SUPREME COURT OF QUEENSLAND

CITATION:	*Commonwealth Development Corporation v Montague* [2000] QCA 252
PARTIES:	**COMMONWEALTH DEVELOPMENT CORPORATION** (United Kingdom) (applicant/respondent) **v** **AUSTIN JOHN MONTAGUE** (respondent/appellant)
FILE NO/S:	Appeal No 8159 of 1999 DC No 29 of 1999
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	27 June 2000
DELIVERED AT:	Brisbane
HEARING DATE:	17 April 2000
JUDGES:	Thomas JA, Ambrose and Fryberg JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made.
ORDER:	**Leave to appeal granted. Appeal dismissed. Order that the appellant pay to the respondent its costs of and incidental to the application and the appeal to be assessed.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – WHEN APPEAL LIES – whether leave to appeal required to appeal from decision of District Court granting leave to enforce an international arbitration award – decision interlocutory in nature but substantive effect of determining finally the rights of the parties ARBITRATION – THE AWARD – ENFORCING – whether award as to the costs of an international arbitration enforceable against the appellant pursuant to s 33 of the *Commercial Arbitration Act* 1990 (Qld) and s 8 of the *International Arbitration Act* 1974 (Cth) where appellant found not to have been a party to agreement giving rise to arbitrator's jurisdiction – whether the terms of reference themselves constituted an agreement to arbitrate *Commercial Arbitration Act* 1990 (Qld) s 33

International Arbitration Act 1974 (Cth) s 3, s 8, Article II of Schedule 1
International Chamber of Commerce Rules of Conciliation and Arbitration Article 13, Article 20

COUNSEL: A J Moon for the appellant
SG Durward SC for the respondent

SOLICITORS: Wilson Ryan & Grose for the appellant
Blake Dawson Waldron for the respondent

[1] **THOMAS JA**: I agree with the reasons to be published by Ambrose J.

[2] Leave to appeal is necessary in the present matter because the judgment against which the applicant wishes to appeal is in form interlocutory. It was an order granting leave to enforce a "foreign arbitration award sentence" as to costs. No objection was raised by counsel for the respondent against grant of the necessary leave to appeal. I would be disposed to grant leave, not simply on absence of objection, but also in recognition that in substance the effect of the judgment below is to determine finally the rights of the parties[1], and that a legal question of some substance is raised.

[3] On the main question, namely whether the applicant was a party to an arbitration agreement within the meaning of s 8(1) of the *International Arbitration Act* 1974 (Cth), I agree that the Terms of Reference satisfy that requirement. The appellant was a signatory to them by his counsel. They include not only claims described as "preliminary procedural issues and claims relating to jurisdiction in arbitration …. (Nos 8497/BGD and 8951/BGD) …", but also all the "substantive issues and claims" of the parties in those arbitrations. The Terms of Reference comply with the appropriate definition in article 2(1) of the convention as "an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship …" which in turn satisfies the requirements of the definition of "arbitration agreement" in s 3 of the *International Arbitration Act* 1974.

[4] In my view notwithstanding that the applicant, who chose to initiate the arbitration as claimant and to litigate these preliminary issues in that arbitration was not a party to the original master agreement under which the arbitration procedure commenced, the respondent is entitled under s 8 of the Act to enforce the award for costs that were ordered against the applicant on the determination of the preliminary issues.

[5] I agree with the orders proposed by Ambrose J.

[6] **AMBROSE J:** This is an appeal and/or application for leave to appeal against the decision of a District Court Judge granting the Respondent leave to enforce in Queensland an award with respect to costs made by an Arbitrator in New Zealand

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1 See *Ex parte Bucknell* (1936) 56 CLR 221-225; *Jarrett* (1993) 119 ALR 46, 49

in proceedings commenced by the Appellant in the International Court of Arbitration in France.

[7] It was conceded at the commencement of this application that if application for leave to appeal against the enforcement order made in the District Court were necessary then no objection would be taken by the Respondent to such leave being granted.

[8] If it be necessary therefore to grant leave to appeal to consider the merits of the appeal I would do so without determining whether leave to appeal is necessary.

