ARBITRATING DOWN UNDER: HIGHLIGHTS AND LESSONS LEARNED FROM 2018 TO 2019

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Australia is rapidly gaining ground as an attractive seat for international arbitration, particularly within the Asia-Pacific region. The last financial year saw Australia's Courts taking steps towards further supporting the use of arbitration within Australia's wider legal framework for dispute resolution. This article considers some of the highlights from the 2018 to 2019 financial year case law involving arbitration.

From a review of the diverse range of decisions handed down in the 2018–2019 year, we have identified the key points in relation to arbitration agreements on the one hand and arbitral awards on the other, which we consider in detail in this article. In relation to arbitration agreements, we note that the High Court has adopted an orthodox approach to contractual interpretation by stating that arbitral agreements should be construed 'by reference to the language used by the parties, the surrounding circumstances, and the purposes and objects to be secured by the contract'. Further judgments make it clear that, in interpreting arbitration clauses, Courts are hesitant to refer disputes to arbitration where the dispute is not within the scope of the arbitration agreement. In relation to arbitral awards, we consider a number of decisions which highlight that there is a high threshold for parties seeking to set aside an arbitral award by virtue of alleged misconduct on the part of the arbitrator and that Courts may not enforce an arbitral award if an application to set aside that same award has been filed in the jurisdiction in which the award was made.

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A. Agreements

Handed down on 8 May 2019, the High Court's decision in *Rinehart v. Hancock Prospecting Pty Ltd; Rinehart v. Rinehart*[1] is possibly the most important judgment of the year in the Australian arbitration space.

1. *Background*

Between 2003 and 2010, Mrs Gina Rinehart and her controlled entities entered into various deeds with her children, including her son and daughter, Mr John Hancock and Ms Bianca Rinehart. The general purpose of these deeds was to curb a series of claims and threats of litigation publically made by John Hancock, alleging that Gina Rinehart and her controlled entities had committed a number of financial wrongdoings against her children. Three of these deeds have since become the subject of the current litigation:

(1) the confidential Deed of Obligation and Release entered into by John Hancock in April 2005 (**Deed of Obligation and Release**);
(2) the Hope Downs Deed entered into with Bianca Rinehart and her two sisters in August 2006 (**Hope Downs Deed**); and
(3) a further deed entered into with John Hancock in April 2007 in which he adopted the Hope Downs Deed (**April 2007 Deed**),

(together, the **Deeds**).

The Deeds each contain an arbitration clause. For example, clause 20 of the Hope Downs Deed provides that '*[i]n the event that there is any dispute under this deed*' there is to be a confidential arbitration. Clause 9 of the April 2007 Deed and clause 14 of the Deed of Obligation of Release are arbitration clauses in similar terms.[2]

Notwithstanding the terms of the Deeds, in October 2014, Bianca Rinehart and John Hancock (**Appellants**) commenced proceedings in the Federal Court against Gina Rinehart and various entities controlled by her (the **Respondents**). Amongst others, the Appellants made two significant allegations. First, they alleged the Respondents had mismanaged trust assets and committed other breaches of trust in relation to trusts under which the Appellants were beneficiaries (**Substantive Claims**). Second, the Appellants alleged they were not bound by the Deeds, because their signatures were procured by misconduct and undue influence on the part of Gina Rinehart, Hancock Prospecting Pty Ltd and others. They applied for declarations that the Deeds were void as against them (**Validity Claims**).

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1 (2019) 366 ALR 635.
2 Clause 14 of the Deed of Obligation and Release refers 'all disputes hereunder' to arbitration.

By interlocutory application, Gina Rinehart sought an order pursuant to section 8(1) *Commercial Arbitration Act 2010* (NSW) (**Act**) that the proceedings (including both the Substantive and Validity Claims) be dismissed or permanently stayed, and referred to arbitration. Section 8(1) provides:

> *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.*

2. *Primary decision*

At first instance, Gleeson J determined that the Validity Claims were not subject to the arbitral clauses in the Deeds. Her Honour interpreted the words 'under this deed' and 'hereunder' restrictively, finding them to be incapable of extending to a dispute as to the underlying enforceability or validity of the deeds themselves.[3] Accordingly, her Honour ordered a separate trial of the Validity Claims, but agreed that the Substantive Claims could be referred to arbitration.[4]

3. *Full Federal Court decision*

The Full Federal Court (Allsop CJ, Besanko and O'Callaghan JJ) unanimously overturned Gleeson J's decision, holding that the arbitration clauses in the Deeds should be given a liberal, rather than a narrow interpretation.[5] The Full Court was strongly persuaded by the approach taken by the House of Lords to the construction of arbitral clauses in *Fiona Trust & Holding Corporation v. Privalov* [2007] 4 All ER 951 (***Fiona Trust***). In *Fiona Trust*, Lord Hoffman held that the construction of an arbitral clause should[6]:

> *start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal.*

The Full Court construed the arbitral clauses in the Deeds in accordance with the presumption that '*unless the language makes it clear that certain questions [are] intended to be excluded from the arbitrator's jurisdiction*', the entire dispute should be determined in arbitration.[7] As such, the Full Court had little difficulty in determining that, after starting with the assumption in *Fiona*

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3 *See Hancock Prospecting Pty Ltd v. Rinehart* (2017) 257 FCR 442.

4 *Ibid.*

5 *Hancock Prospecting Pty Ltd v. Rinehart* (2017) 257 FCR 442 at 489 [166]-[167], 496 [193].

6 *Fiona Trust* [2007] 4 All ER 951 at 958 [13].

7 *Ibid.*

Trust, a liberal reading of the clause '*any dispute under this deed'* clearly led to a finding that both the Substantive Claims and Validity Claims were within the scope of the arbitration agreement.

4. *High Court*

On appeal, the High Court upheld the Full Federal Court's decision, agreeing with their Honours' conclusion, but for different reasons. Notably, the High Court rejected the relevance of *Fiona Trust*, finding it unnecessary to consider the correctness of Lord Hoffman's approach. Instead, the High Court preferred to rely wholly on the construction of the clause '*by reference to the language used by the parties, the surrounding circumstances, and the purposes and objects to be secured by the contract'*.[8]

The High Court noted that a critical object of the Hope Downs Deed was the maintenance of confidentiality about the affairs of the Hancock Group (including a number of companies under Gina Rinehart's control), the trusts, the intra-family dispute and the provisions of the Deeds themselves.[9] This need for commercial confidentiality was underscored by the fact that highly confidential negotiations were underway amongst the Hancock Group in relation to financing a new joint venture agreement.[10] In this context, the parties were essentially agreeing to avoid public scrutiny threatening to jeopardize their commercial endeavours.[11] Moreover, at the time the Deeds were drafted, the Appellants and the Respondents were aware that disputes were likely to arise in the future.[12] This, in turn, was said by the High Court to indicate that the parties intended to draft an arbitration clause that facilitated a method of dispute resolution of the same level of confidentiality that characterized the Deeds as a whole.[13] In their Honours' words[14]:

> *It is inconceivable that such a person would have thought that claims of the latter kind, raising allegations such as undue influence, were not to be the subject of confidential dispute resolution but rather were to be heard and determined publicly, in open court.*

Thus, the High Court rejected the Appellants' appeal, referring the parties to arbitration in respect of both the Validity Claims and Substantive Claims.

