HERBERT SMITH FREEHILLS

NSWCA HIGHLIGHTS 'MED-ARB' PITFALLS

08 April 2019 | Australia
Legal Briefings – By **Leon Chung, Mitchell Dearness, Phoebe Winch and Haiqiu Zhu**

The New South Wales Court of Appeal has recently affirmed the importance of strict compliance with legislative requirements when arbitrators seek to assume the role of mediator during the course of arbitration proceedings – otherwise known as 'med-arb'.[1]

The use of med-arb has enjoyed increasing popularity in Australia. The *Commercial Arbitration Act 2010* (NSW) (**CAA**) provides a mechanism by which an arbitrator may act as a mediator in the course of domestic arbitration proceedings.[2] However, pursuant to the CAA, the authority of an arbitrator to act as a mediator is predicated on the unanimous, written consent of the parties. Such consent must be obtained at two stages – first, before the arbitrator acts as a mediator[3] and second, should the mediation fail, when the arbitrator seeks to resume the arbitration proceedings.[4]

BACKGROUND

The plaintiff in the first instance and applicant in the appeal proceedings, Ku-ring-gai Council, was party to a construction contract with the respondent, Ichor Constructions Pty Ltd. Disputes arose between the parties under the contract and an arbitration was commenced.

On the final day of the arbitration, the arbitrator asked the parties in an "off the record" discussion whether they would consent to his putting forward a proposal for settlement. The parties agreed to the offer and signed a handwritten document outlining their consent. After the parties did not accept the arbitrator's settlement proposal, the arbitration proceedings were subsequently resumed without reference by the arbitrator or either party to the need for any consent of the parties.

Several days after the conclusion of the arbitration, the respondent's solicitors wrote to the solicitors of the applicant, indicating that the arbitrator had "acted as mediator" within the meaning of s 27D(4) of the CAA when he put forward his settlement proposal and, therefore, was required to obtain the parties' written consent before conducting subsequent arbitration proceedings. Since the respondent did not provide such consent, the arbitrator's mandate had been terminated pursuant to s 27D(6) of the CAA.

FIRST INSTANCE DECISION

The primary issues at trial were:

a. whether the arbitrator had acted as a mediator; and
b. if so, whether the arbitrator had obtained the parties' written consent, as required by s 27D(4) of the CAA, before resuming conduct of the arbitration proceedings.[5]

The applicant also sought to rely on alternative grounds of waiver (that the arbitrator had waived its right to object to the arbitrator's having resumed the arbitration) and estoppel (that the respondent was estopped from asserting the requirements of s 27D(4) were not met). Both grounds were rejected in the first instance decision.[6]

(a) Did the arbitrator "act as mediator"?

The primary judge answered this question affirmatively. In doing so, his Honour noted that the CAA contained no definition of mediation. However, employing the principle that legislation should be construed so far as possible to promote simplicity and certainty of operation, his Honour reasoned that an arbitrator acts as a mediator when he acts in a "non-arbitral capacity".[7]

In the present case, the parties had engaged in a process which they believed to be a mediation. By conducting proceedings "off the record" in a breakout room, the arbitrator had acted in a non-arbitral capacity. Accordingly, the arbitrator had acted as a mediator within the meaning of s 27D CAA.

(b) Did the arbitrator obtain the parties' written consent?

The primary judge answered this question negatively. In finding that the arbitrator had not obtained the written consent of the parties to resume arbitral proceedings, the primary judge again stressed that the Act should be construed so as to promote certainty of operation.[8] Accordingly, nothing short of written consent could satisfy the requirement of written consent.

As the arbitrator had not obtained the written consent of the parties to resume arbitral proceedings, consequently the arbitrator's mandate terminated with the mediation proceedings.

APPEAL DECISION

The primary judge's factual findings were not disputed on appeal. Rather, the primary issue for the Court of Appeal was whether the CAA precluded the Court from hearing the appeal.

In order to resolve this issue, the Court first identified the source of the Supreme Court's power to hear the trial proceedings. The applicant contended that the power arose under s 17J, which provides for court-ordered interim measures. However, the Court found that the original summons sought final relief for the purpose of resolving a controversy around the termination of the arbitration; the application did not concern interim measures. The power to award such final relief arose under s 14(2) of the CAA (which empowers the Court to decide on, *inter alia*, the termination of the mandate if an arbitrator becomes "in law…unable to perform").[9]

The Court then considered whether the primary judge's decision was "final" in the sense of "not subject to an appeal" within the meaning s 14(3) of the CAA. Employing principles of statutory construction, the Court answered this question in the affirmative.[10]

Accordingly, the decision of McDougall J was not amenable to appeal and the application for leave to appeal was dismissed as incompetent. The Court noted that, notwithstanding this, the primary judge was plainly correct in his Honour's conclusions at trial.[11]

IMPLICATIONS

In light of the increasing popularity of hybrid med-arb proceedings this litigation demonstrates that, if this course is pursued, it is imperative that parties adhere to the procedural requirements imposed by the CAA. Arbitrators must also be aware of the requirements.

Parties to domestic arbitration proceedings must be careful to ensure that they obtain the written consent of all parties whenever an arbitrator:

- proposes to act as a mediator, and
- proposes to resume arbitral proceedings after ceasing to act as a mediator.

In the latter case, this consent must be given on or after termination of the mediation proceedings. Parties will not be able to rely on any prior consent. Accordingly, as a practical consideration, parties should be careful before agreeing to mediation if they are not certain that all parties will consent to the resumption of the arbitration after the mediation has concluded. Although, practically it is difficult to see how a party could ever be certain of this given that the way the mediation is conducted will invariably affect the assessment of the arbitrator's attitude towards each party's case. Parties must keep in mind that replacing an arbitrator is not a desirable situation as it will cause delay and increase the costs of the process.

ENDNOTES

1. *Ku-ring-gai Council v Ichor Constructions Pty Ltd* [2019] NSWCA 2 (5 February 2019) per Bathurst CJ (Beazley P and Ward CJ in Eq agreeing) (**Appeal Judgment**); *Ku-ring-gai Council v Ichor Constructions Pty Ltd* [2018] NSWSC 610 (8 May 2018) (**Primary Judgment**).
2. Section 27D of the CAA provides that 'An arbitrator may act as a mediator in proceedings relating to a dispute between the parties to an arbitration agreement', subject to certain requirements.
3. Section 27D(1)(b).
4. Section 27D(4).
5. Appeal Judgment [3].
6. Primary Judgment at [81], [93].
7. Appeal Judgment at [31].
8. Appeal Judgment at [37].
9. Appeal Judgment at [65].
10. Appeal Judgment at [75].
11. Appeal Judgment at [80]–[81].

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

LEON CHUNG
PARTNER, SYDNEY

+61 2 9225 5716
Leon.Chung@hsf.com

LEGAL NOTICE

The contents of this publication, current at the date of publication set out above, are for reference purposes only. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this publication.

© Herbert Smith Freehills 2020

SUBSCRIBE TO STAY UP-TO-DATE WITH LATEST THINKING, BLOGS, EVENTS, AND MORE
Close

© HERBERT SMITH FREEHILLS LLP 2020