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Arbitration Update

State Supreme Courts consider arbitrability of Corporations Act claims

WHAT YOU NEED TO KNOW

- Two recent Supreme Court decisions affirm previous authority to the effect that Courts will not decline to refer a proceeding to arbitration simply because it includes statutory claims under the Corporations Act.
- An exception is where the claim relates to the dissolution or winding up of a company. Such claims have not been referred to arbitration for reasons of public policy.

Arbitrability of Corporations Act claims

In *A Best Floor Sanding Pty Ltd v Skyer Australia Pty Ltd*,[1] Warren J held that an arbitration clause, to the extent that it purported to relate to the dissolution or winding up of a company, was null and void because it was contrary to the provisions of the Corporations Law.

In *ACD Tridon Inc v Tridon Australia Pt Ltd*,[2] Austin J referred to *A Best Floor Sanding* and commented that the decision was based, in part, on public policy considerations in respect of the process of winding up a company and also seemed to be based on that fact that a winding up order affects the rights of third parties and not just the parties to an arbitration agreement. However according to his Honour, such considerations should not apply more generally to the *Corporations Act 2001* (Cth) ("**Corporations Act**") so as to prevent the referral of questions arising under the Corporations Act to arbitration.[3]

This article examines two recent Supreme Court decisions relating to the arbitrability of disputes involving claims under the Corporations Act, both of which support Austin J's view that proceedings involving claims under the Corporations Act may be referred to arbitration.

[1] [1999] VSC 170 at [18].
[2] [2002] NSWSC 896.
[3] *ACD Tridon Inc v Tridon Australia Pt Ltd* [2002] NSWSC 896 at [191]-[194].

In the matter of Ikon Group Limited (No 2)[4]

Following the intensification of a dispute between the interests of the directors of companies within a group, along with the expression of an intention by one of the directors to exit a joint venture involving the companies, the plaintiff, Ikon Group Limited, brought proceedings against five defendants. It sought numerous declarations and orders, including a declaration that there had been breaches of directors' duties under the Corporations Act and orders for relief under the Corporations Act.

In reliance upon an arbitration clause contained within an addendum to a joint venture agreement, the first and second defendants applied for an order for a stay of the proceedings and referral to arbitration under the *International Arbitration Act 1974* (Cth) ("**IAA**").

The arbitration clause in the addendum to the joint venture agreement stated that *"[a]ny and all Disputes including any question regarding the existence, validity or termination of any of the JV Documents or the Third Addendum"* were to be referred to arbitration under the LCIA Rules. The term "Disputes" was defined to include *"any dispute or difference aris[ing] out of, in relation to or in connection with the JV Documents or any of them or the Third Addendum"*.

[4] [2015] NSWSC 981.

In issue was whether, for the purposes of s7(2)(b) of the IAA, the proceedings in question involved the determination of a matter that was capable of settlement by arbitration in pursuance of the arbitration agreement.

In addressing this question, Brereton J held that the starting point was a consideration of the relief claimed and what is alleged in support of that relief, along with the defences to be raised in answer to the claims.

After reviewing the claims brought by the plaintiff, his Honour held that he was satisfied that the claims *"arose out of, in relation to or in connection with"* the joint venture agreement and therefore fell within the scope of the arbitration clause.

Turning to the fact that some of the claims were also statutory claims for breaches of directors' duties under the Corporations Act, his Honour commented that:[5]

> *"it is beside the point that the rights sought to be invoked by the plaintiff may be statutory rights under (Cth) Corporations Act 2001 and not rights directly arising under joint venture agreements, and it is also beside the point that an arbitrator may not be able to grant all of the relief which a Court could grant under the Corporations Act."*

Justice Brereton noted that some of the relief claimed by the plaintiff, for instance, an order under s1322 of the Corporations Act, may not be able to be granted by an arbitrator. This notwithstanding, the underlying questions of fact and law could be determined by the arbitrator. Citing *Tanning Research Laboratories Inc v O'Brien*,[6] Brereton J stated that, where the ultimate question or relief could not itself be referred to arbitration, the appropriate course was for the proceedings to be stayed and, once the arbitration was complete, the remaining issues could be dealt with by a Court.

His Honour ordered that the claims against the first and second defendants in the proceedings be stayed and that those claims be referred to arbitration.

Robotunits Pty Ltd v Mennel[7]

Robotunits Pty Ltd brought proceedings against its former managing director, Juergen Karl Mennel, claiming that he had made certain payments without a legal or equitable basis and in breach of his duties as managing director under the Corporations Act and under general law.

Mr Mennel and Robotunits were parties to a shareholders agreement under which disputes were to be submitted to arbitration. Mr Mennel applied for a stay of the proceedings and referral to arbitration under s7(2) of the IAA.

In issue was whether the requirements of s7(2)(b) of the IAA were met.

Referring to *ACD Tridon Inc v Tridon Australia Pty Ltd*,[8] Croft J held that s7(2)(b) required that three elements be satisfied. First, it was necessary to identify the matters for determination in the proceeding. Here, such matters were readily ascertainable and were whether two shareholders agreements and an employment agreement provided a legal or equitable basis for Mr Mennel to make certain payments. Secondly, it was necessary to determine whether the matters in question were capable of settlement by arbitration "in pursuance of the agreements". His Honour found that this requirement was satisfied in the case of the shareholders agreements but not the employment agreement.

Justice Croft then turned to the third requirement of s7(2)(b), being whether the matters to be determined in the proceeding "were capable of settlement by arbitration". After referring to the comments of Allsop J in *Comandate Marine Corp v Pan Australia Shipping Pt Ltd*,[9] Croft J stated that it was clear that the sorts of disputes that were **not** capable of settlement by arbitration were those for which exclusive jurisdiction was maintained by national courts for reasons of public policy.

His Honour agreed with the comments of Allsop J in *ACD Tridon Inc v Tridon Australia Pty Ltd*[10] – that, with the exception of the power to make a winding up order, there was no special public interest criteria with respect to the statutory powers of a Court under the Corporations Act.

Justice Croft further commented that it was not inappropriate for a dispute involving the Corporations Act to be resolved by arbitration simply because statutory bodies, such as ASIC, might have an interest in the proceeding or sufficient standing to bring an action in relation to the proceeding. The settlement of such matters by arbitration would not, his Honour said, interfere with the powers of bodies such as ASIC.

[5] *In the matter of Ikon Group Limited (No 2)* [2015] NSWSC 981 at [23].
[6] (1990) 169 CLR 332 at 344 per Brennan and Dawson JJ.
[7] [2015] VSC 268.
[8] [2002] NSWSC 896.
[9] (2006) 157 FCR 45.
[10] [2002] NSWSC 896.

His Honour granted the application for a stay of the proceedings but only in relation to the matter of whether the shareholders agreements provided a legal or equitable basis for Mr Mennel to make a share payment.

Note:

In 2014, prior to the decisions in *Ikon Group Limited (No 2)* and *Robotunits Pty Ltd*, the Court of Appeal of the Supreme Court of Victoria in *Brazis and Ors v Rosati and Ors*[11] granted leave to appeal a first instance decision[12] to stay a dispute concerning an oppression claim under the Corporations Act and refer it to arbitration, pursuant to s8 of the *Commercial Arbitration Act 2011* (Vic). In granting leave to appeal, the Appeal Court commented that the application before it raised *"important questions of law relating to the interrelationship between the Corporations Act and the Commercial Arbitration Act 2011"*. No decision on any appeal has been handed down to date.

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[11] [2014] VSCA 264.
[12] *Re 700 Form Holdings Pty Ltd* [2014] VSC 385.

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