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8 *Rinehart v. Hancock Prospecting Pty Ltd; Rinehart v. Rinehart* (2019) 366 ALR 635 [44].
9 *Ibid.*, at 46.
10 *Ibid.*, at 45.
11 *Ibid.*, at 46.
12 *Ibid.*, at 48.
13 *Ibid.*, at 48.
14 *Ibid.*, at 48.

1. *Cross-appeal*

A second (albeit less publicized) matter in the dispute was the cross-appeal brought by three of the Respondents, Roy Hill Iron Ore Pty Ltd, Hope Downs Iron Ore Pty Ltd and Mulga Downs Iron Ore Pty Ltd (**Cross-Appellants**). The Cross-Appellants sought a stay under section 8 of the Act in respect of claims brought against them by the Appellants, relating to breach of trust and knowing receipt of trust property (being mining tenements) held by the Respondents for the Appellants. The Cross-Appellants, none of which is a party to any of the Deeds, applied to Gleeson J for an order that the claims against them be referred to arbitration. The basis for their request was that each of them was claiming 'through or under' a party to the Hope Downs Deed (Hancock Prospecting Pty Ltd and Hancock Resources Limited), and therefore was a party within the definition of 'party' in section 2 of the Act, which provides[15]:

> ''*party' means a party to an arbitration agreement and includes:*
>
> *any person claiming through or under a party to the arbitration agreement, and'*

The High Court overturned the decision of the Full Court in allowing the cross-appeal.[16] The majority (Kiefel CJ, Gageler, Nettle, Gordon JJ) reasoned that the Cross-Appellants received the mining tenements with knowledge that they were assigned to them in breach of trust. As such, when the Cross-Appellants sought to contest the claim brought against them by the Appellants on the basis there was no breach of trust, the Cross-Appellants took their stand upon a ground which was available to the Respondents and stood in the same position vis-à-vis the Appellants as the Respondents.[17] In other words, since the Respondents and the Appellants are bound by an arbitration agreement applicable to the claim of breach of trust, this claim should be determined as between the Cross-Appellants and the Respondents in the same way as it is determined between the Appellants and the Respondents.[18] The Cross-Appellants therefore satisfied the definition of 'party' in section 2 of the Act. However, Edelman J dissented, finding that the 'wide and liberal interpretation' given by the majority to the words '*through or under*' was '*antithetical to the global fundamental principle that arbitration is a matter of contract*', in respect of which the concept of privity of contract ought to be upheld unless the parties agreed otherwise.[19] The majority swiftly rejected Edelman J's approach and references to comparative jurisprudence. Their Honours noted in obiter that despite the international

15 *Ibid.*, at 48.
16 *Ibid.*, at 60.
17 *Ibid.*, at 73.
18 *Ibid.*, at 73.
19 *Ibid.*, at 85.

origins of Australia's arbitration legislation, no party made submissions regarding the approach of other jurisdictions and thus, '*attempts to resolve issues raising separate considerations capable of discrete controversy must be eschewed as beyond the boundaries of the resolution of the question of law raised*'.[20]

2. *Conclusion*

The High Court's decision in the Rinehart/Hancock dispute highlights the importance of considering and applying the ordinary principles of contract interpretation and construction when drafting an arbitration clause. Potentially limiting words and phrases such as 'under' this deed and 'hereunder' should be treated with additional care to ensure they do not dilute the scope of the clause and lead to litigated proceedings, where the court is likely to publically scrutinize the specific factual context in which the parties negotiated, drafted and signed the contract. Indeed, this is precisely what occurred in the Rinehart/Hancock dispute, despite the parties' initial intentions to keep their disputes away from the public eye.

B. Applications for stay of proceedings

On many occasions in the past year, Courts made orders staying proceedings and referring parties to arbitration under both state[21] and federal legislation.[22] However, this was not necessarily the outcome of every decision, as several Courts refused to grant stays where the arbitration agreement in question was inoperative or incapable of being performed. We consider decisions where stays were not granted, below.

1. *Hurdsman v. Ekactrm Solutions Pty Ltd*

In *Hurdsman v. Ekactrm Solutions Pty Ltd*,[23] the applicant was the defendant in an action commenced by the plaintiffs seeking damages for breach of a Share Sale Agreement (**SSA**). The applicant sought an order that the proceedings be permanently stayed on the basis that the parties were bound by an

20 *Ibid.*, at 78.

21 *See Stockco Agricapital Pty Ltd v. Sugarloaf Nominees Pty* [2019] NSWDC 12; *First Solar (Australia) Pty Ltd, in the matter of Lyon Infrastructure Investments Pty Ltd v. Lyon Infrastructure Investments Pty Ltd* [2018] FCA 1666.

22 *Duro Felguera Australia Pty Ltd v. Samsung C&T Corporation (ABN 49 160 079 470 with Republic of Korea Registration Number 110111–0015762)* [2019] WASC 90; *Joban Kosan Co Ltd v. Flame SA* [2018] NSWSC 1754.

23 [2018] SASC 112.

agreement to arbitrate in accordance with the rules of the Singapore International Arbitration Centre (**SIAC**) applying South Australian law, pursuant to clause 28.3 of the SSA, which stated:

> *If the parties have been unable to resolve the Dispute within the Initial Period, then the parties must submit the Dispute to a mediator for determination in accordance with the Rules of the Singapore International Arbitration Centre (Rules), applying South Australian law, which Rules are taken to be incorporated into this agreement.*

The clause referred to a mediator and appeared to be more of a mediation agreement than an arbitration agreement. However, the clause required the mediation to be conducted in accordance with the rules of the SIAC, which the Court said:

'is not consistent with an intention to resolve disputes by mediation. This is because there are in fact no rules for mediation prescribed by the SIAC. I note that counsel for the plaintiff did give evidence from the bar table that there are rules of the Singapore International Mediation Centre.