[9] It is convenient to state shortly the facts which preceded the making of an interim award with respect to costs in New Zealand on 3 August 1998.

[10] It emerges from the material that on 14 December 1994 the Appellant and Oriental Ranches Limited instituted proceedings in the International Court of Arbitration against the Respondent and the Republic of Vanuatu and Bel Mol Cattle Company Limited and Bill Hawkes (as receiver of Bel Mol Cattle Company Ltd) purporting to do so upon the assertion that a number of separate agreements each executed by only some of those parties amounted to a joint venture between the parties to those agreements.

[11] A number of the defendants to the Appellant's proceedings (including the Respondent) took preliminary objections to those proceedings.

[12] On 20 June 1995 the International Court of Arbitration determined that the preliminary objections as to jurisdiction should be determined in accordance with Article 8(3) of the ICC Rules which states that:-

> "Should one of the parties raise one or more pleas concerning the existence or validity of the agreement to arbitrate and should the International Court of Arbitration be satisfied of the prima facie existence of such an agreement the Court may without prejudice to the admissibility or merits of the plea or pleas decide that the arbitration shall proceed. In such a case any decision as to the Arbitrator's jurisdiction shall be taken by the Arbitrator himself."

[13] It is unnecessary to analyse in detail the facts upon which the Arbitrator's jurisdiction depended. It suffices to say that the factual issue for which the Appellant contended to establish jurisdiction was that although he was not a party to what was described as the "master agreement" to which Oriental Ranches Limited (a corporation which the Appellant controlled) was a party, nevertheless because of the content and legal effect of other agreements to which the Appellant was a party, in effect all agreements should be treated together as a single joint venture between various parties to all agreements so that the arbitration clause in the master agreement gave him the legal right to institute arbitration proceedings in the International Court of Arbitration to seek relief in respect of agreement to which he was clearly a party which constituted a joint venture which he asserted "incorporated" the master agreement containing the arbitration clause which he had not signed.

[14] On 24 January 1996 the Appellant and Oriental Ranches Limited proposed that Mr DAR Williams QC act as sole arbitrator in the reference and that the venue of the

arbitration be Auckland in New Zealand. There were a number of applications made in the course of the arbitral proceedings but in my view it is unhelpful to analyse them in detail. It suffices to record merely the observation of the Arbitrator in his interim award –

> "It will be noted that the first claimant (i.e. the Appellant) is not a party to the master agreement. He is a party only to the management agreement and the agreement relating to the South Santo Cattle project. His absence as a party to the master agreement is one of the central jurisdictional points taken by the Defendants. Mr Hawkes was a receiver and manager of the Third Defendant, Bel-Mol and was not a party to any of the agreements."

[15] The jurisdiction of the International Court of Arbitration to entertain the arbitral proceedings instituted by the Appellant depended upon s 9 of the master agreement, which provided for submission of disputes to arbitration, being imported into all other contracts and documents identified as part of a joint venture.

[16] The issues canvassed upon arbitration of the Respondent's objection to jurisdiction were summarised by the Arbitrator in the following terms:-

> "Is there jurisdiction for Mr Montague to make the claim as he is not a party to the arbitration agreement" and "is the Appellant's (original request) invalid or irregular in whole or part" and "does the relief the Appellant claimed against Bel-Mol and Hawkes fall within the jurisdiction of the Arbitrator as herein appointed to grant."

[17] After consideration of the relevant documentary evidence, other evidence and submissions the Arbitrator concluded –

> " However, assuming admissibility and accepting the extrinsic evidence for the purpose of testing all of the claimant's (Appellant's) arguments I do not consider that the extrinsic evidence either on its own or in conjunction with a textual analysis of the six (6) contracts establishes even an arguable case for the existence of a joint venture agreement or fiduciary duties owed by the Government or CDC to the claimants (Appellant). I have come to the conclusion that these arguments are wholly untenable for the reasons which follow."

[18] The Arbitrator then set out his reasons for arriving at this conclusion.

