Tesseract International Pty Ltd v Pascale Construction Pty Ltd [2024] HCA 24

A discussion of its dimensions

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The Honourable Justice Michael Lundberg
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Tesseract International Pty Ltd v Pascale Construction Pty Ltd [2024] HCA 24

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Introduction

1. Good evening to all of you.

2. We meet this evening on the land of the *Whadjuk* people of the *Noongar* nation. I pay my respects to the traditional owners of the *Whadjuk* people, and to their elders past and present. I also recognise that we meet towards the start of what is the sixth Noongar season, which is known as *Kambarang*. That season runs through the months of October and November, and symbolises the return of the hot weather to the country and the resurgence of native flora.

3. I also wish to thank the Anglo Australasian Lawyers Society for the invitation to speak as part of this seminar series.

A brace of arbitration decisions from the High Court

4. When considering a suitable topic for this seminar, it occurred to me there had been some considerable excitement in the arbitration community arising from two recent decisions of the High Court of Australia.

5. The first of these is the judgment of the Court in *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* [2024] HCA 24, which was delivered on 7 August 2024. That was an appeal against the decision of the Court of Appeal of the Supreme Court of South Australia. The second of the decisions is *CBI Constructors Pty Ltd v Chevron Australia Pty Ltd* [2024] HCA 28 which was delivered only a week later on 14 August 2024. That was an appeal against a decision of this State's Court of Appeal.

6. Both decisions arise out of domestic arbitrations conducted under the auspices of the mirror domestic arbitration statutes which operate across Australia (which I will generally refer to as the **Domestic Arbitration Acts**).[1] Of course, the provisions in those statutes now essentially mirror the provisions of the UNCITRAL Model Law on International Commercial Arbitration (which I will refer to as the **Model Law**).

7. Both decisions are undoubtedly of interest to those who practice in the arbitration space and, I am sure, to those who practice more widely than that area. The High Court's decision in *Tesseract*, which is the subject of this evening's discussion, is of particular interest because it cuts against a consensus view, it would seem, that proportionate liability legislation had no direct application in an arbitral setting.

8. By way of introduction, I will briefly sketch out the result in the two cases, before descending further into the details of the decision in *Tesseract*.

CBI Constructors

9. I will start with the second decision of the Court just mentioned, *CBI Constructors*. That was an appeal against a decision of this State's Court of Appeal. The majority decision is found in the plurality judgment comprising of five members of the Court, which provides a ready basis upon which to draw out the *ratio decidendi* of the case. In the decision of the Chief Justice, and Gordon, Edelman, Steward and Gleeson JJ, their Honours held that the Supreme Court of Western Australia relevantly had the power under s 34(2)(a)(iii) of the *Commercial Arbitration Act 2012*

[1] Tesseract concerned the *Commercial Arbitration Act 2011* (SA). CBI Constructors concerned the *Commercial Arbitration Act 2012* (WA).

(WA) to set aside a subsequent award made by an arbitral tribunal if the court first determined, *de novo*, that the tribunal was *functus officio*.

10. As to this latter point, the plurality judgment makes it decidedly clear that the contention that the superior court should afford absolute, or alternatively, substantial deference to the decision reached by the arbitral tribunal that it was not *functus officio*, must be rejected. The relevant standard of review to apply was a *de novo* review of the decision of the tribunal as to its jurisdiction. As the plurality observed at [47], a legal question such as whether the tribunal was *functus officio* is a matter on which there is only one correct answer, such that the correctness standard of appellate review must apply. In this regard, the plurality rejected the appellant's reliance on the numerous authorities cited in a leading and well-used international arbitration text, said to stand as authority for the proposition that a 'considerable measure of judicial deference' is accorded to the arbitrators' interpretation of the scope of their mandate under the parties' submissions.

11. The minority in *CBI Constructors* (Jagot and Beech-Jones JJ) held to the contrary. Their Honours concluded that, whether or not the first interim award precluded the tribunal from entertaining and upholding the repleaded case in the second interim award, was a matter within the tribunal's jurisdiction to decide. It was not a matter to be considered by a superior court hearing an application to set aside the second of those awards under the provision in question.