[25] For this reason I consider there is some ambiguity in the clause and I have therefore had recourse to some of the pre-contractual negotiations between the parties

[30] Whether clause 28.3 is a mediation clause or not, it was not suggested by either party that mediation was a pre-condition to litigation. The defendant contends that clause 28.3 is an arbitration clause and that arbitration is a pre-condition for litigation. For the reasons I have given, I find that clause 28.3 is not consistent with an intention to determine disputes by arbitration. Furthermore, having considered the clause in its entirety, I find that clause 28.3 is neither this nor that, that is to say it is not quite an arbitration agreement and not quite a mediation agreement.'

Thus, the Court found that cl 28.3 of the SSA did not constitute a binding arbitration agreement and the application for a permanent stay of the proceedings was dismissed.

2. *US Healthcare Food Group Pty Ltd v. Zouky*

Similarly, the plaintiff in *US Healthcare Food Group Pty Ltd v. Zouky*[24] brought proceedings against the defendants to recover money under two contracts and a guarantee. The defendants filed a conditional notice of intention to defend, disputing the jurisdiction of the District Court of Queensland, and later an application for an order that the proceedings be stayed and referred to arbitration under the *Commercial Arbitration Act 2013* (Qld) or alternatively, the *International Arbitration Act 1974* (Cth).

24 [2019] QDC 58.

In July 2017, the plaintiff and second defendant (Zouky for Lebanon S.A. R.L.) entered into a unit purchase agreement, containing an arbitration agreement. The clause provided that if the parties were not able to resolve any '*dispute, claim or controversy arising out of or relating to this agreement or the breach, termination, enforcement, interpretation or validity of this agreement … shall be determined by binding arbitration … by the American Arbitration Association … in Wilmington, Delaware USA.*'

Less than a month later, the plaintiff and the second defendant entered into a loan agreement which contained varied terms to those in the unit purchase agreement. There was no arbitration agreement in the loan agreement, but its clause 7.17 provided that each party irrevocably submitted to the non-exclusive jurisdiction of the Courts of Queensland.[25] Similarly, the guarantee did not contain an arbitration agreement.[26]

A dispute arose between the parties under the loan agreement. The plaintiff alleged that the second defendant failed to repay the amount repayable under the loan agreement, and the first defendant failed to fulfil its guarantee in relation to ensuring the due and punctual payment of the loan debt. Further, the plaintiff alleged that the relief it sought was under the loan agreement, which did not contain an agreement to arbitrate. The defendant submitted that the unit purchase agreement was nevertheless central to the proceedings commenced by the plaintiff and that accordingly, the dispute between the plaintiff and the second defendant could be seen as a dispute relating to that agreement, so it was covered by the arbitration clause and under section 7 *International Arbitration Act 1974* (Cth).[27]

The District Court of Queensland first referred to the Full Federal Court's reasoning in *Hancock Prospecting Pty Ltd v. Rinehart*,[28] opining that the expression 'relating to this agreement' is wide enough to encompass disputes or claims touching on the validity of the agreement.[29] However, in this case, '*there was a separate, later agreement involving two of the parties to the unit sale agreement, and an additional party, the first defendant, in relation to a separate transaction, a loan of money, which was made later than the unit sale agreement and was essentially independent of it.*'[30] The Court also attributed weight to the fact

25 *US Healthcare Food Group Pty Ltd v. Zouky* [2019] QDC 58 [10].

26 *Ibid.*, at 11.

27 *Ibid.*, at 12–13.

28 (2017) 350 ALR 658 (156–157). *US Healthcare Food Group Pty Ltd v. Zouky* was decided before the High Court handed down *Rinehart v. Hancock Prospecting Pty Ltd; Rinehart v. Rinehart* (2019) 366 ALR 635. However, the general principles drawn upon by the Queensland District Court from the Full Federal Court's decision in *Hancock Prospecting Pty Ltd v. Rinehart* remain good law.

29 *US Healthcare Food Group Pty Ltd v. Zouky* [2019] QDC 58 [23].

30 *Ibid.*, at 23.

that the loan agreement was governed by the law of Queensland, demonstrating that the parties did not intend to 'pick up' the arbitration clause in the earlier agreement, because the arbitrators from Delaware would not easily apply Queensland law.[31] Accordingly, the District Court found that the plaintiff's claim seeking to enforce only the loan agreement and guarantee against the defendants did not involve a '*dispute, claim or controversy arising out of or relating to the unit purchase agreement, or otherwise within the scope of the arbitration clause in that agreement.*'[32] In spite of this conclusion, the District Court noted that the wording of the claim and statement of claim could easily lead the defendants into thinking that the plaintiff in part sought to enforce the unit purchase agreement. As such, the defendants' application to stay the proceedings was dismissed subject to the plaintiff making the necessary amendments to its claim to make it clear that the unit purchase agreement was not in dispute.[33]

3. *RW Health Partnership Pty Ltd v. Lendlease Building Contractors Pty Ltd*

The decision of *RW Health Partnership Pty Ltd v. Lendlease Building Contractors Pty Ltd*[34] highlights that a Court will not refer a dispute to arbitration where a dispute does not fall within the scope of the arbitration agreement. The Plaintiff (**RW Health**) was a special purpose entity responsible for the design, construction, commissioning, managing and maintenance of a hospital. It subcontracted a range of its obligations with respect to the hospital to the Defendant (**Lendlease**). The Subcontract included the following dispute resolution provisions:

> ***74 Dispute Resolution***
>
> ***74.1 Establishment of panel***
>
> *'(a) Any party to a dispute may by notice (Referral Notice) to the other party refer the Dispute to the Panel for resolution. The referral notice must specify in reasonable detail the nature of the Dispute.*
>
> *…*
>
> *(g) If the Panel does not meet, resolve the Dispute or reach unanimous agreement on any matter within the Resolution Period, the Dispute is hereby:*

31 *Ibid.*, at 30.
32 *Ibid.*, at 32.
33 *Ibid.*, at 37.
34 [2019] VSC 353.

> *(i) referred to expert determination under clause 74.3 [Expert determination] if this Contract expressly provides for that Dispute to be resolved in accordance with expert determination as described in this Contract;*
>
> *(ii) referred to expert determination under clause 74.3 [Expert determination] in the case of Disputes in relation to Compensation; or*
>
> *(iii) referred to an arbitrator under clause 74.4 [Arbitration] in the case of all other Disputes.'*

In March 2018, RW Health gave a referral notice to Lendlease alleging that Lendlease's design and construction of a water system in the hospital was defective, and demanding rectification. The dispute did not resolve by the resolution period stipulated in the Subcontract, so on 14 March 2018, RW Health issued a notice to Lendlease referring the dispute to arbitration or alternatively, to expert determination, under the Subcontract. Due to time pressures, on 15 March 2018, RW Health also initiated (but did not serve at that stage) proceedings in the Supreme Court of Victoria as a precautionary measure if Lendlease refused to arbitrate. On the same day Lendlease replied to the Referral Notice and Referral to Arbitration, asking for an extension of time for the parties to choose an arbitrator. RW Health agreed to this extension and the parties eventually agreed on an arbitrator. Nevertheless, Lendlease filed an appearance in the court proceedings on 11 April 2018 and then sought to have the dispute resolved in court rather than arbitration.

