[2008] WASCA 110

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA
TITLE OF COURT	**:**	THE COURT OF APPEAL (WA)
CITATION	**:**	PAHARPUR COOLING TOWERS LTD -v- PARAMOUNT (WA) LTD [2008] WASCA 110
CORAM	**:**	STEYTLER P NEWNES AJA
HEARD	**:**	8 APRIL 2008
DELIVERED	**:**	13 MAY 2008
FILE NO/S	**:**	CACV 139 of 2007
BETWEEN	**:**	PAHARPUR COOLING TOWERS LTD Appellant AND PARAMOUNT (WA) LTD Respondent

ON APPEAL FROM:

Jurisdiction	**:**	SUPREME COURT OF WESTERN AUSTRALIA
Coram	**:**	ACTING MASTER CHAPMAN
Citation	**:**	PARHARPUR COOLING TOWERS LTD -v- PARAMOUNT (WA) LTD [2007] WASC 234
File No	**:**	CIV 1549 of 2007

Catchwords:

Practice and procedure - Contract for supply of equipment - Parties agreed to refer disputes between them to arbitration - Bill of exchange to secure purchase price drawn by one party to contract and accepted by other party to contract and a third party - Claim by drawer against both acceptors - Whether dispute as to liability of acceptors within arbitration agreement

Legislation:

Commercial Arbitration Act 1985 (WA), s 53(1)
International Arbitration Act 1974 (Cth), s 7

Result:

Appeal allowed
Order for stay of action and referral of dispute to arbitration set aside

Category: B

Representation:

Counsel:

Appellant	:	Mr J C Curthoys
Respondent	:	Mr M N Solomon

Solicitors:

Appellant	:	Slee Anderson & Pidgeon
Respondent	:	Murcia Pestell Hillard

Case(s) referred to in judgment(s):

ACD Tridon Inc v Tridon Australia Pty Ltd [2002] NSWSC 896
Ashville Investments Ltd v Elmer Contractors Ltd [1988] 3 WLR 867
Comandate Marine Corp v Pan Australia Shipping Pty Ltd (2006) 157 FCR 45
Fiona Trust & Holding Corporation v Privalov [2007] UKHL 40

Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd (1996) 39 NSWLR 160

Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd [1993] QB 701

IBM Australia Ltd v National Distribution Services Pty Ltd (1991) 22 NSWLR 466

Recyclers of Australia Pty Ltd v Hettinga Equipment Inc [2000] FCA 547

Seeley International Pty Ltd v Electra Air Conditioning BV [2008] FCA 29

Walter Rau Neusser Oel und Fett AG v Cross Pacific Trading Ltd [2005] FCA 1102

1 **JUDGMENT OF THE COURT**: This is an appeal against a decision of Acting Master Chapman by which he ordered that proceedings by the appellant (Paharpur) against the respondent (Paramount) in this court (the action) be stayed and the determination of the matters in issue be referred to arbitration, pursuant to s 7 of the *International Arbitration Act 1974* (Cth).

The facts

2 It is by no means easy to piece together from the various affidavits which were included in the appeal papers the material events which led to the application to the acting master. But doing the best we can, it appears that they were as follows.

3 On or about 23 June 2003, Paharpur and Paramount entered into a contract by which Paharpur agreed to design, supply and supervise the installation of two cooling towers for an ammonia plant being constructed by Paramount for Burrup Fertilisers Pty Ltd (BFPL) in Karratha, in the north of Western Australia.

4 The contract price was an amount of $8,074,770, payable by Paramount in a number of specified instalments so that all but 5% of it was to be paid within 30 days of Paharpur shipping the equipment from India, on the provision of a bill of lading. It was expected that Paharpur would ship the equipment from India in the middle of 2004.