12. I will not further dwell on the decision in *CBI Constructors*, other than to observe that the plurality reinforced in its decision some of the overarching principles which are discussed by the Court in *Tesseract* and which are familiar to practitioners who act in this area. In particular, at [15], by

reference to the decision of the Court in *Tesseract* delivered just a week earlier, the plurality in *CBI Constructors* described the principle of party autonomy as 'foundational'. Their Honours held (at [15]):

> The jurisdiction of the arbitral tribunal is based on the parties' agreement and, subject to jurisdiction conferred by statute, depends on the content and extent of the parties' voluntary consent and agreement to submit their commercial dispute to arbitration (Art 7 of the Model Law; cf s 7 of the Arbitration Act). (footnote omitted)

13. Further, the Court discussed the paramount object of the domestic arbitration legislation, which is consistent with the Model Law (at [16]). That paramount object is to facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense. I will return to the principles of party autonomy and the paramount object in due course.

Tesseract

14. And now to *Tesseract*.

15. In *Tesseract*, the High Court concluded by a majority of 5 to 2, at least insofar as a commercial arbitration is concerned where the laws governing the substance of the dispute were the laws of South Australia, that those laws *included* specific proportionate liability provisions.[2] The statutory provisions in question in *Tesseract* were pt 3 of the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) and pt VIA of the *Competition and Consumer Act 2010* (Cth), which I will refer to as the **SA Law Reform Act** and the **CCA** respectively.

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[2] ***Tesseract*** [13] - [14] (Gageler J), [85] (Gordon and Gleeson JJ), and [290] (Jagot and Beech-Jones JJ).

16. The majority in *Tesseract* thus concluded that the arbitrator in that case had jurisdiction to make the award settling the dispute through the application of the relevant provisions of these proportionate liability regimes. The majority is comprised of the decisions of the Chief Justice and the separate joint judgments of Gordon and Gleeson JJ, and Jagot and Beech-Jones JJ.

17. Each of the dissenting judges in *Tesseract* (being Edelman and Steward JJ) provided separate reasons, meaning the High Court has provided us with five separate judgments to digest. That may be perceived as a virtue. The virtue is that lower courts and practitioners now have, as a result of the several judgments of the Court in *Tesseract*, a series of detailed and quite extensive deliberations on the interpretation and effect of the Domestic Arbitration Acts which operate in this country, the Model Law, and the scope of arbitral jurisdiction generally.

18. Against this background, what I propose to do this evening is to first explain the factual background to the decision in *Tesseract*, discuss the analysis undertaken by the Chief Justice in particular, and then comment on the potential significance of the decision. In this latter respect, I am assisted by the postscript of one of the dissenting judges, Edelman J, who has provided some useful observations on the effect of the majority's decision.

The factual background to *Tesseract*

19. I have already identified the central question which arose in *Tesseract*, as to whether the arbitrator was required to apply proportionate liability laws in the particular context of that case.

20. The factual background is most conveniently found in the joint judgment of Gordon and Gleeson JJ. The case concerned a contract for the provision

of engineering consultancy work by Tesseract in connection with building works comprising Pascale's design of a multilevel warehouse at Windsor Gardens in South Australia. As sometimes happens, a dispute arose between the parties as to whether Tesseract's work was done to the standard required by the contract.

21. The contract itself provided for conciliation of any dispute between the parties and if such a dispute was not resolved by conciliation, either party was permitted to refer the dispute to arbitration. The language used to describe the scope of disputes subject to this agreed regime was of wide import - the regime applied to any dispute between the contracting parties in connection with the contract (at [79]).

22. Pascale ultimately referred the dispute to arbitration pursuant to the provisions of the contract. Within the arbitration, Pascale claimed damages for breach of contract, negligence and for misleading or deceptive conduct.[3]

23. By way of defence, Tesseract denied liability. In the alternative, Tesseract contended that any damages payable by it should be reduced ([80]):

    (a) by reference to Pascale's contributory negligence in accordance with pt 2 of the SA Law Reform Act; or

    (b) in accordance with the proportionate liability regime established by pt 3 of the SA Law Reform Act, in relation to Pascale's contract and negligence claims; and

[3] The claim for damages for misleading or deceptive conduct was made pursuant to s 236 of the *Australian Consumer Law* (found in sch 2 to the CCA, for contravention of s 18 of the *Australian Consumer Law*.

(c) further or alternatively, in accordance with the proportionate liability regime established by pt VIA of the CCA, in relation to Pascale's claims under the Australian Consumer Law.

24. These alternative defences were based on Tesseract's contention that a gentlemen known as Mr Penhall was responsible for part or all of the losses claimed by Pascale in the arbitration, by reason of his negligence in assisting Pascale to prepare its tender for the design and construction of the warehouse. Mr Penhall was, of course, not a party to the contractual agreement between Pascale and Tesseract which contained the arbitration agreement to which I have earlier referred.