The Court was presented with five issues, which ultimately gave rise to three important questions:

(1) Is the dispute 'the subject of an arbitration agreement' within the meaning of section 8 *Commercial Arbitration Act 2011* (Vic)?
(2) If no to issue 1, did the parties' correspondence constitute an agreement that the dispute be arbitrated?
(3) If no to issues 1 and 2, such that there is no arbitration agreement, has Lendlease waived its right under the Subcontract for the dispute to be referred to expert determination, with the result that it is referred to arbitration under clause 74.1(g)(iii) of the Subcontract?

Issue 1 – Section 8(1) *Commercial Arbitration Act 2011* (Vic) provides:

> '*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.'*

Issue 1 turned on whether the dispute was 'in relation to compensation' as per the wording of clause 74.1(g)(ii), because if not, then it would be referred to arbitration. RW Health contended that the dispute was not in relation to

compensation and fell into the category of 'all other disputes', because the expression 'disputes in relation to compensation' should be interpreted narrowly to mean disputes only about the amount of loss or damage.[35] Lendlease argued that the phrase 'in relation to' in clause 74.1(g)(ii) should be given a wide meaning, and it would be wrong for the Court to read it down or substitute the phrase with alternative words (e.g. 'disputes **about** compensation' or '**restricted to** compensation').[36]

The Court noted that dispute resolution clauses are construed using the same traditional principles of contract interpretation as applies to other commercial contracts.[37] In accordance with those principles, his Honour determined that[38]:

> *On a plain reading of the ordinary English words, in my opinion, a reasonable business person in the position of the parties would understand a Dispute in relation to Compensation' as unambiguously including a dispute as to the liability to pay compensation particularly in the context of a dispute in relation to compensation arising out of a building contract. To read the expression as "a dispute in relation to **the assessment of** Compensation" requires the insertion of the underlined words, which is not justified in the context of the terms of the Contract; and could easily have been added by the parties if it was intended. The phrase "in relation to" is wide in its connotation; and does not warrant reading words of limitation into the expression.*

Issue 2 – RW Health submitted in the alternative that the parties entered into an ad hoc agreement to arbitrate the dispute, based on the correspondence between the parties in which Lendlease essentially acquiesced to arbitration and agreed on an arbitrator. Lendlease contended that this correspondence did not constitute an arbitration agreement for various reasons, particularly that no arbitrator was actually appointed and no steps were taken in the arbitration. In any case, the parties agreed that, if the dispute was in relation to compensation, then the dispute would have automatically been referred to expert determination under clause 74.1(g)(ii) by 15 March 2018.[39]

The Court agreed that it was indeed common ground the dispute was automatically referred to expert determination under clause 74.1(g)(ii) of the Subcontract.[40] As such, issue 2 turned on whether the parties contracted to terminate the expert determination mechanism under the Subcontract and

35 *RW Health Partnership Pty Ltd v. Lendlease Building Contractors Pty Ltd* [2019] VSC 353 [20].
36 *Ibid.*, at 31.
37 *Ibid.*, at 32.
38 *Ibid.*, at 35.
39 *Ibid.*, at 43.
40 *Ibid.*, at 44.

submit the dispute to arbitration.[41] Having briefly set out the law in respect of contract formation, the Court opined that the relevant correspondence between the parties did not demonstrate any intention to vary the Subcontract.[42] In fact, nothing could be inferred from the correspondence other than that the parties were preparing to put steps in place for an arbitration under the mistaken apprehension that arbitration was the appropriate mechanism provided for under the Subcontract for their dispute.[43] Also, any variation to the Subcontract, such as an ad hoc arbitration agreement, was required to be in writing and signed by the parties pursuant to clause 76.2 of the Subcontract, but no such written variation existed.[44] Although clause 76.2 does not prevent an oral variation to the contract, the Court noted that it was relevant to the question of whether a variation was actually agreed.[45]

Issue 3 – RW Health submitted that by its conduct during the month after RW Health produced the Referral to Arbitration, Lendlease waived any right under the Subcontract for the dispute to be the subject of expert determination, by the application of:

(1) waiver by an unequivocal abandonment of a right; and
(2) the doctrine of election.[46]

RW Health submitted that its Referral to Arbitration of 14 March 2018 provided Lendlease an opportunity to assert that the proper dispute resolution method was expert determination and that Lendlease's failure to assert otherwise was significant.[47] Additionally, RW Health contended that Lendlease's correspondence in relation to the arbitration demonstrated that Lendlease abandoned its contractual right to expert determination of the dispute, or constituted an election between alternative and inconsistent rights (being, the right to arbitrate and the right to expert determination).[48] Lendlease submitted that its correspondence did not amount to an unequivocal abandonment of the right to have the dispute determined by an expert, nor was it an election between inconsistent rights.[49] It was alleged that Lendlease's correspondence was consistent with the party preparing to explore the possibility of arbitration without committing to it.[50] Further,

41 *Ibid.*, at 45.
42 *Ibid.*, at 49.
43 *Ibid.*, at 49.
44 *Ibid.*, at 49.
45 *Ibid.*, at 49.
46 *Ibid.*, at 50.
47 *Ibid.*, at 51.
48 *Ibid.*, at 51–52.
49 *Ibid.*, at 54.
50 *Ibid.*, at 55.

the effect of clause 7.1(g) was that on the expiry of the resolution period, the dispute was referred to expert determination, instead of a choice being conferred on the parties. As such, it was alleged Lendlease did not actually have the option of choosing between two alternative rights.[51]

The Court held that each party had a choice to insist on enforcement of clause 74 or to agree to determine it in some other manner.[52] The judge did not consider that choosing to select another procedure for the adjudication of the dispute constituted an election between inconsistent substantive rights, nor did the correspondence (in which Lendlease acquiesced in the preliminary stages of the appointment of an arbitrator) constitute an equivocal election to arbitrate and to not enforce rights under the Subcontract.[53] Moreover, the Court set out the principles of waiver, agreeing that '*waiver is constituted by the deliberate, intentional and unequivocal release or abandonment of the right that is later sought to be enforced*',[54] which results in a change in the relationship of the parties.[55] His Honour held that the correspondence could not constitute a waiver by abandonment, because it did not constitute an unequivocal representation that Lendlease would forgo certain rights[56]:

> *'There is no reference to the foregoing of rights and a reasonable business person reading the correspondence would infer no more than that the parties believed (wrongful as I have found) that the Contract did require arbitration of the Dispute.*
>
> *Further, the fact that no arbitrator was appointed militates strongly against a conclusion that a 'deliberate, intentional and unequivocal … abandonment of the right' to an expert determination was demonstrated by the Relevant Correspondence.*
>
> *In the circumstances, I do not consider that Lendlease's conduct relevantly changed the relationship of the parties in the manner discussed by Brennan J and Gaudron J, as referred to above.'*

The Court found that there was no agreement between RW Health and Lendlease to arbitrate the dispute. Accordingly, RW Health's summons under section 8(1) *Commercial Arbitration Act 2011* (Vic) was dismissed and dispute proceeded in the Victorian Supreme Court.

