AGREEMENTS TO ARBITRATE CLARIFIED

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The Court of Appeal of the Queensland Supreme Court has laid to rest any doubt as to whether Clause 47 of AS2124-1992 constitutes an agreement to arbitrate for the purposes of the *Uniform Commercial Arbitration Acts*. In *Mulgrave Central Mill Co Ltd v Hagglunds Drives Pty Ltd* (Appeal No. 2309 of 2001) decided on 2 November 2001, it was held by a 2 to 1 majority that notwithstanding that Clause 47.2 gives a party an option to litigate or to arbitrate, that the clause did incorporate an agreement to arbitrate as defined in Section 4 of the *Commercial Arbitration Act 1990* (Qld) for the purposes of Section 53 of that Act.

The decision has affirmed that three of the major standard contracts in use in Australia, NPWC-3, JCC (1994 edition) and now AS2124-1992 each contain agreements to arbitrate for the purposes of the *Commercial Arbitration Acts* of the various States and Territories (the Act).

Section 4 of the Act defines an Arbitration Agreement as an agreement to refer present or future disputes to arbitration. Section 53 of the Act allows a party to an arbitration agreement to apply to stay Court proceedings until such time as an arbitration has been concluded. The power to apply for a stay of Court proceedings must be exercised before any step is taken in any Court proceedings and is subject to the Court's discretion as to whether in the circumstances it is proper to stay any Court proceedings until such time as the arbitration has been completed.

The relevant parts of Section 53 of the Act provide—

53. (1) If a party to an arbitration agreement commences proceedings in a court against another party to the arbitration agreement in respect of a matter agreed to be referred to arbitration by the agreement, that other party may, subject to subs (2), apply to that court to stay the proceedings and that court, if satisfied—

(a) that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the agreement; and

(b) that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary for the proper conduct of the arbitration;

may make an order staying the proceedings and may further give such directions with respect to the future conduct of the arbitration as thinks fit.

(2) ...

(3) Notwithstanding any rule of law to the contrary, a party to an arbitration agreement shall not be entitled to recover damages in any court from another party to the agreement by reason that that other party takes proceedings in a court in respect of the matter agreed to be referred to arbitration by the arbitration agreement.

It is perhaps pertinent to review each decision which has, in effect, held that in relation to the three sets of contract conditions above, that each contains an agreement to arbitrate.

NPWC3—*PMT Partners* (High Court of Australia)

The issue of Section 53 first arose in respect to NPWC3 in the High Court decision of *PMT Partners Pty Ltd (in liquidation) v Australian National Parks & Wildlife Service* (1995) 184 CLR 301. The High Court held, notwithstanding that only one party had the right to elect to litigate or arbitrate under the dispute resolution clause of the contract, that there was an agreement to arbitrate contained within Clause 45 of the conditions

for the purpose of the relevant provisions of the *Northern Territory Commercial Arbitration Act 1985* (s.48 which is in similar terms to s.53 quoted above).

JCC-C,D,E & F 1994—*City Of Manningham v Dura* (Court Of Appeal—Victoria)

The issue in respect to JCC (1994 edition) came to a head in the decision of the Court of Appeal of the Victorian Supreme Court in *Manningham City Council v Dura (Australia) Constructions Pty Ltd* (1999) VSCA 158, decided on 1 October 1999.

JCC-D 1994 gives a party a right, once the relevant period of notice has expired following service of a notice of dispute under Clause 13 of the contract conditions, to elect either to arbitrate or litigate that dispute. The option to arbitrate requires as a condition precedent to the service of the notice of intention to arbitrate, evidence that an appropriate security deposit has been paid by the party wishing to serve that notice.

In the Manningham case, the Council issued a notice of dispute and following the dispute not being resolved, each party attempted to secure the forum of its choice in which it wished the dispute to be resolved. The Council delivered a notice seeking to refer the dispute to litigation. A few minutes later the Contractor delivered a notice to the Council wishing to resolve the dispute by arbitration. Later the same day, the Council issued a Writ in the Supreme Court of Victoria and the Contractor applied for a stay of the Council's Supreme Court proceedings under Section 53 of the Act, on the ground that the dispute had already been referred to arbitration by virtue of the Contractor's notice.

