act, a party may, before or during arbitral proceedings, request from a court an <u>interim measure</u> of protection.[9] As defined in s 17, an interim measure is a temporary measure by which a party may be required to, for example:

    (a) maintain or restore the status quo pending determination of the dispute;

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9 See *Ku-ring-Gai Council v Ichor Constructions Pty Ltd* (2019) 99 NSWLR 260 at [61] and [63], as to the distinction between the reference to "interim measures of protection" in s 9 and "interim measures" in s 17J, noting however that "interim measures of protection" has been construed to extend to a wide range of measures.

(b) take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process;

(c) provide a means of preserving assets out of which a subsequent award may be satisfied; or

(d) preserve evidence that may be relevant and material to the resolution of the dispute.

27. The conditions for granting interim measures are set out in s 17A, and essentially mirror the requirements for grant of an interlocutory injunction.

28. Court ordered interim measures have been described as "designed to facilitate and protect the arbitration process", rather than to frustrate or impede it.[10] However, in *Transurban WGT Co Pty Ltd v CPB Contractors Pty Ltd* [2020] VSC 476 at [144] Lyons J said that the authorities to that effect may be distinguished in a case where there are two related arbitrations on foot, in which case the court would have the power under s 17J to restrain for a period one arbitral process while the related process was in progress.

29. Consistent with the deliberately limited role for courts in arbitration processes, the power to grant "interim measures" has been described as one to be exercised sparingly, and only when the orders are the only means by which the position of a party could be protected until an arbitral tribunal can be convened.[11]

30. In addition, the Court has a role in enforcing interim measures issued by the arbitral tribunal (s 17H); but, expressly, may not undertake any review of the substance of the interim measure (s 17I(3)).

31. Another function conferred on the Court is to appoint the arbitrator(s), where the parties cannot agree (s 11). It has been said that the task for the court in this regard involves a balancing exercise, having regard to the experience and qualifications of each candidate, the nature,

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10 See the recent decision in *Transurban WGT Co Pty Ltd v CPB Contractors Pty Ltd* [2020] VSC 476 at [142]-[143], referring, inter alia, to the decision of the NSW Court of Appeal in *Ku-ring-Gai Council v Ichor Constructions Pty Ltd* (2019) 99 NSWLR 260 at 273-4 [63] and the decision of Edelman J, then of the Federal Court, in *Sino Dragon Trading Ltd v Noble Resources International Pty Ltd* (2015) 246 FCR 47 at [104].

11 See again *Transurban WGT Co Pty Ltd v CPB Contractors Pty Ltd* [2020] VSC 476 at [145].

complexity and magnitude of the issues in dispute and the proportionality of the arbitrator's fees to the quantum of the dispute.[12]

32. Relatedly, where there is a challenge to an arbitrator, which in the first instance is decided by the arbitral tribunal, if the challenge is not successful, the challenging party may request the Court to decide the challenge (s 13(4)).

33. Next, if there is a controversy about the arbitrator's ability to perform their functions, or if they fail to act without undue delay, a party may request the Court to decide on the termination of the arbitrator's mandate (s 14(1)).

34. Where a preliminary question arises as to whether the arbitrator has jurisdiction, and the arbitral tribunal rules that it does, a party may request the Court to decide the matter (s 16(9)).

35. Each of these provisions also provides that, as long as the decision is "within the limits of the Court's authority", such a decision is final, that is, not subject to appeal[13] – see, for example, s 11(5), s 13(5), s 14(3) and s 16(10). The phrase "within the limits of the Court's authority" has been construed to mean within the limits of the court's jurisdiction. It has been said to be concerned with an excess of jurisdiction, analogous to what might once have been described as *ultra vires* in the narrow sense, and not to accommodate the common law concept of jurisdictional error by a constructive failure to exercise jurisdiction (for example, by a failure to respond to "a substantial, clearly articulated argument relying upon established facts", such as might amount to a failure to accord natural justice). As Brereton JA said in *Hancock v Hancock Prospecting Pty Ltd* (2022) 409 ALR 638 at [12]:

> "A construction of the phrase that confines its application to decisions that exceed the limits of the Court's jurisdiction reflects the words used, promotes the 'paramount object' of the uniform Acts, namely, to 'facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense', and is consistent with the purpose of the … Model Law from which the uniform Acts are derived in avoiding delay by providing that decisions are, generally, not appealable."