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51 *Ibid.*, at 56.
52 *Ibid.*, at 69.
53 *Ibid.*, at 69–70.
54 *Zhang* (2006) 201 FLR 178, 186 [14].
55 *Verwayen* (1990) 170 CLR 394, 427.
56 *RW Health Partnership Pty Ltd v. Lendlease Building Contractors Pty Ltd* [2019] VSC 353 [71].

C. Awards

Largely drawing upon general principles and settled law, Australian Courts handed down a number of decisions enforcing, or refusing to enforce, arbitral awards in the past year.[57] However, the following two decisions are particularly of note due to their novel factual circumstances: the first involving an application to enforce an award made at the same time as an application to set aside the award in the jurisdiction in which it was made, and the second involving an insolvent award debtor.

1. *Mitchell Water Australia Pty Ltd v. McConnell Dowell Constructors (Aust) Pty Ltd*

The parties in *Mitchell Water Australia Pty Ltd v. McConnell Dowell Constructors (Aust) Pty Ltd*[58] were signatories to a subcontract containing an arbitration agreement. McConnell Dowell initiated arbitration in accordance with that arbitration agreement on 15 December 2014. The arbitration was conducted between May and December 2016 pursuant to *Commercial Arbitration Act 2013* (Qld) (**CAA (Qld)**) and the arbitral seat was Brisbane, Queensland. However, the hearings took place before the arbitrator in the County Court building in Melbourne.

The Arbitrator delivered his initial award on 6 December 2017 and then a supplementary award on 24 December 2017 (together referred to as the '**December Award**'). On 27 December 2017, Mitchell Water paid McConnell Dowell the amounts payable in the December Award, less an amount equalling Mitchell Water's security, which McDonnell Dowell continued to hold.

On 12 January 2018, Mitchell Water issued a request (**Request**) pursuant to section 33(5) of the CAA (Qld), which provides that:

> *(5) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within 30 days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award.*

The Request concerned Mitchell Water's alternative claim for its direct costs of delay (**Alternative Delay Costs Claim**). The basis for the Request was that the December Award did not address the Alternative Delay Costs Claim, but made all the requisite legal and factual findings to make out that claim.

On 16 March 2018, the Arbitrator issued his determination, refusing the Request on the basis that section 33(5) of the CAA (Qld) did not apply

57 *See* e.g. *Mi v. Li* [2018] ACTCA 66.
58 [2018] VSC 753.

(**Determination**).[59] However, the Arbitrator did not go on to determine the issue of whether his mandate continued in respect of the Alternative Delay Costs Claim. Subsequently, various correspondence passed between the parties, in which McConnell Dowell argued that the Arbitrator was *functus officio*. Around this time, Mitchell Water also paid McConnell Dowell the amount remaining due under the December Award (previously held back until payment of Mitchell Water's security).

On or about 7 June 2018, the Arbitrator published another ruling, which concluded that the Arbitrator's mandate continued in respect of the Alternative Delay Costs Claim (**Mandate Determination**) and that he would proceed to determine the claim.

On 2 July 2018, McConnell Dowell filed an application under section 16(9) of the CAA (Qld) (**section 16(9) Application**), which states:

> *If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within 30 days after having received notice of that ruling, the Court to decide the matter.*

The section 16(9) Application challenged the Mandate Determination and sought an order from the Queensland Supreme Court that the arbitral tribunal did not have jurisdiction to make any additional award. McConnell Dowell filed the section 16(9) Application in the Queensland Supreme Court, because the seat of the arbitration was Brisbane. However, McConnell Dowell chose not to prosecute the section 16(9) Application until after the Arbitrator determined the Alternative Delay Costs Claim.

On 29 October 2018, the Arbitrator made a further award on the Alternative Delay Costs Claim in favour of Mitchell Water (**Additional Award**). Subsequently, McConnell Dowell sought to prosecute the section 16(9) Application in the Queensland Supreme Court. It also applied to amend the application to include an order setting aside the Additional Award under section 34(2)(a)(iii) of the CAA (Qld),[60] on the basis that the Arbitrator had no jurisdiction to make the Additional Award. Around this time, Mitchell Water applied under section 35 *Commercial Arbitration Act 2011*

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59 The Victorian Supreme Court's judgment does not explain the Arbitrator's reasoning as to why s. 33(5) did not apply.

60 S. 34(2)(a)(iii) of the *Commercial Arbitration Act 2013* (Qld) provides that 'an arbitral award may be set aside by the Court only if the party making the application furnishes proof that the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside'.

(Vic) (**CAA (Vic)**) to enforce the Additional Award in the Victorian Supreme Court. In response, McDonnell Dowell sought an adjournment of Mitchell Water's application pursuant to:

> (a) section 36(2) of the CAA (Vic), which provides: '*if an application for setting aside or suspension of an award has been made to a court referred to in subsection (1)(a)(v), the Court may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the party to provide appropriate security*'; or alternatively,
>
> (b) the Court's inherent or general power to control its own proceedings, on the basis that McDonnell Dowell had issued an application to set aside the Additional Award in Queensland.

However, Mitchell Water submitted that there was no basis upon which section 36(2) of the CAA (Vic) was enlivened, because the section 16(9) Application in the Queensland Supreme Court was not an application for 'setting aside' for the purposes of section 36(2) of the CAA (Vic). Justice Croft dealt with the application in three stages.