The trial Judge held that the Contractor's notice did refer the dispute to arbitration and accordingly stayed the proceeding under Section 53 of the *Commercial Arbitration Act*.

On appeal, the Court of Appeal unanimously upheld the trial Judge's decision and stayed the Council's Supreme Court proceedings. The Court held that there were in fact three issues to be resolved in deciding whether there should be a stay—

1. Was the Council a party to an agreement to arbitrate? The Court held, notwithstanding that certain preconditions must be satisfied, that did not preclude the fact that there existed an agreement to arbitrate for the purposes of Section 53 of the Act;

2. Did the fact that a party elected to litigate preclude the other party from subsequently exercising the option to arbitrate? The Court decided that the notice required under Clause 13 of JCC dealing with the election to arbitrate or litigate was intended to alert the party to whom the notice was given of the fact that the party giving the notice regarded the period of negotiation contemplated by clause 13 as having ended. The Court held that notice by one party to litigate did not preclude notice by the other to arbitrate.

3. Did Section 53 operate to allow the Court to exercise its discretion given by that Section to stay or not stay the proceedings subsequently issued after the notice of election to arbitrate had been given? The Court held that the stay would normally be granted on the basis that as Clause 13 contains an agreement to arbitrate as enunciated by the High Court in the *PMT Partners* case, the parties should be required to comply with that agreement. The Court accordingly stayed the proceedings.

AS2124-1992 *Mulgrave v Hagglunds* (Court of Appeal—Queensland)

Clause 13 of JCC-C, D, E & F-1994 was modelled on Clause 47 of AS2124-1992 by requiring, once notice of dispute had been given, the parties to attempt to negotiate resolution of the dispute before proceeding either to litigate or arbitrate.

JCC also required a party wishing to elect to arbitrate to produce evidence of payment of the security deposit at the time of giving notice of electing to arbitrate. This requirement for payment of and evidence of the payment of the security deposit required by JCC is absent in Clause 47.2 of AS2124-1992.

In Mulgrave's case the trial Judge held that this distinction between the two forms of contract was significant and meant that Clause 47 did not amount to an agreement to arbitrate. She in effect held that the clause amounted to an 'agreement to arbitrate or litigate' not merely an 'agreement to arbitrate'.

In Mulgrave's case the Plaintiff had sued two Defendants; the first being the other party to the contract to which AS2124-1992 applied and the other Defendant being the Swedish parent company of the first Defendant. To complicate matters further, the AS2124-1992 contract between the first Defendant and the Plaintiff contemplated any arbitration taking place in Western Australia, although the site of the dispute was in Queensland.

On 23 August 1999, Hagglunds gave notice of dispute to Mulgrave under Clause 47.1 of AS2124-1992 and negotiations to settle the dispute ensued unsuccessfully over a period of some months.

Clause 47.2 requires a party to issue a second notice either to arbitrate or litigate in order to terminate the negotiation stage. No second notice under Clause 47.2 of AS2124-1992 was issued by either party before Mulgrave issued proceedings in the Supreme Court of Queensland on 20 October 2000, against both Defendants. Mulgrave however notified Hagglunds that these proceedings had been issued and suggested in a without prejudice letter that Hagglunds reconsider its position. Mulgrave had issued proceedings also in order to preserve whatever rights it had under the *Trade Practices Act* against the two parties to the proceedings. It did not at this time however formally serve the Writ on either Defendant.

The next step taken was by the first Defendant Hagglunds which on 22 November 2000 gave notice under Clause 47.2 to refer the dispute to arbitration. The second Defendant at the same time offered to have the claims by the Plaintiff against it also dealt with in this arbitration which of course was to take place in Western Australia. This offer by the second Defendant was not accepted by the Plaintiff.

Mulgrave then on 27 December 2000 served the Writ on the Defendants. It did not give the notice of election to litigate as required by Clause 47.2 but the Court held that in any event, service of the Writ itself in effect constituted service of the notice of election to litigate for the purposes of Clause 47.2.

