APC Logistics Pty Ltd v CJ Nutracon Pty Ltd [2007] FCA 136 (16 February 2007)

Last Updated: 19 February 2007

FEDERAL COURT OF AUSTRALIA

APC Logistics Pty Ltd v CJ Nutracon Pty Ltd [2007] FCA 136

AGREEMENT TO ARBITRATE – whether or not agreement to arbitrate reached between parties by the exchange of e-mails – whether written agreement

International Arbitration Act 1947 (Cth) s 7(2)

Comandate Marine Corp v Pan Australia Shipping Pty Ltd [2006] FCAFC 192 Considered
Pan Australian Shipping Pty Ltd v The Ship Comandate (No 2) [2006] FCA 1112 Cited

APC LOGISTICS PTY LTD (ABN 52 006 246 260) AND PHOENIX INTERNATIONAL FREIGHT SERVICES LIMITED (A FOREIGN CORPORATION) v CJ NUTRACON PTY LTD (ABN 25 118 134 759) AND MULTISOURCE NETWORK CORPORATION
VID 978 OF 2006

KIEFEL J
16 FEBRUARY 2007
BRISBANE

IN THE FEDERAL COURT OF AUSTRALIA

QUEENSLAND DISTRICT REGISTRY

VID 978 OF 2006

BETWEEN:

APC LOGISTICS PTY LTD (ABN 52 006 246 260)
First Applicant

PHOENIX INTERNATIONAL FREIGHT SERVICES LIMITED (A FOREIGN CORPORATION)
Second Applicant
AND:

CJ NUTRACON PTY LTD (ABN 25 118 134 759)
First Respondent

MULTISOURCE NETWORK CORPORATION
Second Respondent

JUDGE:

KIEFEL J
DATE OF ORDER:

16 FEBRUARY 2007
WHERE MADE:

BRISBANE

THE COURT ORDERS THAT:

1. The applications by the applicants and by the second respondent for a stay of the proceedings and referral of the parties to arbitration are dismissed.
2. The applicants and the second respondent pay the first respondent's costs on the applications.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.
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APC LOGISTICS PTY LTD (ABN 52 006 246 260)
First Applicant

PHOENIX INTERNATIONAL FREIGHT SERVICES LIMITED (A FOREIGN CORPORATION)
Second Applicant
AND:

CJ NUTRACON PTY LTD (ABN 25 118 134 759)

First Respondent

MULTISOURCE NETWORK CORPORATION
Second Respondent

JUDGE:

KIEFEL J
DATE:

16 FEBRUARY 2007
PLACE:

BRISBANE

REASONS FOR JUDGMENT

1 The applicants and the second respondent apply to the court for orders staying these proceedings until the parties to the proceedings, or alternatively the respondents, conduct an arbitration in respect of the issues between them, prior to 15 March 2007. At issue on their applications is whether an agreement for arbitration was concluded as between all of the parties or as between the respondents. A further issue is raised by the first respondent as to whether electronic mails ('e-mails') passing between the parties may constitute a 'written agreement' within the meaning of the International Arbitration Act 1974 (Cth) ('the Act') and the Convention and Model Law to which it refers. It is convenient to refer to this requirement at the outset.

2 Section 7(2) of the Act provides for a mandatory stay of legal proceedings where there is an arbitration clause applying to the resolution of the dispute in question. The operation of the Act and its relationship to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention of 1958) and the 1989 amendments to the Act giving effect to the Model Law on International Commercial Arbitration were explained by Allsop J in Comandate Marine Corp v Pan Australia Shipping Pty Ltd [2006] FCAFC 192, at [37] and following. For present purposes it is sufficient to observe that Article II of the Convention requires a court in Australia to refer the parties to an arbitration when they have made an agreement to that end. Given that the place of the arbitration is here said to be the United States of America, only certain Articles of the Model Law apply. Relevantly Article 7, which does apply, provides the definition of an arbitration agreement and the form it takes. It is in these terms:

'(1) 'Arbitration agreement' is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of tele-communication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The

reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.'

3 Article 8 also provides that the court should refer the parties to an arbitration agreement to arbitration and stay the proceedings.