In the first stage, Croft J dismissed Mitchell Water's argument that there was no basis upon which section 36(2) of the CAA (Vic) was enlivened. His Honour opined that the provisions of section 36(2) CAA (Vic) were drafted broadly and descriptively and as such, supported an application under section 16(9) CAA Qld.[61] His Honour went on to consider the origins of the CAA (Vic) and international authorities on the definition of 'award' from Canada and New Zealand,[62] noting that section 36(2) of the CAA (Vic) functions as a mechanism[63]:

> *to avoid a multiplicity of proceedings in various state and territory courts and the risk of inconsistent findings and any compromising or erosion of the effective exercise of jurisdiction under their particular state or territory arbitration legislation; viewed in the context of the Australian national scheme of uniform commercial arbitration.*

In this context, his Honour opined that the expression 'setting aside' must be read as indicating both an application under section 16(9) and 34 of the CAA (Qld).[64] In any case, his Honour also clarified that even if he was not of the view that section 36(2) of the CAA (Vic) extended to include an application under section 16(9) of the CAA (Qld), then he would nevertheless be satisfied that the inherent jurisdiction of the Court should be exercised in favour

61 *Mitchell Water Australia Pty Ltd v. McConnell Dowell Constructors (Aust) Pty Ltd* [2018] VSC 753 [15].

62 *Ibid.*, at 25.

63 *Ibid.*, at 16.

64 *Ibid.*, at 17.

of an adjournment to allow the section 16(9) Application to proceed in the Supreme Court of Queensland (as the court of the arbitral seat).[65]

In the second stage, Croft J distinguished the Mandate Determination and the Additional Award and considered whether a finding by the Victorian Supreme Court in respect of the latter would encroach on McConnell Dowell's ability to challenge the former in Queensland. His Honour found that the Mandate Determination, which involved the determination of a 'preliminary question', was unlike the Additional Award in that did not result in the handing down of an award on the merits.[66]

As the Mandate Determination would not likely be considered an 'award' for the purposes of section 36(1)(a)(iii) of the CAA (Vic), McConnell Dowell would not be able to apply to the Victorian Supreme Court to have the award set aside. Thus, the extent to which the jurisdictional issue was determined in the Mandate Determination, McConnell Dowell was shut out from challenging the arbitrator's lack of jurisdiction in the enforcement proceeding.[67] Going a step further, Croft J opined that even though the Victorian Supreme Court could not rule on whether the arbitral tribunal was correct in making its Mandate Determination, its findings on the Additional Award might encroach upon McConnell Dowell's ability to challenge the Mandate Determination in the Queensland Supreme Court.[68] As such, his Honour held[69]:

> *It is for these reasons, and because McConnell Dowell contends that it may be shut out from prosecuting its s16(9) application in the Supreme Court of Queensland if the Enforcement Application proceeds before the hearing and determination of the section 16(9) application; hence, the Enforcement Application in this Court should be adjourned.*

Next, Croft J turned to the discretionary factors elucidated by Gross J in *IPCO (Nigeria) Ltd v. Nigerian National Petroleum Corp*,[70] such as whether the application before the court is brought bona fide and not simply by way of delaying tactics; whether the application before the court has at least a real prospect of success; and the extent of the delay occasioned by an adjournment and any resulting prejudice.

His Honour was persuaded that McConnell Dowell's section 16(9) Application was both bona fide and had real prospects of success. At first

65 *Ibid.*, at 20.
66 *Ibid.*, at 26.
67 *Ibid.*, at 28.
68 *Ibid.*, at 29.
69 *Ibid.*, at 31.
70 [2005] EWHC 726 (Comm), [15].

glance, it was evidently appropriate that McConnell Dowell applied to amend the section 16(9) Application in the Queensland Supreme Court, because it was the relevant court under the provisions of section 36(1)(a)(v) of the CAA (Vic) (being, the court of the State … in which … that award was made).[71] Further, Croft J considered that the setting aside application could be heard and determined in February 2019 and that a short delay until that date was not unreasonable.[72] McConnell Dowell also undertook to '*diligently prosecute its section 16(9) application and that it was also ready, willing and able to provide security for the full amount of the Additional Award*'.[73]

Thus, in view of his Honour's findings in the above three stages, Croft J ultimately found that McConnell Dowell's case was sufficiently arguable for the purposes of the adjournment application. Accordingly, the Victorian proceedings were adjourned pending the outcome of McConnell Dowell's application in the Queensland Supreme Court.

2. *Hyundai Engineering & Steel Industries Co Ltd v. Two Ways Constructions Pty Ltd*

In *Hyundai Engineering & Steel Industries Co Ltd v. Two Ways Constructions Pty Ltd*,[74] the applicant (**Hyundai**) commenced proceedings in the Federal Court of Australia pursuant to section 8(2) *International Arbitration Act 1974* (Cth), which provides that 'a foreign award may be enforced in a court of a State or Territory as if the award were a judgment or order of that court'. Specifically, Hyundai sought orders that 'the Final Award dated 9 March 2018 of Mr Alvin Yeo registered in the Singapore International Arbitration Centre Registry of Awards as Award Number 024 of 2018 on 13 March 2018 and notified to the parties by the Registrar of the Court of Arbitration of the Singapore International Arbitration Centre upon or about that date be enforced as a judgment of this court.'[75]

The directors of the respondent company (**Two Ways**) appointed voluntary administrators on 4 September 2018. Consequently, the proceedings brought by Hyundai were automatically stayed by virtue of section 440D *Corporations Act 2001* (Cth). Hyundai applied for leave to proceed with the

71 *Mitchell Water Australia Pty Ltd v. McConnell Dowell Constructors (Aust) Pty Ltd* [2018] VSC 753 [15].

72 *Ibid.*, at 43.

73 *Ibid.*, at 44.

74 [2018] FCA 1427.

75 *Hyundai Engineering & Steel Industries Co Ltd v. Two Ways Constructions Pty Ltd* [2018] FCA 1427 [2].

enforcement proceedings pursuant to section 440D(1)(b) *Corporations Act 2001* (Cth), which provides:

> *'During the administration of a company, a proceeding in a court against the company or in relation to any of its property cannot be begun or proceeded with, except*
>
> *… (b) with the leave of the court and in accordance with such terms (if any) as the court imposes.'*

In the Federal Court's decision, O'Callaghan J adopted the comments of Hammerschlag J in *Larkden Pty Ltd v. Lloyd Energy Systems Pty Ltd*,[76] which stipulate that applications of this sort must be commenced with an assumption that leave is only rarely granted. His Honour noted that he had previously ordered under section 8(8) *International Arbitration Act 1974* (Cth) that the enforcement proceedings be adjourned to 30 November 2018 for further mention, conditional on Two Ways providing security for the award. However, Two Ways never provided such security.[77] Two Ways' failure to provide this security was relevant, because according to the O'Callaghan J, if the Court had known at the time of making its previous orders that Two Ways would not provide the security, it would have proceeded to hear and determine the proceedings.[78] His Honour also opined that Hyundai should not be worse off as a result of the respondent's failure to do so.[79] Accordingly, O'Callaghan J granted Hyundai leave to proceed in the enforcement proceeding.