25. Pascale agreed that these defences formed part of the dispute between the parties, but denied the applicability of the proportionate liability laws to the resolution of that aspect of the dispute. The fundamental position adopted by Pascale was that Tesseract was not entitled to the benefit of the proportionate liability laws against Pascale *in any forum*.

26. This proposition needs some further unpacking.

27. It was said by Pascale that, first, Tesseract could not litigate the proportionate liability defences in court proceedings because it was contractually bound to arbitrate the dispute (at [81]).

28. Further, Pascale asserted that Tesseract could *not* avail itself of the benefit of the proportionate liability laws within the arbitration because Pascale itself was not entitled to join any other alleged concurrent wrongdoer to the arbitration who might otherwise be found partially responsible for Pascale's losses in accordance with those laws (at [81]). That said, Pascale accepted that it could bring separate proceedings to recover losses from a concurrent wrongdoer, but contended that the opportunity for a plaintiff to recover all

of its losses in a single proceeding was integral to the proportionate liability laws.

29. To resolve the question of the applicability of the proportionate liability laws, the arbitrator directed Tesseract to apply to the Supreme Court of South Australia for leave[4] to obtain a determination of the following question of law:

> Does Part 3 of the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) and/or Part VIA of the *Competition and Consumer Act 2010* (Cth), apply to this commercial arbitration proceeding conducted pursuant to the legislation and the *Commercial Arbitration Act 2011* (SA)?

30. The Court of Appeal of the Supreme Court of South Australia granted Tesseract leave, and answered this question of law in the negative.

Overarching principles

31. Let me pause at this point before addressing the Court of Appeal's decision and then the decision of the High Court.

32. I pause in order to explicate some cardinal propositions. I have mentioned two along the way already.

33. *First*, there is the principle of party autonomy. That is, the foundation of arbitration is the determination of the parties' rights by the agreed arbitrators pursuant to the authority given to them by the parties.[5]

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[4] Pursuant to s 27J of the *Commercial Arbitration Act 2011* (SA).

[5] *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 [9] (French CJ and Gageler J), citing *Dobbs v National Bank of Australasia Ltd* [1935] HCA 49; (1935) 53 CLR 643 at 653-654 and *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich* [2003] UKPC 11; [2003] 1 WLR 1041 at 1046 [9]. See now *Tesseract* [20].

34. *Second*, there is the paramount object of the Domestic Arbitration Acts, namely to facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense.[6] Practitioners in the arbitration world, and those parties who adopt arbitral processes to resolve their disputes, well know this paramount object. It represents a key driver for commercial entities to elect arbitration mechanisms, with an intended desire to achieve certainty in the resolution of disputes, without the potential for multiple levels of appellate intervention (or at least with more limited appellate intervention in the sense that the supervisory jurisdiction of superior courts is comparatively narrow).

35. *Third*, there is the conception that participation in an arbitration will almost always be restricted to the parties to the particular arbitration agreement. An arbitral tribunal cannot adopt a procedure, whether chosen by the parties or not, that would require third parties against whom the applicant might have a claim to be joined to the arbitration.[7] To be joined, speaking generally, the third party must agree and the original participants would need to agree to the joinder. Arbitral proceedings are, of course, confidential and fundamentally driven by the parties thereto.

36. These first three cardinal propositions emanate from the domain of the law which has developed with regard to arbitration matters. The fourth proposition, if I can call it that, derives from a statutory development in Australia which emerged over 20 years ago.

37. I am speaking in this respect of the development of proportionate liability regimes throughout Australia, which have largely displaced the common

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[6] *Tesseract* [16].
[7] Model Law, Article 17(5).

law rule of solidary liability. There are regimes at State level[8] and at Federal level.[9] The State regimes apply to claims for property damage or purely economic loss arising from a failure to take reasonable care, and claims for damages for misleading or deceptive conduct under the Fair Trading legislation.[10] The Federal regimes apply to claims for damages for misleading or deceptive conduct in relation to, for example, a financial product or a financial service.[11]

38. Under a rule of solidary liability, an injured party may recover their entire loss from any one concurrent wrongdoer, leaving the risk of recoverability to fall on the wrongdoers rather than the claimant. Proportionate liability, in contrast, enables liability to be apportioned between wrongdoers according to their assessed proportion of responsibility for the damage suffered. It moves the risk of recoverability on to the claimant.