4 The first respondent submitted that the agreement for arbitration must itself be in writing and that a strict view should be taken of that requirement. Reliance was placed in that regard upon the primary judge's decision in Pan Australian Shipping Pty Ltd v The Ship Comandate (No 2) [2006] FCA 1112. That part of the primary decision was however held to be erroneous by the Full Court. It was explained by Allsop J (in the appeal decision at [148]-[151]) that Article II requires bilateral recognition of an arbitration agreement. Relevantly to this matter the Court held that it does not require that the contract be formed by an exchange of letters. Conduct might suffice. What is required is that the terms of the agreement and assent to those terms are in exchanged documents.

5 A distinction may therefore be seen to be drawn between the requirements of the common law as to agreements coming into effect and the requirements of the provisions for enforcement, internationally, of agreements so concluded. The latter require recognition of the agreement. It may be however that in some cases the exchange of correspondence may be relied upon both for the conclusion of a binding agreement having been reached by the parties and their overt acceptance of that conclusion. This is such a case.

6 These proceedings concern the transportation of machinery and equipment from the United States of America to Queensland. The applicants claim their charges as freight forwarders from both respondents, although it would seem the second respondent is liable to pay them. The second respondent has a claim against the first respondent arising out of their contractual arrangements relating to the carriage of the goods.

7 The starting point with respect to any alleged agreement to arbitrate is the meeting held on 12 September 2006 in Los Angeles between all the parties. The United States lawyer for the applicants, Mr Kaplan, asserts that although the dispute was not settled that day, it was orally agreed that the parties would undertake mediation and, if it was not successful, arbitration. Both were to be conducted in the United States. The mediator and arbitration was nominated, a retired judge, Judge Wisot. It is not clear if Mr Kaplan is contending that the appointment of Judge Wisot was agreed to on 12 September. No other party does and the e-mail correspondence shows the topic of the identity of the arbitrator arising later. Mr Kaplan's affidavit is unhelpful in other respects, because it states conclusions without facts and details, including dates. Mr Kaplan, for example, asserts that a problem arose, concerning Judge Wisot's cancellation fee if the arbitration proceeded, but that this was somehow overcome. It is not said when this arose, how it was resolved and the correspondence does not show that it was. There are other general assertions which do not appear to be supported by the correspondence between the parties, in particular those which suggest that, following the mediation held on 5 and 6 December 2006, the parties were finalising the details of their agreement to arbitrate and talking of an extended time-frame for undertaking it.

8 The version of events given by the second respondent's United States lawyer Mr Roberts, is not the same as that of the applicants' lawyer. He does not suggest that there was anything more than an agreement 'in principle' reached on 12 September 2006 for mediation, and arbitration if necessary. Nor does he suggest

that the parties followed up on some previous agreement for arbitration at the conclusion of the mediation on 6 December. He says that at that time he asked the Australian lawyer for the first respondent to enter into an arbitration agreement before he left Los Angeles but he was not prepared to do so. Mr Roberts concludes by suggesting that the parties ought to be bound by the spirit of their agreement or understanding, whether 'in principle' or otherwise.

9 The first respondent's Australian lawyer, Mr Kinneally, responds in some detail to the assertions by Mr Kaplan. He accepts that there were some discussions on 12 September 2006 as to the prospect of mediation and arbitration, but denies that agreement was reached. He recalls a long discussion as to possible venues and possible mediators and arbitrators, with none selected. The name of Judge Wisot, who was later appointed as mediator, was not mentioned until later in following correspondence. The parties necessary to the arbitration were not resolved, the issues between the applicants and the second respondent and as between the respondents being different.

10 Mr Kinneally says that following an agreement later reached with the applicants, which is recorded in an Interlocutory Settlement Deed ('the Deed') dated 22 September 2006, the first respondent made many attempts to persuade the second respondent to take part in alternative dispute resolution. The second respondent was not prepared to enter into any binding agreement unless the 'neutral' person was directly agreed upon. At a meeting conducted by telephone between the lawyers for the parties, on 26 October 2006, it was apparent that the applicants wanted to put arbitration in place, in order to put pressure upon the parties; the second respondent thought it should be abandoned and the parties focus upon the mediation; and the first respondent was generally in agreement with the second respondent. In the event the parties undertook mediation pursuant to a standard agreement with an alternative dispute resolution provider (JAMS). As to the discussions at, or following, the mediation on 6 December, he points out that neither the applicants nor their lawyer was present. He attempted to speak to the applicants' lawyer by telephone on 5 December 2006. He was told by the mediator that the applicants' lawyer had contacted him and had suggested, for the first time, that the matter proceed to arbitration. The conversation between the respondents' lawyers at the conclusion of the mediation did not assume that there had been any agreement for arbitration. The question raised by Mr Roberts was whether it was appropriate to discuss it further.