3. *Structural Monitoring Systems Ltd v. Tulip Bay Pty Ltd*

In *Structural Monitoring Systems Ltd v. Tulip Bay Pty Ltd*,[80] the Western Australian Supreme Court dismissed an application to set aside an arbitral award on the ground of alleged misconduct pursuant to sections 42 and 44 now repealed *Commercial Arbitration Act 1985* (WA) (**1985 Act**).[81] An arbitration agreement was contained in clause 17 of an agreement between Structural Monitoring Systems Ltd (**SMS**), Tulip Bay Pty Ltd (**Tulip Bay**) and a Mr Kenneth Davey (**Agreement**), which provided that a single arbitrator would be appointed with the unanimous consent of the parties, but if

76 (2011) 285 ALR 207.

77 *Hyundai Engineering & Steel Industries Co Ltd v. Two Ways Constructions Pty Ltd* [2018] FCA 1427 [9].

78 *Ibid.*, at 15.

79 *Ibid.*, at 16.

80 [2017] WASC 379.

81 The repealed Act applies to arbitrations commenced prior to the commencement of the *Commercial Arbitration Act 2012* (WA).

agreement could not be reach within fourteen days, then '*the arbitration shall be heard and determined by three (3) arbitrators'*.

A dispute arose under the Agreement in relation to intellectual property and SMS ceased making royalty payments that were owed to Tulip Bay and Mr Davey under the Agreement. Tulip Bay and Mr Davey then commenced proceedings in the Western Australian District Court and obtained default judgment. Tulip Bay and Mr Davey also issued a statutory demand against SMS for payment of the judgment debt. Later on 7 June 2012, SMS issued a notice referring the dispute to arbitration, and commenced proceedings in the Western Australian Supreme Court to set aside the statutory demand against it.

In accordance with the Agreement, SMS appointed an arbitrator (Mr Philip George Clifford), Tulip Bay appointed another (Mr Kelvin Lord) and then the two arbitrators, after an eight month delay, appointed a presiding arbitrator (Mr Peter John Hannan). The final award was delivered four and a half years after the notice of reference to arbitration was served. Pursuant to sections 42 and 44 of the 1985 Act, SMS then commenced proceedings against Tulip Bay and Mr Davey, seeking orders setting aside the award on the ground of misconduct, said to be constituted by:

(1) denial of procedural fairness, by taking into account submissions from Tulip Bay and Mr Davey, to which SMS allegedly had no opportunity to respond;
(2) excessive delay in the delivery of the award; and
(3) the matter being decided by two of the arbitrators (Mr Hannan and Mr Clifford) in circumstances where three arbitrators had been appointed.

Martin CJ delivered his Honour's primary decision on 22 December 2017, in which he found in favour of Tulip Bay and Mr Davey on each ground. SMS appealed Martin CJ's decision and the same three grounds above constituted SMS's three grounds of appeal from the primary decision.

In relation to the first ground and in the court of first instance (Western Australian Supreme Court), SMS's primary argument alleged that SMS was denied an opportunity to respond to submissions made by Tulip Bay and Mr Davey on 20 January 2016 in answer to twenty-two issues identified by the tribunal in relation to the parties' prior written submissions lodged on 9 July 2015.[82] The parties were not required to make any submissions on the twenty-two issues, but were advised they could if they wished. Counsel for SMS alleged that if SMS had known reliance would be placed on those submissions of 20 January 2016, it would have made submissions on them.

82 *Structural Monitoring Systems Ltd v. Tulip Bay Pty Ltd* [2017] WASC 379, [91]-[92].

However, Martin CJ rejected this proposition on the basis that it was inherently unlikely that a response from SMS would have dealt with any issues that were not already alive between the parties from the exchange of prior materials, and in any case, SMS had 'every opportunity to put its case in relation to those matters before the arbitrator'.[83] Accordingly, SMS' failure to deal with those matters could not be attributed to any conduct on the part of the arbitrators, Tulip Bay or Mr Davey.[84] Upon appeal by SMS, the Western Australian Court of Appeal affirmed this conclusion, opining that SMS had not demonstrated any error on the part of the primary judge in relation to his Honour's conclusions.[85]

With respect to the second ground, Martin CJ agreed that were was indeed '*excessive delay in the delivery of the award*', as two of the arbitrators' reasons were published more than sixteen months after the evidence and submissions of each party had been served. The third arbitrator later indicated his agreement with those reasons and the 'final award' was published eighteen months after the evidence and submission were received.[86] However, none of the parties could adduce any persuasive authorities in support of their claims, and SMS admitted that although a claim for excessive delay supported a claim for denial of procedural fairness, it could not of itself support a conclusion that procedural fairness had been denied. Accordingly, his Honour determined that the delay in the publication of the reasons and the award could not constitute misconduct of a kind which would justify setting aside the award. On appeal, the Court of Appeal noted that '*even where inordinate delay is found to constitute misconduct, it remains necessary to consider whether the misconduct is such as to justify setting aside the award.*'[87] Their Honours agreed with Martin CJ in refusing to exercise their discretion to set aside the award, holding that there was there was no basis for apprehending that the delay gave rise to a miscarriage of justice or prejudiced SMS.[88] Additionally, the Court of Appeal criticized SMS for failing to apply to remove the arbitrators at the time of the delay, rather than waiting until the award adverse to its interests was delivered.[89]

Finally, as to the third ground, no persuasive authorities were put forward by the parties. Nonetheless, Martin CJ proceeded to consider the critical question of this ground, being that, although Mr Lord ultimately agreed with the award, did he 'hear' and 'determine' the arbitration as required

83 *Ibid.*, at 95–96.
84 *Ibid.*, at 95.
85 *Structural Monitoring Systems Ltd v. Tulip Bay Pty Ltd* [2019] WASCA 16 [82].
86 *Structural Monitoring Systems Ltd v. Tulip Bay Pty Ltd* [2017] WASC 379 [109].
87 *Structural Monitoring Systems Ltd v. Tulip Bay Pty Ltd* [2019] WASCA 16 [91].
88 *Ibid.*, at 16 (94).
89 *Ibid.*, at (96).

under clause 17 of the Agreement. His Honour stated that the reference to the arbitration being 'heard' was not intended to mean that there must be an oral hearing.[90] Rather, '*the word "heard" should be construed as encompassing whatever procedure the arbitrators and parties adopt in order to place before the arbitrators the evidence and submissions required to determine the dispute.*'[91] As such, clause 17 would be complied with if Mr Lord considered the evidence and submissions presented by the parties and determined the terms upon which their dispute should be resolved.[92] Martin CJ referred to several persuasive features of the evidence, including on one hand that Mr Lord was copied into all communications and was provided with the evidence, submissions and joint reasons (to which he expressed his concurrence in a letter), while on the other, he did not sign the award or charge any fees for his services.[93] Martin CJ held that any failure on the part of an arbitrator to turn his mind to the evidence, submissions and award and either express or concur in reasons, was an abdication of his responsibilities as an arbitrator, which would be a finding of a very serious nature.[94] However, in the absence of any evidence to this effect, his Honour was not prepared to find Mr Lord did not '*hear and determine*' the dispute. Accordingly, Martin CJ concluded that SMS failed to establish misconduct on the part of the tribunal which would justify the court's intervention in setting aside the award. However, his Honour emphasized his dissatisfaction with the conduct of the arbitration, stating that the arbitration '*fell well short of a paradigm example of efficient and cost-effective dispute resolution*' and contrary to these legislative objectives, the dispute would have been resolved much more quickly, cheaply and finally if the parties had gone to court.