5 Clause 22 of the contract provides that when any dispute arises between the parties any party may give to the other party a notice in writing that a dispute exists. Clause 22 then sets out a process by which the parties are to endeavour to resolve the dispute. If they are unable to do so, Paramount (as Principal) at its sole discretion:

> [S]hall determine whether the parties resolve the dispute by litigation within the jurisdiction of the courts of Western Australia or arbitration under the Commercial Arbitration Act. [Paramount] shall notify [Paharpur], by notice in writing, of its decision to refer the dispute to litigation or arbitration within 28 days of either [Paramount] or [Paharpur] electing that the dispute be determined by either litigation or arbitration.

6 In cl 2 of the contract, 'Dispute' is defined as follows:

> '**Dispute**' means a dispute or difference between the parties as to the construction of the Contract or as to any matter or thing of whatsoever nature arising, whether antecedent to the Contract and relating to its formation or arising under or in connection with the Contract, including any claim at common law, in tort, under statute or for restitution based on

> unjust enrichment or for rectification or frustration or a dispute concerning a direction given and/or acts or failing to act by the Engineer or the Engineer's Representative or interference by the Principal or the Principal's Representative.

7 Although 'dispute' (rather than 'Dispute') is used in cl 22, we do not think there can be any doubt that what is referred to in cl 22 is intended to be a 'Dispute' as defined in cl 2.

8 In June 2004, Paramount and Paharpur agreed to amend the terms of payment. It was agreed that Paramount would pay the balance of the contract price then owing, less the sum of $4,000,000, on clearance of the equipment for dispatch from India and would pay the sum of $4,000,000 on a date six months from the date upon which Paharpur shipped the last of the equipment from India. Interest was to be paid by Paramount on the outstanding sum at the rate of 4.5%.

9 Paramount also agreed to provide a bill of exchange, accepted by Paramount and BFPL, in the sum of $4,000,000 (together with interest) payable to Paharpur 180 days from the date of the shipment of the last of the equipment. Paramount further agreed to procure from 'the Burrup Trust' a guarantee of Paramount's obligations under the contract. That guarantee was subsequently provided by Burrup Holdings Pty Ltd and Pankaj Oswal, as trustees of the Burrup Trust. Where the Burrup Trust fitted into the picture is not clear.

10 Paharpur says that, on 25 February 2005, it shipped the last of the equipment to Paramount and, accordingly, the sum of $4,000,000, together with interest of $167,847, was payable on 25 August 2005.

11 According to the evidence given on behalf of Paharpur, on 16 June 2005, Paharpur forwarded to Paramount and BFPL, for acceptance by them, a bill of exchange in the sum of $4,000,000 plus interest of $167,847. The total sum was expressed in the bill of exchange to be payable 180 days from 25 February 2005, that is, on 25 August 2005.

12 In fact, it appears from the copy of the executed bill of exchange in evidence that it was expressed to be drawn only on Paramount. It does contain provision for execution by Paramount as being 'accepted' and by BFPL as 'co-accepted' but the evidence does not explain whether those provisions were on the copy of the bill of exchange forwarded by Paharpur or were subsequently added by Paramount or BFPL.

13 What happened after the bill of exchange was forwarded by Paharpur is not clear from the affidavits, but on 21 June 2005, Mr Rambal, the deputy managing director of BFPL, sent to Paharpur an email which (relevantly) was in the following terms:

> As per my discussion with Mr Swraup BOE will be amended duly signed from Paramount but regarding payment no payment will be released until all technical issues will be resolve. [*sic*]

14 On 20 July 2005, Mr Ambalavaner, a director and the general manager of Paramount, wrote to Paharpur in the following terms:

> This letter is to confirm that Vinojit Ambalavaner of Paramount (WA) Ltd is signing the bill of exchange on the 19 July 2005.
>
> The signing of bill of exchange does not waive a right of Paramount (WA) Ltd to recover from Paharpur Cooling Towers Limited any amount wrt [*sic*] late delivery and defect rectification in accordance with the contract.