39. Under the Civil Liability Act in Western Australia, which is in similar form in most States and Territories,[12] a defendant to an apportionable claim where there are concurrent wrongdoers, is *not* obliged to join fellow wrongdoers if the plaintiff has chosen not to target them (s 5AK(4)). The defendant should however give the plaintiff notice of the existence of the

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[8] *Civil Liability Act 2002* (WA), pt 1F; *Civil Liability Act 2002* (NSW), pt 4;*Civil Liability Act 2003* (Qld), pt 2; SA Reform Act, pt 3; *Civil Liability Act 2002* (Tas), pt 9A; *Wrongs Act 1958* (Vic), pt IVAA; *Civil Law (Wrongs) Act 2002* (ACT), ch 7A; and *Proportionate Liability Act 2005* (NT), pt 2.

[9] CCA, pt VIA; *Corporations Act 2001* (Cth), pt 7.1 div 2A; and *Australian Securities and Investments Commission Act 2001* (Cth), pt 2 div 2 subdiv GA.

[10] In Western Australia, see the definition of 'apportionable claim' in s 5AI of the *Civil Liability Act 2002* (WA).

[11] Under the *Corporations Act 2001* (Cth), see the definition of 'apportionable claim in s 1041L(1), which refers to contraventions of s 1041H which proscribes misleading or deceptive conduct in relation to a financial product or a financial service.

[12] Noting that the Victorian regime has a difference (see s 24AI(3) of the *Wrongs Act 1958* (Vic)) and the South Australian regime also has a difference (see s 11 of the SA Law Reform Act).

other wrongdoers, as is contemplated by s 5AKA. The plaintiff may then seek leave to join those other persons, under s 5AN.

40. All of that may well work smoothly in a litigation setting. But bearing in mind the third proposition I have just mentioned, the restriction of an arbitration to the parties to the arbitration agreement, an obvious issue arises. How does one join a concurrent wrongdoer to an arbitration who is not a party to the agreement? If that cannot be done in a workable manner, does it follow that the proportionate liability regime has been displaced? The Court of Appeal in *Tesseract* thought so, as did the dissenting judges in the High Court on appeal.

41. Indeed, Steward J in the High Court described the appeal as presenting an 'invidious choice' (at [228]), as follows:

(a) If the proportionate liability regimes apply in the arbitration (and only part of that law can ever apply), the claimant (Pascale) may be disadvantaged. This disadvantage might arise because if Pascale can only recover part of its claimed loss or damage against Tesseract, then Pascale will have to institute separate proceedings to recover the balance of its loss against the alleged concurrent wrongdoer, Mr Penhall. Mr Penhall is not a party to the arbitration and he cannot be joined without his consent.

(b) However, if the proportionate liability regimes do *not* apply, then Tesseract may be disadvantaged. This disadvantage arises because Pascale may be able to recover *all* of its loss or damage in the arbitration, leaving Tesseract to recover contribution in separate proceedings from Mr Penhall.

42. Steward J described the risk of multiple proceedings and inconsistent findings as to the extent of liability in both scenarios as being 'real' (at [228]).

What did the Court of Appeal decide?

43. The Court of Appeal (Doyle JA, Livesey P and Bleby JA) found that Tesseract's defences based upon the proportionate liability laws formed part of the dispute that the parties had agreed to have settled by arbitration. The Court of Appeal also found that the substantive laws to be applied by the arbitrator to resolve the dispute were the substantive laws of South Australia (which included the proportionate liability laws).[13]

44. The Court of Appeal's decision may be summarised as follows.

45. *First*, the Court accepted that the 'key operative provisions in the proportionate liability laws' would be capable of operating in arbitration proceedings. This included the provisions limiting the defendant's liability to its share in the responsibility for the plaintiff's harm.

46. *Second*, however, the Court of Appeal nonetheless concluded that the arbitrator was *not* able to apply the proportionate liability laws to the resolution of the dispute between the parties. Two matters were identified in this regard to justify this position. The first was that these statutory regimes contemplated that the plaintiff would have the opportunity to join all wrongdoers in the one set of proceedings. The second was the inability to join all wrongdoers to an arbitration except by consent.

47. As Gordon and Gleeson JJ explained, the Court of Appeal concluded that 'the proportionate liability laws were not amenable to arbitration because

[13] As explained by Gordon and Gleeson JJ at [83].

the arbitrator could not apply the laws except in a manner that would differ materially from the regimes intended by the relevant legislatures' (at [84]).