11 The arguments put for the applicants and the second respondent shifted somewhat from the case disclosed by their United States' lawyers. For the applicants it was submitted that the relevant agreement was that reflected in the Deed. The difficulty, that the second respondent was not a party to it, was sought to be overcome by each of the parties having 'ratified' the agreement in subsequent correspondence. The applicants relied in this regard upon the exchanges occurring in the period 12-14 December 2006, leading up to the making of consent orders adjourning the directions hearing which was to be held on 15 December 2006. The applicants say that it may be seen that the common purpose of the adjournment was to permit arbitration to take place before the next directions hearing, due on 9 February 2006.

12 The second respondent, in argument, contended that the terms of the draft arbitration agreements, together with e-mails relating to them, and exchanged between the respondents from and after 22 September 2006, show that they were basically of the same mind upon the terms of an arbitration agreement. It is submitted that their subsequent conduct is consistent with agreement having been reached.

13 It seems plain enough that no concluded agreement was reached by the parties, or as between the respondents, on 12 September 2006. The correspondence which follows provides no support for such a

conclusion. There may have been something approaching an agreement 'in principle' between the parties, at the conclusion of their negotiations, that mediation should take place with an arbitration to follow if necessary. The first respondent's Australian lawyer appears to have thought so when he e-mailed his colleague the following day. At this point the applicants and the first respondent were co-operating, with the objective of persuading the second respondent to commit to such a course. It is in this connexion that the Deed dated 22 September 2006, signed by the applicants and the first respondent on 27 and 28 September 2006, came into existence. Clause 8 of that Deed, which is relied upon by the applicants as the relevant agreement to arbitrate, is in these terms:

'CJ will use commercially reasonable efforts to mediate and if mediation is not successful, arbitrate its claim against MS expeditiously at a location to be agreed between CJ and MS with the mediation or arbitration being held no later than 15 December 2006 unless otherwise agreed in writing by Phoenix and APC. For that purpose CJ will use its commercially reasonable endeavours to procure execution by MS of the Arbitration Agreement exhibited as Attachment 4 hereto, within 14 days of the date of execution of this Deed by the last party to sign'.

('CJ' refers to the first respondent and 'MS' to the second respondent). It went on to say that if the second respondent does not agree, the first respondent would use its 'commercially reasonable' endeavours to prosecute a cross-claim against it as expeditiously as the proceedings allow.

14 On 22 September 2006 the first respondent's lawyer wrote to the second respondent's lawyer enclosing the draft arbitration agreement, which had been annexed to the Deed. He had apparently obtained his client's approval to its terms. The agreement was said to note matters of agreement and to identify issues to be addressed. It was recognised that there may be other issues which might be raised. It was observed that, so far as arbitrators were concerned, the first respondent's lawyers viewed the matters between the respondents as essentially contractual while those involving the applicants involved shipping law and practice.

15 The second respondent did not respond promptly. After the first respondent again sought the second respondent's lawyer's instructions as to the draft, he replied on 3 October 2006 attaching a revised arbitration agreement which had been executed by him and the second respondent. In relation to this new draft it was said that:

'The changes in our view more closely reflect what we agreed to in Los Angeles, and leave the essential framework for resolution in place.'

Upon receipt of your fully executed counterpart, we will instruct counsel to appear in the Australian proceedings and furnish you with a list of proposed arbitrators for consideration.'

16 The second respondent has prepared a table of the essential provisions of each of the draft agreements in order to show that the respondents were proposing much the same terms. It appears from subsequent correspondence that the place for arbitration was not in dispute. The second respondent submits that the essential subject matter of the arbitration was the same and the method of appointment of the arbitrator was agreed. It would not however appear that the first respondent's lawyer was at this point of that view. On 5 October 2006 he wrote to the second respondent's lawyers advising:

'Unfortunately you have made a number of changes to agreement which I would say are more inconsistent with discussions in LA than mine which I viewed as logical mechanics. Having said that, subject to Andrew's agreement, CJ are prepared to be flexible on many of the items. One thing that concerns us is not having a mechanism in place as to the appointment of a arbitrator in the absence of agreement. There is no point in having an agreement unless we know it will go ahead. Now that we know LA is the place. I will seek CJ attorneys in LA to act but in the meantime could you suggest arbitrators you believe would be appropriate.'