15 When the bill of exchange, endorsed as accepted by Paramount and as 'co-accepted' by BFPL, was returned to Paharpur, it had been amended by changing the date from which the 180-day period ran from 25 February 2005 to 16 July 2005. The effect of the amendment, therefore, was to extend the date upon which the bill of exchange fell due for payment from 25 August 2005 to 12 January 2006. It appears that Paharpur accepted the amendment.

16 Payment was not made on 12 January 2006 and it has not been made since.

17 Paharpur subsequently commenced the action against Paramount, BFPL, Burrup Holdings Pty Ltd and Pankaj Oswal, the latter two parties being sued in their capacity as trustees of the Burrup Trust. In the action, Paharpur claims against Paramount in the sum of $4,667,501, said to be due and payable under the contract; against Burrup Holdings Pty Ltd and Pankaj Oswal in the same amount, said to be due and payable under the guarantee; and against Paramount and BFPL in the sum of $4,167,847 on the bill of exchange.

18 It seems that Paramount has not filed a defence or counterclaim in the action but it says that it has various claims against Paharpur for, among other things, the allegedly defective design and late delivery of the equipment, non-delivery of parts of the equipment and defects in the equipment. The amount of those claims is said to be some $5.7 million.

19 After the action was commenced, Paramount served on Paharpur a notice referring to arbitration, under cl 22 of the contract, all of the matters in issue between them.

20 Paramount then applied to the court for an order that the action, so far as it related to Paramount, be stayed pursuant to s 7 of the *International Arbitration Act*, or alternatively, under s 53(1) of the *Commercial Arbitration Act 1985* (WA), or in the inherent jurisdiction of the court, pending the determination of the relevant issues by arbitration under cl 22 of the contract.

21 That application came on for hearing before the learned acting master on 5 September 2007. On the hearing of the application, Paharpur accepted that its claim against Paramount under the contract should go to arbitration, but contended that its claim against Paramount in respect of the bill of exchange should not. The learned acting master concluded that cl 22 of the contract was sufficiently wide to encompass the claim in respect of the bill of exchange. He said that the bill of exchange 'was born out of the contract and the issues in dispute under the contract have a clear connection with the payment under the bill of exchange'. The learned acting master rejected Paharpur's contention that cl 22 of the contract excluded the operation of s 7 of the *International Arbitration Act*. He ordered that the action be stayed in its entirety.

22 We should say that the precise nature of the dispute in relation to the bill of exchange did not appear from the papers on the appeal. We were, however, informed by counsel for Paramount that, in essence, the dispute relates to Paramount's contention (relying on the two emails to which we have referred) that it expressly accepted the bill of exchange on the condition that the bill would not be enforced until Paramount's claims for rectification and defects were addressed, and that Paramount would not be precluded from enforcing its rectification and defects claims prior to payment falling due on the bill. That is, the dispute relates to the nature of Paramount's acceptance of the bill of exchange and whether the instrument has effect as a bill of exchange.

23 From what we were told from the bar table, it seems that BFPL relies, at least in part, on similar arguments in resisting Paharpur's claim against it on the bill of exchange. Whether any issue arises as to BFPL's liability, or the nature of any liability it may have, from the fact that it appears it 'co-accepted' a bill of exchange in respect of which it was not expressed to be a drawee, did not emerge.

24 In any event, the appeal (and apparently the application below) was conducted by the parties on the basis that any liability of Paramount and BFPL was as acceptors and the appeal falls to be determined on that basis.