48. The approach of the Court of Appeal is consistent with the much earlier decision in Western Australia of Beech J (as his Honour then was) in *Curtin University of Technology v Woods Bagot Pty Ltd* .[14] Beech J reached a conclusion which was consistent with the dicta of the Full Court of Tasmania.[15] His Honour's decision came to represent the approach adopted by practitioners, at least in this State and at least in my experience, when advising on such issues (recognising, though, that his Honour expressly noted that he was not called on to consider whether the proportionate liability regime could be applied to an arbitration by an express or implied term of the arbitration agreement).[16]

49. Indeed, Edelman J in *Tesseract* referred to this view as representing a 'widespread consensus' (at [226]). In essence, the approach adopted was that an arbitrator was not entitled to apply statutory proportionate liability regimes on the basis that such regimes were concomitant with the power to join concurrent wrongdoers to the proceedings. Absent an ability to do so in a private arbitration context, the arbitrator could not apportion liability among concurrent wrongdoers.

On what basis or bases did the High Court decide the Court of Appeal had erred?

50. I propose to first address the decision and reasoning of the Chief Justice.

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[14] [2012] WASC 449.
[15] *Aquagenics Pty Ltd v Break O'Day Council* [2010] TASFC 3.
[16] *Curtin University of Technology v Woods Bagot Pty Ltd* [2012] WASC 449 [97].

Gageler CJ

51. His Honour's analysis draws a very clear distinction between the role played by, and the operation of, two particular provisions within the Model Law, which are reflected in the Domestic Arbitration Acts. Those provisions are, focusing on the Model Law, Article 28 and Article 34(2)(b). I have drawn out these provisions in the attached diagram, which I hope assists to bring the overarching framework together.[17]

52. Article 28 is headed 'Rules applicable to substance of dispute'. It forms part of ch VI of the Model Law, which deals with the making of awards and the termination of proceedings. In essence, the provision requires an arbitral tribunal to decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute.

53. Article 34 is found in ch VII, which concerns recourse against an award. The provision is headed 'Application for setting aside as exclusive recourse against arbitral award'. Article 34(1) confines recourse to a court against an arbitral award to applications for setting aside in accordance with Articles 34(2) and 34(3). The second of these sub-clauses imposes time limits. The first provision, Article 34(2), is more substantive. I need not address Article 34(2)(a) in the present context, but can confine my comments to Article 34(2)(b), which is the provision given significance by Gageler CJ.

54. Article 34(2)(b) empowers a court to set aside an award if the court finds that (i) the subject-matter of the dispute is not capable of settlement by

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[17] The diagram identifies with a small circle the particular Articles of the Model Law which afford parties the several choices to which Gageler CJ refers in his reasons, identified below at [61].

arbitration under the law of this State, or (ii) the award is in conflict with the public policy of this State.

55. As is apparent from the text of these provisions just mentioned, they draw attention to notions of arbitrability and public policy. Gageler CJ held that such notions are not the province of Article 28, but are the province of Article 34(2)(b) of the Model Law. Accordingly, his Honour concluded that more than one question must be answered in considering the dispute brought to the High Court in *Tesseract*. His Honour posed the questions as follows:

(a) The primary question, which arises under Article 28, is whether all or some of the provisions of the proportionate liability regimes form part of the law applicable to the substance of the dispute (addressed in detail by his Honour at [50] - [67] of his reasons).

(b) The second question, which arises by reference to Article 34(2)(b)(i), is whether the subject matter of the dispute to be decided through the application of those provisions of the proportionate liability regimes is incapable of settlement by arbitration under the law of South Australia (addressed at [68] - [71]).

(c) The third and final question, which arises by reference to Article 34(2)(b)(ii), is whether an award deciding the dispute by applying those provisions of the proportionate liability regimes would be contrary to the public policy of South Australia (addressed at [72] - [75]).

56. Gageler CJ answered the first question in the affirmative, and the latter two questions in the negative, which produced the consequence that an award settling the dispute through the application of the relevant provisions of the

proportionate liability regimes would *not* be liable to be set aside under Article 34(2)(b) of the Model Law. Therefore, the arbitrator had jurisdiction to make the award (at [13]).

57. I will briefly address his Honour's reasons in relation to the three questions just outlined, but it is well to observe that his Honour regarded an understanding of the overarching framework as critical to an understanding of the issues. In this regard, his Honour made the following points in particular.

58. First, party autonomy, which is manifested in the operation of the Model Law, is the foundation of arbitration (at [19]). I have now mentioned that concept three times. It is obviously important.