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[12] A recent example of the operation of this provision is *Gemcan Constructions Pty Ltd v Westbourne Grammar School* [2020] VSC 429 at [67].

[13] *Ku-ring-gai Council v Ichor Constructions Pty Ltd* (2019) 99 NSWLR 260 at [69] per Bathurst CJ.

36. Once the arbitral proceeding is underway, there are a number of other circumstances in which the Act contemplates the Court might become involved.

37. The first is the enforcement of orders made or directions given by an arbitral tribunal in the course of the proceedings – for example, as to the manner in which the proceeding is to be conducted, in relation to the admissibility, relevance, materiality and weight of any evidence, or for the examination of a party or witness on oath or affirmation (s 19).

38. Relatedly, an arbitral tribunal or party may request assistance from the Court in taking evidence (s 27). This may include by the issue of subpoenas (s 27A) or the making of orders to compel a person to attend Court to be examined as a witness, produce a relevant document or do something (s 27B).

39. The Act makes comprehensive provision for the protection of confidential information in the context of arbitration proceedings – but does contemplate disclosure in some circumstances (s 27F). Another function of the Court, however, is to deal with an application by a party to the arbitral proceedings to prohibit the disclosure of confidential information (s 27H) or to allow such disclosure in circumstances beyond those otherwise contemplated by s 27F (s 27I).

40. The Court also has power to determine any question of law arising in the course of the arbitration (s 27J).

41. Once concluded, the functions of the Court potentially include the assessment of costs of the arbitration (if not taxed or settled by the arbitral tribunal) (s 33B(5)) or dealing with an application for costs of an arbitration that has failed (s 33D).[14]

42. The Court has limited powers to set aside an arbitral award (s 34) and there is also limited scope for any appeal against an award – such an appeal being limited to a question of law and only where the parties have agreed to an appeal and the Court grants leave (s 34A). In considering whether the parties have agreed that an appeal may be made, under s 34A, it has been held that there is a need to closely scrutinise the words used by the parties to ascertain the requisite intention (and agreement)

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[14] See *Liescheke v Lieschke (Costs)* [2023] NSWSC 92, in relation to the costs of an arbitration, where the arbitral award had been set aside by the court under s 34.

to that effect, and that a dispute resolution clause that merely *contemplates* an appeal is insufficient.[15] As Doyle JA said in *Inghams Enterprises Pty Ltd v Southern Cross Farms Australia Pty Ltd* (2022) 398 ALR 562 at [113]:

> "… Consistently with the legislative intention to limit the scope for curial intervention, and the legislative provision permitting the parties to agree a right of appeal any time up to the expiration of the appeal period, it seems to me that the task is to identify a real choice by the parties to confer upon each other a right to appeal of the type contemplated by s 34A."

43. Finally, the Court has a role to play in recognising and enforcing an arbitral award (s 35 and s 36).

44. As far as I can tell – at least from judgments published by the court – neither the Supreme Court nor the District Court of Queensland have been asked to exercise these additional functions. To the extent the jurisdiction of the Court has been invoked, it has been in the context of applications to stay court proceedings which have been commenced. That might suggest arbitral proceedings in Queensland are running smoothly, in accordance with the procedures contemplated by the Act, without need for recourse to the Courts. It certainly shows that the legislative purpose, to reduce the litigation associated with arbitral proceedings, has been achieved with the introduction of the 2013 Act.

45. Where you do have a need to invoke the jurisdiction of the Court, keep in mind the Supreme Court's Commercial List, regulated by Practice Direction 1 of 2023. There are seven judges managing cases on the Commercial List, led by Justice Applegarth as the Principal Judge. Those judges have the experience and the capacity to deal with commercial matters quickly and efficiently, whether that is in the context of an arbitral proceeding *or* where commercial parties seek to resolve their dispute through court proceedings.

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[15] See *Inghams Enterprises Pty Ltd v Southern Cross Farms Australia Pty Ltd* (2022) 398 ALR 562; 140 SASR 239 at [130] per Doyle JA (Livesey and Bleby JJA agreeing).