The grounds of appeal

25 Paharpur's grounds of appeal are as follows:

> 1. The learned acting master erred in law in finding that the bill of exchange was subject to the dispute resolution clause in the contract between the appellant and the respondent and that accordingly CIV 1549 of 2007 should be stayed in respect of the bill of exchange.
>
> 2. The learned acting master erred in law in finding that a justiciable dispute, whether by arbitration or litigation, existed in respect of the respondent's liability on the bill of exchange.
>
> 3. Alternatively, the learned acting master erred in law in finding that the dispute resolution clause in the contract between the appellant and the respondent could, as a matter of law or should as a matter of construction, apply to the respondent's failure to honour the bill of exchange when it fell due.
>
> 4. Alternatively, the learned acting master erred in law in finding that the appellant and the respondent had not by the dispute resolution clause in their contract excluded the operation of the *International Arbitration Act 1974* (Cth) and that accordingly he did not have a discretion to not stay CIV 1549 of 2007 insofar as it relates to the bill of exchange.
>
> 5. The learned acting master erred in law in failing to give effect to the parties' contractual intention that the contract should be subject to the provisions of the *Commercial Arbitration Act 1985* (WA).
>
> 6. Alternatively, the learned acting master erred in law in not finding he had a discretion under s 53(1) of the *Commercial Arbitration Act* and further erred in law in not exercising that discretion to refuse to stay CIV 1549 of 2007 insofar as it relates to the bill of exchange.

Paharpur's submissions

26 It was submitted on behalf of Paharpur that the bill of exchange was a 'stand alone' contract between the three parties and was not the subject of the arbitration agreement in the contract. While the bill of exchange had its genesis in the contract, it was a separate and subsequent contract in its own right and moreover, by its very nature as a bill of exchange it could not be the subject of an arbitration.

27 Counsel argued that, in any event, in entering into the contract it could never have been the intention of Paharpur and Rosemount that cl 22 would apply to a dispute involving a person who was not a party to the contract and who therefore was not bound by the arbitration clause. The consequence of Paramount's construction of cl 22 is that its liability under the bill of exchange would be determined by arbitration under cl 22 of the contract while the liability of its co-acceptor, BFPL, under the bill of exchange would be determined in the action. That could not have been an outcome intended by the parties to the contract.

28 It was submitted in the alternative on behalf of Paharpur that the operation of the *International Arbitration Act* had been excluded by cl 22 of the contract and that the *Commercial Arbitration Act* applied. Clause 22 provided for the determination of a dispute 'by litigation within the jurisdiction of the courts of Western Australia or arbitration under the Commercial Arbitration Act'. By the contract, Paharpur and Paramount had agreed to arbitration under the *Commercial Arbitration Act* as an alternative to litigation in the event of a dispute. The reference to the *Commercial Arbitration Act* in cl 22 was not merely a reference to the procedural rules to be applied. It invoked the substantive jurisdiction under that Act, not just the procedural rules.

29 Counsel for Paharpur argued that in the exercise of its discretion under the *Commercial Arbitration Act*, the court should refuse to order that the action be stayed so far as it related to Paramount's liability under the bill of exchange. BFPL is not a party to the arbitration agreement and its liability under the bill of exchange can only be resolved by this court. Moreover, the arbitration is to be conducted by an engineer. It is inappropriate that the enforceability of the bill of exchange as against co-acceptors be determined in different forums and it is also inappropriate that Paramount's liability under the bill of exchange be determined by an engineer as arbitrator.

Paramount's submissions

30 Paramount submitted that whether or not the dispute in relation to the bill of exchange fell within cl 22 was simply a matter of construction of cl 22. It is well established that arbitration clauses such as cl 22 should be construed broadly and liberally. When so construed, cl 22 covers a dispute in relation to the bill of exchange.

31 It did not follow that because the co-acceptor of the bill (BFPL) is not a party to the contract, cl 22 does not apply to the dispute between Paharpur and Paramount in relation to the bill of exchange. By the

contract, Paramount and Paharpur had agreed for any dispute between them to be resolved by arbitration. The fact that in respect of one aspect of a dispute there is another party that has assumed concurrent liability with Paramount does not mean that, so far as the dispute involves Paharpur and Paramount, it should not be determined in accordance with cl 22.