('Andrew' I take to be a reference to the United States lawyer for the applicant). The e-mail concluded with a request for a discussion. The second respondent's lawyer wrote the following day advising that all he had done was to remove 'excess verbiage to clarify the items in dispute. The major issue is, and has always been, whether the MS-CJ contract is cost plus or cost inclusive. As we both acknowledged in LA, everything else is just 'details'.' He went on to discuss who might handle the 'mediation/arbitration'.

17 Communications followed concerning nominees for the position of arbitrator and the considerable costs involved. On 23 October 2006 the first respondent's lawyer wrote to the second respondent's lawyer recommending five persons as arbitrators. The second respondent shortly afterwards nominated Judge Wisot and said that he would contact the entity which provided the arbitration services and check upon his availability. In what follows the respondents appear to be talking of Judge Wisot conducting both the mediation and the arbitration, if the latter were also necessary. Although the communications on 23 October continue to bare the reference to the Judge by later that evening it appears that other names were being considered, inferentially because of concerns about the rates charged by Judge Wisot and his cancellation fee in the event that an arbitration did not proceed.

18 On 25 October 2006 the lawyer for the second respondent wrote to the first respondent's and the applicants' lawyers, discussing the rates charged by the other candidates and their qualifications and suggesting one of them (Judge Haberfield)to be the best. He then went on:

'My next suggestion may come as a bit of a surprise, but I would like you to consider it before our next conference call. We have been wasting a great deal of time and expense to finalize the details of the arbitration agreements. Your client wants more detail on the issues and we want less. That's a bit like two chefs fighting over a restaurant menu, where one wants a detailed description of each entrée and its ingredients, and one wants only a general description of the dish. The meal is the same, the price is the same, and the customer can ask if anything is unclear.

We all agree that this case should settle, and I don't believe anyone wants to litigate. I think we should hire the very best mediator we can find, either Judge Wisot or Judge Haberfield, abandon the arbitration, and stay with mediation until the case is settled. The resumes of the candidates all indicate that disputes worth many times what is at stake here … have been settled …'.

19 The applicants' lawyer replied shortly afterwards to the effect that the proposal appeared to be sensible but added the qualification '… however, remember that there exists an agreement to arbitrate on or before December 15, 2006'. This is the date referred to in the Deed, between the applicants and the first respondent, but not a date which appears to have been discussed in the correspondence. The applicant's lawyer suggested a revised scheduling for mediation and an arbitration if necessary. He went on to say that he would obtain instructions about postponing any arbitration if that was 'the only obstacle to getting all

Agreements signed and MS appearing in the Australian proceedings'.

20 The first respondent's lawyer responded later that day to the second respondent's suggestion. In his e-mail to the second respondent and the applicants he said that he and his client agreed:

'… with the latest proposal re splitting Mediation and Arbitration and believe with the right mediator the matters can be resolved without arbitration …'.

21 He went on to propose the timing of mediation and arbitration – the former in November or December in Brisbane and the latter if necessary in Los Angeles in December or January. He enclosed a revised Arbitration agreement 'which I will change to reflect about arrangement after our discussion'. He advised that once there was 'broad commercial agreement' he would redraft it and send it to his principals. He enquired of the second respondent whether it had lodged an appearance to these proceedings. By a later e-mail that day the second respondent sought a booking for a mediation for 5 and 6 December 2006. The parties did so pursuant to a basic standard agreement with the service provider.