Both Defendants then sought to stay the Supreme Court action, the first Defendant under Section 53 of the Act and the second Defendant under what it claimed to be the inherent jurisdiction of the Court to stay proceedings generally, coupled with an undertaking that the claims against the second Defendant effectively be resolved under the arbitration which the first Defendant had sought to invoke.

The trial judge refused the stay on the basis that there was no agreement to arbitrate in existence between the Plaintiff and the first Defendant, i.e. Clause 47.2 did not constitute an agreement to arbitrate. She declined to follow *Manningham's* case on the basis that there was a fundamental difference between Clause 13 of JCC which was the subject of the *Manningham* decision, and Clause 47 of AS2124-1992. She in effect held that Clause 47 of AS2124-1992 did not refer the disputes to arbitration but instead to 'litigation or arbitration', and accordingly the clause did not contain an agreement to arbitrate.

Both Defendants appealed. By a majority decision MacPherson JA and Jones J held that Clause 47.2 of AS2124-1992 did contain an agreement to arbitrate, effectively following *PMT Partners* and *Manningham's* case. Both judges felt uniformity was important in respect of the two standard contracts JCC and AS2124-1992 which had similar, although not identical, provisions in respect to their dispute resolution procedures.

Thomas JA dissented on this point holding the Clause 47 did not contain any clear provision that in certain events, the parties must arbitrate rather than litigate. He therefore held the Appellants had failed to establish jurisdiction under Clause 53 of the Act to enable the Court to grant a stay and distinguished *PMT Partners*.

The action was further complicated by the fact that the second Defendant had sought to invoke the inherent jurisdiction of the Court to refer the case to arbitration. The majority held that the Court had no such jurisdiction in this instance to refer the

Plaintiff's claim against the second Defendant to arbitration. The Court in effect held that to have done so would have meant forcing the Plaintiff to accept an agreement which clearly it had not accepted, i.e. the offer by the second Defendant to have its claims also dealt with in the arbitration.

Whilst the decision of the majority affirmed that Clause 47 of AS2124-1992 did contain an agreement to arbitrate if so invoked by one party giving the requisite notice, both the majority judges nevertheless refused to stay the proceedings because the Court was confronted by the two conflicting principles mentioned by Pearson LJ in *Taunton-Collins v Cromie* (1964) 1 WLR 633, the first being that the parties should be held to their agreement and the second being that a multiplicity of proceedings was undesirable. Both majority judges regarded this latter consideration as paramount in this case, notwithstanding the second Defendant's offer to have the Plaintiff's claim against it resolved also at the arbitration if it proceeded. The Court held that the second Defendant was not a party to an agreement to arbitrate and consequently the discretion conferred by Section 53(1) of the Act should not be exercised in such a way as to force the Plaintiff to accept the second Defendant's offer to refer those clauses to arbitration. The effect was that all three judges refused to stay the proceedings.

The *Mulgrave* decision is unusual in a number of respects. It is significant that any arbitration, had the stay of proceedings been granted, would have been conducted in Western Australia. The Plaintiff had of course chosen its forum, Queensland, once it issued proceedings. The fact that the first Defendant delayed issuing its notice referring the dispute to arbitration for over a month after being aware the proceedings had been issued (although not served), possibly influenced the majority of the Court of Appeal as well. More importantly, however, the fact that there were two Defendants, one of whom was not party to the contract and therefore not party to an arbitration agreement, presumably weighed heavily on the Court of Appeal in refusing the stay. In effect, all three judges declined to stay the proceedings with the result that the Plaintiff gained the considerable tactical advantage in not only being the Plaintiff in prosecuting its case first, but of course having its preferred choice of forum.

SUMMARY

It is submitted that the following propositions can be enunciated from these three decisions.

1. An agreement contains an agreement to arbitrate even if it gives only one of the parties the right to refer disputes to arbitration (*PMT Partners*).

2. The contract which gives either party the option to litigate or arbitrate still contains an agreement to arbitrate (*Manningham* and *Mulgrave*). In other words, the fact that the contract contemplates resolution of dispute by means other than arbitration, does not preclude the contract containing an agreement to arbitrate (*Manningham* and *Mulgrave*).

