Australia—requirements for arbitrator to act as mediator (Ku-ring-gai Council v Ichor Constructions)

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Arbitration analysis: Benjamin Holloway, associate at Jones Day, discusses Ku-ring-gai Council v Ichor Constructions, in which the Supreme Court of New South Wales provides guidance on the strict guidelines and processes imposed on arbitration-meditation (Arb-Med) proceedings in connection with Australian arbitrations.

Ku-ring-gai Council v Ichor Constructions Pty Ltd [2018] NSWSC 610

What are the practical implications of this case?

The Supreme Court of New South Wales has provided guidance on the strict guidelines and processes imposed on Arb-Med proceedings in connection with Australian arbitrations. These guidelines were drafted to protect the integrity of the arbitration process and arguably reflect the caution with which many common law lawyers approach Arb-Med and Arb-Med-Arb processes.

The court held that an arbitrator's mandate to arbitrate a dispute is deemed to have been terminated if they decide to act as mediator. The arbitrator may only resume as arbitrator after first obtaining the parties' written consent.

In the present case, the court terminated an arbitrator's appointment following the conclusion of a relatively significant arbitral hearing in which the arbitrator convened an informal mediation.

Significantly, the court held that the parties' participation in the final day of the arbitration hearing (after the mediation was terminated) did not act as a waiver of the plaintiff's right to object because neither party was aware of the requirement that an arbitrator obtain written consent of both parties before resuming the arbitration pursuant to section 27D(4) of the New South Wales Commercial Arbitration Act 2010 (CAA 2010). CAA 2010 is based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration 1985 and is part of the Uniform Commercial Arbitration Acts operating in each Australian jurisdiction.

The court found that CAA 2010, s 4 (which mirrors Article 4 of the UNCITRAL Model Law), which concerns the waiver of a party's right to object, requires a party to have actual knowledge of the non-compliance with the provision(s) of CAA 2010 or the arbitration agreement from which the parties seek to derogate. This construction of CAA 2010, s 4 is based on the drafting history of Article 4 of the Model Law and therefore may be persuasive to the construction of similar provisions in other Model Law countries.

The court also provided guidance on what will constitute 'mediation' for the purpose of the Arb-Med-Arb provisions in the Australian domestic commercial arbitration legislation.

What was the background?

Ku-ring-gai Council and Ichor Constructions were parties to an arbitration before a single arbitrator (which for clarity will be referred to as the arbitrator).

On the final day of the arbitration hearing, the arbitrator asked in the parties whether they would consent to him putting forward a proposal for settlement. The parties agreed and prepared a short document recording their consent for the arbitrator to act as a mediator, which was a necessary precondition to him doing so pursuant to CAA 2010, s 27D(4).

What followed could only loosely be described as a mediation. It was, in short, a meeting between the arbitrator and the parties away from the hearing room in which the arbitrator put forward a proposal that the parties walk away from their respective claims. Features commonly associated with a mediation were notably missing—there were no opening statements by the parties, nor were there private discussions between the arbitrator and one party in the

absence of the other. The evidence suggests that the arbitrator did not receive confidential information from either party in the mediation.

Following the conclusion of the 'mediation', the parties resumed the final day of the arbitration hearing before the arbitrator. Neither party provided written consent to the arbitrator resuming as arbitrator or knew that written consent was necessary under CAA 2010.

Four business days after the conclusion of the arbitration hearing, the plaintiff sought to have the arbitrator's appointment terminated on the basis that the arbitrator resumed the arbitration without the parties' written consent under CAA 2010, s 27D(4).

What did the court decide?

Written consent necessary

The court held that once an arbitrator takes on the role of mediator, their mandate as arbitrator is deemed to have been terminated and can only be re-enlivened with the written consent of the parties.

Pursuant to CAA 2010, s 27D(4), this second consent (the first being consent to the mediation in the first place) must be provided after the mediation. This timing is important as it allows a party to communicate openly with the 'mediator' while reserving its position with respect to the arbitration.

Actual knowledge of derogation necessary

The court held that the parties' participation in the arbitration after the mediation had terminated did not amount to a waiver of the plaintiff's right to object under CAA 2010, s 4 because the plaintiff did not have actual knowledge of the requirement for the second consent under CAA 2010, s 27D(4).

In arriving at a conclusion that the proper construction of CAA 2010, s 4 requires actual knowledge of non-compliance, the court made reference to the drafting of the Model Law (upon which CAA 2010, s 4 is based) and the Commission's deliberate deletion of the words 'A party who knows or ought to have known…' from the draft of CAA 2010, s 4.

There was a 'mediation'

The defendant in this case argued that the arbitrator did not conduct a 'mediation' for the purpose of CAA 2010, s 27D(4). The argument put to the court was that the arbitrator did not act in a way that mediators frequently do and what the arbitrator put to the parties was no more than what a judge might say in open court, in urging the parties to settle.

As to what constitutes a 'mediation' for the purpose of CAA 2010, the court observed that the essential distinguishing feature of a mediation is unclear, as is the line that may divide facilitated non-mediator discussions from mediation.

However, the court found that the contrast between an arbitrator and that of a mediator is that the latter acts in a non-arbitral capacity. Unlike an arbitrator, a mediator is not required to hear the parties, or to give them an opportunity to present their cases, or to decide their dispute. The court concluded that when the arbitrator put to the parties his specific proposal, he acted in a non-arbitral capacity. The court also found that the parties agreed, intended and expected to mediate their dispute, as evidenced by their conduct and the conduct of the arbitrator.

Ben Holloway's practice is predominantly in high value and complex commercial, construction and projects disputes, with a focus on the Australian mining and oil and gas sectors. His recent experience includes acting in some of the largest domestic and international construction arbitrations in the Asia-Pacific.

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Interviewed by Kate Beaumont.

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