32 On the application of the *International Arbitration Act*, it was submitted that there was nothing in cl 22 which evinced any intention to exclude the operation of that Act. But even if the Act did not apply and the question of a stay fell to be determined under the *Commercial Arbitration Act*, the court should not interfere with the exercise of the acting master's discretion to refer the matter to arbitration. The dispute between Paharpur and Paramount in respect of the bill of exchange is discrete. Whatever decision is made on that dispute, there will still be arbitration proceedings between Paharpur and Paramount, and civil proceedings between Paharpur and the other defendants to the action, including BFPL, in respect of the other disputes. Accordingly, a multiplicity of proceedings will not be avoided. As the issues pertaining to Paramount are discrete, inconsistent findings are unlikely.

The disposition of the appeal

33 We propose to deal first with ground 3 of the grounds of appeal. In respect of that ground, the essential question is whether there is, in relation to Paharpur's claim under the bill of exchange, a dispute within the meaning of cl 22 of the contract. That depends upon the meaning of a 'Dispute' under cl 2.

34 There are a number of cases which suggest that a 'liberal' construction should be taken to an arbitration clause in a contract. But as Austin J observed in ***ACD Tridon Inc v Tridon Australia Pty Ltd*** [2002] NSWSC 896:

> 'Liberal' construction is not a rigorous notion. In Australia, courts see their task as ascertaining the intention of the authors of a commercial instrument, as expressed in the instrument, taking into account surrounding circumstances and extrinsic materials to the extent permitted by law …
>
> In other words, while Australian courts are not constrained by considerations of public policy to adopt a 'liberal' construction of arbitration clauses, reflection on the likely intention of the parties will steer them away from any narrow construction. [119] - [120]

35 In a similar vein, see the decision of the English Court of Appeal in ***Ashville Investments Ltd v Elmer Contractors Ltd*** [1988] 3 WLR 867, 873.

36 More recently, in ***Fiona Trust & Holding Corporation v Privalov*** [2007] UKHL 40, Lord Hoffman said:

> Arbitration is consensual. It depends upon the intention of the parties as expressed in their agreement. Only the agreement can tell you what kind of disputes they intended to submit to arbitration. But the meaning which parties intended to express by the words which they used will be affected by the commercial background and the reader's understanding of the purpose for which the agreement was made. Businessmen in particular are assumed to have entered into agreements to achieve some rational commercial purpose and an understanding of this purpose will influence the way in which one interprets their language. [5]

37 Having concluded that the parties will have intended, for their own commercial reasons, that any disputes that arise between them should be decided by the tribunal they have chosen for that purpose, Lord Hoffman went on to say (in a passage relied upon by Paramount on this appeal):

> In my opinion the construction of an arbitration clause should 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 clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. [13]

38 His Lordship concluded (citing German authority) that:

> There is every reason to presume that reasonable parties will wish to have the relationships created by their contract and the claims arising therefrom, irrespective of whether their contract is effective or not, decided by the same tribunal and not by two different tribunals. [14]

39 That view that the parties to a commercial agreement who have agreed to include an arbitration clause in the agreement are likely to have intended that all disputes between them should be resolved by that means, reflects the approach that has been taken in Australia. In ***Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd*** (1996) 39 NSWLR 160, in an oft-cited passage, Gleeson CJ said:

> When the parties to a commercial contract agree, at the time of making the contract, and before any disputes have yet arisen, to refer to arbitration any dispute or difference arising out of the agreement, their agreement should not be construed narrowly. They are unlikely to have intended that

> different disputes should be resolved before different tribunals, or that the appropriate tribunal should be determined by fine shades of difference in the legal character of individual issues, or by the ingenuity of lawyers in developing points of argument. (165)

40 In ***Walter Rau Neusser Oel und Fett AG v Cross Pacific Trading Ltd*** [2005] FCA 1102, Allsop J suggested ([41]) that the emphasis on a liberal interpretation of arbitration clauses has been an attempt by judges in more recent years to counter a restrictive approach to construction of arbitration clauses reflective of suspicion of removal of disputes from courts, being a suspicion more evident in years past. His Honour went on to say ([42]) that the courts will presume that the parties did not intend the inconvenience of having possible disputes from their transaction being heard in two places, particularly in circumstances where disputes can be given different labels, or placed into different juridical categories, possibly by reference to the approaches of different legal systems.