59. Second, this foundation gives the parties to an arbitration a number of choices. This includes a choice to designate the law applicable to the substance of the dispute (that is, the substantive law). This choice is the province of Article 28(1). The parties may also choose the procedure to be followed by the arbitral tribunal (that is, the arbitral procedure). This choice is the province of Article 19. The parties may also choose to designate the place of the arbitration. This is the province of Article 20.

60. Third, his Honour noted that the choice of the place of the arbitration also enlivens the jurisdiction of a designated court of that place (at [25]). In *Tesseract*, this was the Supreme Court of South Australia. This enlivened the jurisdiction of that court to adjudicate any application to set aside an award under Article 34 (through s 34 of the domestic statute) (at [25]). That is, this is a choice as to the curial law.

61. Thus, the Model Law structure, founded upon the autonomy of the parties, affords the parties choices as to (at [28]):

(a) the substantive law;[18]

(b) the arbitral procedure;[19] and

(c) the curial law.[20]

62. The Chief Justice then drew these threads together with this observation (at [29]):

> Whether an arbitral tribunal can and must apply a particular rule of law in determining a dispute which parties have agreed is to be settled by arbitration turns on the scope and consequence of each of those three choices of the parties and on the relationship between those consequences.

63. His Honour's subsequent analysis of the drafting history of the Model Law, and the structure and context of the provisions, led to his conclusion that Articles 19, 28 and 34 require a harmonious construction to be adopted. That detailed analysis produces some consequences, according to his Honour. I will summarise them briefly.

64. One consequence is that, given the role of Article 19, provisions within proportionate liability legislation which prescribe a rule of procedure which would be applicable in proceedings to determine the rights and liabilities of the parties in a court of competent jurisdiction in South Australia, are *not* applicable to the arbitration by reason of Article 28 (even if the rule might be characterised as a matter of substantive law). Those provisions must either be applied by agreement of the parties through Article 19(1), or replicated as a procedural order of the tribunal by an exercise of the tribunal's power under Article 19(2) (at [34]).

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[18] Model Law, Article 28.
[19] Model Law, Article 19.
[20] Model Law, Articles 1(2), 20 and 34.

65. The drafting history of the Model Law also carried the consequence that the choice of the place of the arbitration (and thus the curial law choice) should govern a question as to the non-arbitrability to the *exclusion* of the substantive law chosen under Article 28 (at [42]). Further, if non-arbitrability of the subject matter of the dispute, and public policy matters, would render the arbitration agreement inoperative or incapable of being performed, those matters will impact the jurisdiction of the tribunal. Accordingly, there will be a lack of jurisdiction on the part of the arbitral tribunal if the dispute is incapable of resolution by arbitration under the curial law (i.e. where the resultant award would be susceptible to being set aside under Article 34(2)(b)(i)), or the resultant award would be in conflict with public policy (i.e. susceptible to being set aside under Article 34(2)(b)(ii)) (at [48]).

66. Moving then to the three ultimate questions posed by the Chief Justice, let me turn to the first of those. Does the law of South Australia which is applicable to the substance of the dispute also include provisions within pt 3 of the SA Law Reform Act and pt VIA of the CCA?

67. Before proceeding further with the analysis, his Honour described as correct the decision by the parties on the appeal to abstain from submitting that the statement of Lord Hoffman in *Fiona Trust & Holding Corporation v Privalov*[21] had application here. That statement was to the effect that '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'. His Honour described Lord Hoffman's statement as inapplicable to the problem of determining the

[21] [2007] 4 All ER 951

rules of law chosen by the parties to be applicable to the substance of the dispute (at [53]).

68. Returning to the question, his Honour concluded that (at [55]):

> The law of South Australia applicable to the substance of the dispute through the operation of either s 28(1) or s 28(3) of the Domestic Arbitration Act is the same law as would be applicable to the substance of the dispute in a court in South Australia. The law applicable to the substance of the dispute in the arbitration therefore includes Commonwealth statute law as well as South Australian statute law. It excludes conflict of laws rules, either through the express operation of s 28(2) in relation to s 28(1) or through the antecedent application of conflict of laws rules to determine the applicable law in the operation of s 28(3). And, given that the scheme of the Model Law as reflected in the Domestic Arbitration Act requires arbitrability to be addressed distinctly from s 28 by reference to s 34(2)(b)(i), it necessarily excludes such rules limiting or excluding the arbitrability of the dispute as might be expressed or implied in a Commonwealth or South Australian statute.

69. His Honour saw no difficulty with the reality that various statutes confer powers on a domestic court and make a legal right or liability dependent on the making of an order by the court in the exercise of that power. The language of the statute simply needed some 'modest recasting' in this event (at [56]). It would remain necessary to ensure that the provision applied by the arbitrator 'would have the same legal operation as the provision would have were the provision applied by a court' (at [57]).