22 The communications relied upon by the second respondent end at this point. Those relied upon by the applicants commence after the mediation and on 12 December 2006. By this time the second respondent had filed an appearance to these proceedings. It had done so on 10 November 2006, prior to the mediation. The topics of a further mediation and adjournment of the directions hearing were discussed. On 14 December 2006 the second respondent's Australian lawyer advised, by e-mail, that it did not wish to further mediate, but observed that there had previously been discussions between the parties 'as to the matter proceeding to arbitration and that each of your clients might be amenable to arbitration'. They sought the agreement of the parties to adjourn the proceedings on the basis 'that the parties will continue to engage in discussions with a view to reaching agreement as to the basis on which the matters in dispute might proceed to arbitration in the near future'. In a following e-mail the same day the lawyer noted that they were unaware of the position of the first respondent in relation to the adjournment of the matter 'on the basis proposed in the writer's earlier e-mail'. A draft consent order was enclosed, which understandably, did not contain the reference to the purpose of the adjournment. The first respondents' solicitors replied only that their client consented to the matter being adjourned and said nothing as to balance of the second respondent's enquiry.

23 The first respondent subsequently denied that it was bound to arbitrate and contended that the terms of the Deed did not continue in force. The second respondents have served a formal demand for arbitration.

24 The position of the applicants as a party to any agreement to arbitrate and the status of the Deed as such an agreement may be dealt with shortly. The Deed entered into in September 2006 was not a tripartite agreement; it was not even an agreement to arbitrate as between the applicants and the first respondent. The applicants reliance upon it is somewhat surprising. If it was at any later time used as the point of reference for discussions about mediation and arbitration that is not apparent from the evidence put before the Court. It is true that the applicants, in the course of following discussions, do make reference to matters contained within it, such as the date by which the two forms of alternative dispute resolution are to take place, 15 December 2006. That is to say, on the few occasions where they actively take part in the discussions. The fact that they were provided with copies of much of the correspondence between those parties does not give them the status of parties to any agreement to arbitrate which may have been reached by the respondents, as the applicants suggested in argument.

25 The dispute which was seen at the outset as necessary to be resolved, before the applicants' claim could be met and these proceedings concluded, was as between the respondents. The Deed recognised this. It contained an undertaking by the first respondent to endeavour to persuade the second respondent to undertake alternative dispute resolution with the first respondent. The applicants and the first respondent at this point saw their interests as aligned. It was the second respondent which was not committed to this course at this point. That reluctance persisted.

26 The course that the respondents discussed after 22 September, when the first draft of an agreement to arbitrate was sent by the first respondent to the second respondent, combined, and the first respondent accepted, mediation and arbitration. At the point when the second respondent's lawyers recommended the two methods of dispute resolution be split, and the focus put on an outcome from mediation, the second respondent had not committed to the terms of an agreement to arbitrate. It may be that the respondents were not far apart in their requirements as to the terms of such an agreement. They had effectively reached a consensus about venue. The selection of an arbitrator suitable to the second respondent, which it appears to have insisted upon, might have been resolved in the exchanges which took place between 23 and 25 October 2006. Whether there was consensus about the identification or description of the issues is not so clear. It is not apparent from the exchanges what it was that concerned each of the respondents in this regard. It is not neither possible nor necessary to resolve this issue, for what is absent, critically, is anything amounting to a confirmation or acceptance by the parties that they were in agreement on all terms and consider themselves to be bound to perform it. A review of the correspondence from 3 October 2006, concerning the draft arbitration agreement, might suggest that the parties were speaking about the same matters but sought to express it differently. The point is that they were not prepared to commit at that point, whatever be the reason. Moreover it is apparent from the discussions about the drafts that a written agreement was envisaged, one which was to be signed. The second respondent in particular can be seen to have proceeded upon this basis. That formality was understood to be required may be seen from the applicants' communication on 25 October 2006. The fact that no binding agreement had been reached is confirmed by the approach taken by the second respondent's lawyer both following mediation and at the point of the adjournment. It is apparent that further discussions were considered to be necessary.

27 There was no agreement to arbitrate reached between any of the parties to these proceedings and therefore nothing to enforce. The applications will be dismissed. The applicant and the second respondent should pay the first respondent's costs on both applications. I will speak to the parties concerning further directions in the matter.

I certify that the preceding twenty-seven (27) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Kiefel.

Associate:

Dated: 16 February 2006

Solicitor for the Applicants:

FLA Partners

Counsel for the First Respondent:

Mr D Atkinson

Solicitor for the First Respondent:

Kinneally Miley

Solicitor for the Second Respondent:

Ebsworth & Ebsworth

Date of Hearing:

9 February 2007

Date of Judgment:

16 February 2007