3. The agreement to refer disputes to arbitration comes into effect once the notice electing to refer the dispute to arbitration is given, even if that notice is given after a notice to refer a dispute to litigation is given (*Manningham* and *Mulgrave*).

4. A notice electing to litigate under AS2124-1992 (and it is submitted, under JCC-C, D, E & F –1994) can be given by the service of court proceedings (*Mulgrave*).

5. Even if court proceedings are served before either notice is given, a party wishing to arbitrate still has the right, when there is an agreement to arbitrate contained in the contract, to have the dispute referred to arbitration by applying for a stay under Section 53. It is desirable, if not necessary, that formal notice referring the dispute to arbitration should be given before applying for such stay (*Mulgrave*).

6. An agreement to arbitrate can by agreement be discharged if both parties agree to litigate. The agreement to litigate in effect constitutes a new agreement thereby terminating the agreement to arbitrate already contained in a contract such as Clause 13 of JCC or Clause 47 of AS2124-1992 (*Manningham*). Parties under AS2124-1992 need to heed the terms of Clause 48 of AS2124-1992.

7. A party who is not a party to a contract containing an agreement to arbitrate has no standing to seek a stay of proceedings under Section 53 of the Act (*Mulgrave*).

8. The provision of the second notice requiring election to arbitrate or litigate, as one of its prime purposes, is to give the other party notice that the formal period of negotiation has come to an end and consequently it does not thereby preclude the other party giving a notice to invoke arbitration (*Manningham*).

9. As a general rule, a stay of proceedings will be granted if notice of election to arbitrate is given as the Court prefers an approach which enforces the parties' agreement (to arbitrate) (*Manningham* and *Mulgrave*).

10. Whether an agreement contains an agreement to arbitrate depends on the proper construction of the contract. It is the writer's contention that not only do the above contracts

referred to in this article contain agreements to arbitrate, but AS4000-1997 and other contracts based on the AS4000 suite also contain an agreement to arbitrate in Clause 42 of those contracts.

11. The onus is on the party seeking to avoid arbitration (i.e. usually on the Plaintiff in proceedings sought to be stayed), to satisfy the Court that the proceedings should not be stayed (*Manningham*, affirming *Huddard Parker Ltd v The Ship (Mill Hill)* (1950) 81 CLR 502 at 508 (per Dixon J as he then was)).

Where there are multiple defendants and one or more of the defendants is not a party to an agreement to arbitrate, the court is unlikely to stay the proceedings (*Mulgrave* and *Taunton-Collins*).

CONCLUSION

The rationale behind the reasoning in all three decisions reviewed above can best be summarised by the words of Buchanan JA in *Manningham* at paragraph 32 where he said—

The sub-clause prevents arbitration or litigation until the period of private negotiation has ended. In my opinion there is no warrant for placing a gloss upon the words of c.1.113.03 by reading it as if it provides that once a notice has been given pursuant to the sub-clause, no further notice can be given which has any effect, so that in addition to marking the end of the period of private negotiation and the introduction of litigation or arbitration, the delivery of one notice deprives another of any effect. The gloss is unnecessary, indeed mischievous. It replaces supervision of the choice of forum by a disinterested tribunal with a result determined by success in a race to deliver notices. The proprietor's construction (that its notice to litigate preceded arbitration) is likely to induce disputing parties to cut short negotiation in order to gain the tactical advantage of selecting the forum to resolve the dispute. Further, if, upon the delivery of a notice referring a dispute to litigation, the operation of the clause is spent and there is no longer an 'arbitration agreement' within the meaning of the Act, cl.13 is arguably not available for the resolution of any further disputes. On the other hand, if the delivery of a notice exhausts the operation of the clause only in respect of the dispute the subject matter of the notice, the contract is an arbitration agreement at some times and not an arbitration agreement at other times. I do not think it likely that the legislature intended that the power to grant a stay to enforce an election to arbitrate should turn upon which of the parties was the first to act.

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