On appeal, the Court of Appeal upheld SMS's challenge to Martin CJ's finding of fact on this question,[95] on the basis that His Honour failed to consider a number of critical features in the history of the matter.[96] Their Honours construed Mr Lord's agreement with the award as being '*the product of an attempt by him, after the event, to rectify his failure to have engaged in the arbitration process prior to that time.*'[97] Although Mr Lord claimed to have read the reasons, he gave no indication that he had independently considered the evidence and the submissions.[98] As such, the Court of Appeal held that Mr Lord failed to independently consider the evidence and submissions of the

90 *Structural Monitoring Systems Ltd v. Tulip Bay Pty Ltd* [2017] WASC 379 [139].
91 *Ibid.*, at 139.
92 *Ibid.*, at 140.
93 *Ibid.*, at 142.
94 *Ibid.*, at 144.
95 *Structural Monitoring Systems Ltd v. Tulip Bay Pty Ltd* [2019] WASCA 16 [103].
96 *Ibid.*, at 105.
97 *Ibid.*, at 111.
98 *Ibid.*, at 111.

parties, which constituted a 'mishandling of the arbitration' and a breach of the rules of natural justice, which the definition of misconduct in the 1985 Act[99] expressly included.[100] However, this conclusion did not result in the award being set aside, because in the particular circumstances, the Court of Appeal found that there had not been a substantial miscarriage of justice or that SMS was unjustly prejudiced. Their Honours considered that the terms of the award were agreed by a majority of the arbitrators, the reasons in the award were comprehensive and thorough and there was no reason to doubt the correctness of the critical aspects of the arbitrators' decision.[101] Accordingly, their Honours were satisfied that Mr Lord's misconduct did not bear on the outcome of the case and therefore, refused to exercise their Honours' discretion to set aside the award.[102] SMS's appeal was consequently dismissed.

Even with the conclusion of the above appeal, Tulip Bay and SMS did not stay away from the courts for long. Another dispute relating to royalties arose and on 12 April 2019, Tulip Bay nominated an arbitrator. Under the arbitration agreement between the parties, SMS had thirty days to nominate its own arbitrator, but it did not do so. Accordingly, the deadline for SMS to nominate an arbitrator passed and various correspondence passed between the parties, in which SMS objected to Tulip Bay's attempt to engage a panel of three arbitrators to proceed in another arbitration against SMS. In *Tulip Bay Pty Ltd v. Structural Monitoring Systems Ltd*[103] Tulip Bay applied to the Western Australian Supreme Court, seeking that the court appoint an arbitrator, pursuant to section 11(4)(a) of the *Commercial Arbitration Act 2012* (WA) (**2012 Act**),[104] which provides:

> *'Where, under an appointment procedure agreed on by the parties –*
>
> *(a) a party fails to act as required under the procedure; … :*
>
> *any party may request the Court to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.'*

Also relevant was section 11(6) of the 2012 Act, which provides:

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99 Now repealed.

100 *Structural Monitoring Systems Ltd v. Tulip Bay Pty Ltd* [2019] WASCA 16 [115]-[116].

101 *Ibid.*, at 123–127.

102 *Ibid.*, at 128.

103 [2019] WASC 223.

104 The *Commercial Arbitration Act 2012* (WA) applied in this case as the arbitration would be commenced after the commencement of the 2012 Act.

> *The Court, in appointing an arbitrator, is to have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator.*

SMS contended that the Court ought not to make any orders other than programming orders to a special appointment some time off so that the matters in ostensible dispute over the nomination of an arbitration can be argued even further, on the basis of future anticipated evidence. In particular, SMS contended that Tulip Bay's application amounted to a potential abuse of process or should be dismissed by virtue of *Anshun* estoppel, which prevents parties from re-agitating claims which should have been pursued in former proceedings.[105] His Honour held that this argument was perfectly capable of being determined by a fresh arbitral panel.[106] Indeed, his Honour found that none of SMS's assertions constituted any jurisdictional obstacle impeding the court from granting Tulip Bay's request.[107]

The Court then considered who ought to be appointed as arbitrator, taking into consider section 11(6) of the 2012 Act set out above. His Honour was persuaded to appoint Mr Todd Shand, who had qualifications in chemistry, law and intellectual property, over a local barrister who was put forward by SMS. His Honour justified his decision as follows[108]:

> '*a combination of diverse expertise is desirable in this arbitral panel. There is already the significant legal expertise delivered through the existing appointment of the Hon John Chaney SC, as regards contractual construction and interpretation issues. Bearing in mind the foreshadowed patent lapse arguments and product nexus considerations which may arise in the overall consideration concerning products and the other scientific considerations which could arise in the overall evaluation, I am, with no disrespect to Mr Ellis, presently more persuaded, particularly by reference to section 11 (6), to accept SMS's fall-back request and so, to appoint Mr Todd Shand as the second arbitrator.'*

The Western Australian Supreme Court appointed Mr Shand and the parties are likely making their way through the arbitral process again.

D. Concluding remarks

It was a busy year in Australia for decisions involving arbitration. However, as you can see from the cases considered above, Australia is a robust jurisdiction for international arbitration but unique cases may produce

105 *Port of Melbourne Authority v. Anshun Pty Ltd* (1981) 147 CLR 589.
106 *Tulip Bay Pty Ltd v. Structural Monitoring Systems Ltd* [2019] WASC 223 [14].
107 *Ibid*., at 16.
108 *Ibid*., at [33].

unique results. However, in respect of predictability of decisions, parties from all jurisdictions who are engaged in international commercial arrangements with Australian parties should be comforted by the fact that the Australian courts take into account the objectives of the UNCITRAL Model Law, which forms the basis of the uniform law across all Australian jurisdictions, when determining the disputes or applications before them.