70. Adopting this approach, his Honour concluded that (at [58]):

> …the central provisions within pt 3 of the Law Reform Act and pt VIA of the CCA which empower a court to limit a defendant's liability in a case of apportionable liability (ss 8 and 9 of the Law Reform Act and ss 87CB, 87CC and 87CD of the CCA) are applicable and exercisable in the arbitration

> through the operation of s 28(1) or s 28(3) of the Domestic Arbitration Act. Each provision limits the liability of a concurrent wrongdoer for harm that is claimed to have resulted from that concurrent wrongdoer's contravention of a legal norm. By force of each, the liability of the concurrent wrongdoer is limited in proportion to the wrongdoer's assessed responsibility for the harm.

71. The same process of reasoning explains why the provisions as to contributory negligence in pt 2 of the SA Law Reform have application (at [59]).

72. Some provisions are not engaged within an arbitration through this process. This includes the obligation to notify a plaintiff of a concurrent wrongdoer of whom the defendant is aware, and provisions conferring power on a court to join another concurrent wrongdoer as a party (at [61]). See also [62] - [63].

73. His Honour makes the clear point at [63] that the legal operation of the central provisions within these proportionate liability regimes on the rights or liabilities of the parties in dispute is *not* altered by the inapplicability of the other provisions within the regimes. Critically, in his Honour's view, the operation of the central provisions 'does not depend on all concurrent wrongdoers being parties to one proceeding for a determination to be made as to the proportionate liability of any one concurrent wrongdoer' and '[n]or does their operation as between the parties to a dispute depend on any effect that the resolution of the dispute between those parties might have on third parties' (at [63]).

74. This same point, that the proportionate liability regimes *do not* require the concurrent wrongdoers to be joined as a condition of relying on the defence of apportionment) is made by their Honours Gordon and Gleeson JJ in their

joint judgment at [127] and [130], and by their Honours Jagot and Beech-Jones JJ in their joint judgment at [359].

75. At most, the inapplicability of some of the provisions bears on the distinct questions of arbitrability and public policy under Article 34, according to his Honour the Chief Justice.

76. That segues neatly into the second and third questions posed by the Chief Justice.

77. As to the second question, involving the notion of arbitrability, given the place of the arbitration also supplied the substantive law in *Tesseract*, the single question to be answered was whether the statutory text or structure, or the subject matter or purpose of the proportionate liability legislation evinced an intention to exclude arbitration of the statutory rights or liabilities in issue in arbitration. The answer of the Chief Justice was no (at [70] - [71]). Nothing in the SA Law Reform Act or the CCA provisions suggested the substantive rights or liabilities should *only* be litigated in court.

78. As to the third question, involving the notion of public policy, his Honour concluded that there was no justification in the public policy of South Australia (informed by the object of the International Arbitration Act[22] and the paramount object of the domestic statutes to which I have made reference) for treating 'a dispute about rights or liabilities arising under a Commonwealth statute or a South Australian statute as incapable of settlement by arbitration, where those statutes on their proper construction

[22] Namely, to facilitate international trade and commerce by encouraging the use of arbitration as a method of resolving disputes: *International Arbitration Act 1974* (Cth), s 2D(a).

do not themselves render the dispute incapable of settlement by arbitration' (at [75]).

Gordon and Gleeson JJ

79. In their joint judgment, Gordon and Gleeson JJ adopted a more direct pathway to resolve the question before the Court.

80. Their Honours focused on the operation of s 28 of the Domestic Arbitration Acts. They concluded that, as the law applicable to the resolution of the substance of the dispute was the law of South Australia and the proportionate liability laws form part of that law (at 85):

> ...it follows that s 28 … requires the arbitrator to apply the proportionate liability laws with such modifications as to take account of characteristics which distinguish an arbitration from court proceedings unless the effect of the modifications is that the laws could no longer be described as part of the substantive laws of South Australia.

81. In their Honours' view, the proportionate liability regimes were capable of application with modifications such that the laws could nonetheless still be described as the substantive laws of South Australia. No intention was evinced by the proportionate liability regimes to exclude arbitration (at [140]).

82. Indeed, to the contrary, their Honours considered that those regimes could be modified to apply to an arbitration whilst still retaining the integrity of the scheme of the proportionate liability laws (at [140]).