41 Similarly, in ***IBM Australia Ltd v National Distribution Services Pty Ltd*** (1991) 22 NSWLR 466, Clarke JA, in rejecting a contention that the arbitration clause in that case applied only to the contractual claims that had been made and not to the claims under the *Trade Practices Act 1974* (Cth), said:

> The parties could hardly be thought to have contemplated that the arbitration clause would work in that way. It is far more likely that they intended that all disputes between them concerning the terms of the contract, the performance of it and matters connected, in a real sense, with the contract should be referred to the one tribunal for determination. For my part I would find it difficult to ascribe to the parties to a contract an intention to submit only part of a dispute to an arbitral tribunal reserving the remainder for consideration by the Court as this would, on any view, be inefficient and costly. (483)

42 But while 'one stop adjudication' (see ***Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd*** [1993] QB 701, 726) has commonly been invoked in cases involving disputes between the parties to an arbitration agreement, in support of a construction which would bring a particular dispute within it, it does not necessarily follow that it applies in the same way where the dispute in question is not limited to the parties to the arbitration agreement.

43 On the contrary, where a party to an arbitration agreement makes the same claim against both the other party to the arbitration agreement and a person who is not a party to the arbitration agreement - with the result that, so far as it involves the latter, the dispute cannot be referred to

arbitration - it will generally be equally difficult to ascribe to the parties to the arbitration agreement an intention that in such an event the dispute should be fragmented and that the liability of the party to the arbitration agreement and that of the third party respectively should be determined in different forums.

44 Whether or not the parties intended such an outcome will necessarily turn on the facts of each case, but in our view it is not readily to be inferred. It is not likely to be consistent with the commercial purpose of the agreement. It will commonly result in a duplication of proceedings that will be costly, inefficient and time-consuming, and give rise to the unwelcome possibility of inconsistent decisions of the different tribunals involved. That is, it will commonly result in the very opposite of what the parties ordinarily set out to achieve by an arbitration clause.

45 In the present case, we do not think the parties could be taken to have contemplated such fragmentation. In our view, the reference in cl 2 of the contract to 'a dispute or difference between the parties' was intended to apply to a dispute between the parties to the contract only. It was not intended to apply to a dispute involving the parties and a stranger to the contract such as that which arose here, where the dispute involves the liability to one party to the contract (as the drawer/payee) of two acceptors of a bill of exchange, one of the acceptors being a party to the contract and the other a stranger to it. The parties to the contract would hardly have intended that in such circumstances (and it is common cause that neither party foresaw them at the time of contracting), rather than being determined in one judicial forum, the liability of each acceptor would be dealt with in separate forums, one judicial and one arbitral, with all of the potential difficulties and additional costs involved.

46 In our view, Paharpur's claim in relation to the bill of exchange does not give rise to a dispute within the meaning of cl 22 of the contract.

47 As the dispute in relation to Paharpur's claim on the bill of exchange is not, pursuant to the terms of the arbitration agreement, capable of settlement by arbitration, it follows that s 7 of the *International Arbitration Act* has no application to it: ***Comandate Marine Corp v Pan Australia Shipping Pty Ltd*** (2006) 157 FCR 45 [238]; ***Recyclers of Australia Pty Ltd v Hettinga Equipment Inc*** [2000] FCA 547 [18], [19], ***Seeley International Pty Ltd v Electra Air Conditioning BV*** [2008] FCA 29 [16].

48 The same result follows in respect of s 53 of the *Commercial Arbitration Act*, as the dispute is not one 'in respect of a matter agreed to be referred to arbitration by the [arbitration] agreement'.

49 In light of the conclusion we have reached, it is unnecessary to consider the other grounds of appeal.

Conclusion

50 The appeal should be allowed and the decision of the learned acting master should be set aside so far as it relates to Paharpur's claim under the bill of exchange.