[19] The Arbitrator finally concluded that:-

> "In summary Mr Montague is not a party to the master agreement and cannot rely on s 9 thereof to be a party to this arbitration. Therefore, the Tribunal has no jurisdiction to determine the claims he makes in this arbitration in which the Tribunal's jurisdiction is founded solely on s 9 of the master agreement."

[20] The Appellant does not seek to challenge the principal determination of the Arbitrator on the question of jurisdiction. At the conclusion of the interim award however, the Arbitrator observed –

> "Under Article 20 the Arbitrator's award shall in addition to dealing with the merits of the case fix the cost of the arbitration and decide which of the parties shall bear the costs and in what proportion the costs shall be borne by the parties. The situation reached in this case is somewhat unusual because while

this is an interim award only it is a final determination so far as concerns CDC, Bel-Mol and Mr Hawkes

…

If any defendant wishes to make submissions or applications on costs they may do so in writing within one month of the date of this award."

[21] Article 13 of the ICC Rules of Conciliation and Arbitration requires that the Arbitrator draw up the terms of reference based upon documents and submissions of the parties to the arbitration which must then be signed by the parties to the arbitration and the Arbitrator. Under Article 20-1 of those Rules it is provided –

"The Arbitrator's award shall in addition to dealing with the merits of the case fix the cost of the arbitration and decide which of the parties shall bear the costs or in what proportion the cost shall be borne by the parties."

[22] On 13 September 1996, prior to embarking upon arbitration of the preliminary issue of jurisdiction and arbitrability on 3 November 1997, all parties involved (including the Appellant) signed terms of reference.

[23] Clause 15.2 of those terms recorded –

"At its session of 20 June 1995 the Court satisfied itself as to the existence of a prima facie agreement to arbitrate between the parties. The Arbitrator is to decide the issue of whether he has jurisdiction in this matter and over which parties and in respect of which issues pursuant to Article 8(3) of ICC Rules."

[24] Clause 15.47 records –

"What decision should be taken with regard to the cost of arbitration?"

[25] That document concluded in these terms –

"These terms of reference pursuant to Article 13 of the ICC Rules of Arbitration applicable to these arbitrations were drawn up in nine (9) copies and were agreed and were signed in Auckland, New Zealand on 13 September 1996."

[26] The recognition of foreign awards for the purpose of their enforcement is dealt with in s 8 of the *International Arbitration Act* 1974 (Cth). Section 8 provides (inter alia) –

(1) Subject to this part a foreign award is binding by virtue of this Act for all purposes on the parties to the arbitration agreement in pursuance of which it was made.

(2) Subject to this part a foreign award may be enforced in a Court of a State or Territory as if the award had been made in that State or Territory in accordance with the law of that State or Territory.

[27] Under s 3 "arbitration agreement" is defined to mean unless the contrary intention appears –

"An agreement in writing of the kind referred to in sub-article 1 of Article 2 of the Convention."

[28] Sub-article 1 of Article 2 of the Convention provides –

> (1) Each contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship whether contractual or not concerning a subject matter capable of settlement by arbitration.

[29] Under s 33 of the *Commercial Arbitration Act* 1990 (Qld) an award made under an arbitration agreement may by leave of the Court be enforced in the same manner as a judgment of the Court.

[30] The short point argued by the Appellant is that once the Arbitrator determined that he had no jurisdiction to entertain the proceedings instituted by the Appellant because he was not a party to a written agreement containing an arbitration clause, from that time he lacked power to make any order with respect to the cost of the arbitration proceedings which he initiated in the International Court of Arbitration.

[31] Acceptance of this contention in my view would lead to the very unjust result that having instituted arbitral proceedings in the International Court of Arbitration and having failed to establish that the Arbitrator had jurisdiction to entertain those proceedings upon the preliminary objection taken by the defendants, the Appellant then became entitled to oppose the enforcement in Queensland of the award for costs made by the Arbitrator – which in fact had been opposed by the Appellant in New Zealand – on the ground that there had been no "agreement in writing" between the Appellant and the defendants (including the Respondent) to his claim for arbitration which constituted an "arbitration agreement" within the meaning of the *International Arbitration Act* 1974. There would only have been such an arbitration agreement, so his argument runs, had the Arbitrator ruled in favour of the Appellant and against the preliminary objections of the defendants.

[32] In my view, the short answer to this rather unmeritorious contention is that the terms of reference signed by Counsel for the Appellant and by Counsel for the Respondent and the other defendants and indeed by the Arbitrator himself on 13 September 1996 in clear and explicit terms require the Arbitrator to determine "what decision should be taken with regard to the cost of arbitration".

[33] In my view, the terms of reference, signed by or on behalf of all parties to it, come directly within sub-article 1 of Article 2 of the Convention as "an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship …"

[34] There was clearly an agreement between the Appellant and the defendants to the arbitral proceedings which he commenced in the International Court of Arbitration that the preliminary jurisdictional point raised by the defendants should be determined in the arbitration and the Appellant clearly agreed in writing that the Arbitrator should make a decision with respect to the cost of the arbitration on this issue.

[35] The fact that having regard to the determination of the preliminary jurisdictional point there was no determination of the arbitral proceedings on the merits can have

no relevance to the ability of the Respondent pursuant to the *International Arbitration Act* 1974 to enforce the interim award made by the Arbitrator with respect to the costs of the determination of the preliminary point to which the Appellant agreed in writing signed by his Counsel on 13 September 1996.

[36] I would if necessary grant leave to appeal. I would dismiss the appeal. I would order that the Appellant pay to the Respondent its assessed costs of and incidental to the application and appeal.

[37] **FRYBERG J:** In case leave to appeal is necessary in this matter, it should be granted for the reasons expressed by Thomas JA and Ambrose J.

[38] The circumstances giving rise to the appeal have been set out by Ambrose J and I shall not repeat them. Under s 8 (2) of the *International Arbitration Act* 1974 (Cth), the respondent is entitled to enforce "a foreign award" in the District Court. That term is defined to mean, so far as relevant, "an arbitral award made, in pursuance of an arbitration agreement, in a country other than Australia . . .". "Arbitration agreement" means an agreement in writing of the kind referred to in Sub-Article 1 of Article II of the Convention, a provision set out in the reasons for judgment of Ambrose J.

[39] The respondent argued that the terms of reference constitute such an agreement. The appellant argued that they were only created in the course of the arbitration, establishing some rules and procedures for the particular arbitration and the positions of the various parties. He argued that any agreement to arbitrate had to be found in the so-called "master agreement", not in an ancillary document. He accepted that in some cases there might be an agreement to arbitrate made "within the arbitration", but submitted that this was not such a case.

[40] Article 13 of the rules of arbitration of the International Chamber of Commerce, whose jurisdiction the appellant invoked, required the arbitrator to draw up terms of reference and required the arbitrator and the parties to sign the terms of reference. It contained no requirement that the terms of reference be formulated as an agreement between the parties. It is therefore possible to imagine a case where a party signs terms of reference not as indicating an agreement to anything, but simply in compliance with the rules and in furtherance of the arbitration. However that is not this case. Here, the terms of reference recorded, immediately above the signature of the appellant's solicitor, that they "were agreed and signed in Auckland, New Zealand on the 13th day of September 1996." Doubtless this was the reason for the appellant's concession in the course of argument that the terms constituted an agreement. By them, the parties agreed that the arbitrator was to resolve all issues of fact and law that should arise, including the particular issues listed in cl 15 of the terms. Those particular issues included, "What decision should be taken with regard to the costs of arbitration?" (cl 15.21 and cl 15.47).

[41] For these reasons, the agreement made by the terms of reference was in my judgment one under which the parties undertook to submit a difference which might arise between them in respect of a defined legal relationship (namely, participants in an arbitration) to arbitration. It therefore fell within the definition of "arbitration agreement" in the Act.

[42] Leave to appeal should be granted, but the appeal should be dismissed. The appellant should pay the respondent its costs of and incidental to the application and the appeal to be assessed.