Jagot and Beech-Jones JJ

83. In their joint judgment, in a similar manner to the approach adopted by Gageler CJ, their Honours Jagot and Beech-Jones JJ considered the notions

of arbitrability and public policy had a role to play in resolution of the central issue.

84. Their Honours held that (at [290] - [291]):

(a) The only limits on the substantive law of South Australia (which includes the law of the Commonwealth) applying in the arbitration were those which resulted from the choice of the parties, or from the conflict of laws rules and (given South Australia was the place of the arbitration), from the arbitrability of the dispute and the public policy of South Australia.

(b) As South Australia was the place of the arbitration, the arbitrability of the dispute and the public policy of South Australia necessarily trumped the choice of the parties as to the substantive rules to be applied in the arbitration.

(c) The doctrines of arbitrable subject-matter and the public policy of the jurisdiction in which recognition or enforcement of the award would be sought also applied to an application for recognition or enforcement of an award in that jurisdiction.

(d) In the result, the substantive provisions of the proportionate liability regimes were not excluded by the doctrines of arbitrability or public policy as applicable in South Australia, and the parties did not choose to exclude those regimes from applying in the arbitration.

85. Regrettably, time will preclude a detailed review of the dissenting decisions, although I will return to the postscript of Edelman J's decision when considering the significance of the decision.

What are the broader dimensions of the majority decision in *Tesseract*?

86. At one level, as explained by Edelman J in his reasons, the implications of the conclusion of the majority might be characterised as confined. His Honour noted that the conclusion of the majority 'does not necessarily apply to every arbitration agreement which provides for an arbitration to be governed by the substantive law of an Australian State' (at [225]). The conclusion, according to his Honour, 'cannot dictate the interpretation of any other arbitration agreement' (at [225]).

87. His Honour observed that a 'sufficiently clear context, or sufficiently clear terms' emerging from some arbitration agreements may be sufficient to *exclude* proportionate liability schemes from the rules of law chosen by the parties as otherwise applicable to the substance of their dispute (at [225]).

88. At another level, again as helpfully identified by Edelman J in his reasons, the majority decision strikes against received wisdom in the area which formerly represented a 'widespread consensus' (at [226]), and will have more than a mere ripple effect on parties and practitioners. His Honour explained the matter as follows.

89. First, the 'widespread consensus' concerning proportionate liability schemes in arbitration can no longer inform the interpretation of arbitration agreements. In this regard, his Honour observed that it was not uncommon for a contract that contains an arbitration agreement to include provisions that limit the liability of one or more parties to the contract, such as by limiting the time within which an action could be brought or placing limits on quantum. However, his Honour noted the *former consensus view* was based on the notion that it was 'quite another thing for an arbitration agreement to include proportionate liability laws that both limit liability

and distribute (and therefore widen) a dispute beyond the parties, and therefore beyond an arbitration, to require curial involvement' (at [226]).

90. Absent a legislative response, Edelman J explained that drafters of arbitration agreements would now need to be aware that the 'widespread consensus' over the last decade no longer applies in Australia and that 'proportionate liability laws will usually (but not necessarily always) apply as part of the substantive law in Australian arbitrations' (at [227]).

91. A review of the commentary published by the legal profession in the weeks since *Tesseract* was decided appears to have distilled several consequences arising from the case, and no doubt generated discussion with clients who may be affected by the majority's conclusion. There may be latent issues not yet apparent. The visible issues would seem to include, at least:

(a) When considering the dispute resolution process to pursue, as a claimant party, an additional factor to reflect upon is the potential response of any respondent parties where the claim is an apportionable one and there are concurrent wrongdoers. A claimant who invokes an arbitral mechanism may be met with a scenario in which the respondent party relies upon a proportionate liability regime to reduce the extent of their liability, in circumstances in which the claimant cannot easily join other concurrent wrongdoers to the arbitration in order to achieve full recovery. The claimant may be required to commence multiple proceedings in several fora for this purpose.

(b) The particular provisions of the proportionate liability regime which are sought to be invoked in the arbitration must be closely considered. The regime is largely uniform, but there are differences.

Whether they are material enough to produce a different conclusion will need to be assessed on a case by case basis.

(c) When drafting dispute resolution clauses, attention should be given to the decision in *Tesseract*. It will be a matter for negotiation whether the parties might agree to expressly exclude the application of proportionate liability legislation, which the Court accepts is possible,[23] or to expressly opt-in or include such a regime. There may be further issues to explore as to the proper construction and effect of such exclusion clauses.

(d) Additionally, when drafting dispute resolution clauses, the decision in *Tesseract* provides an additional reason as to why the choice of governing law is an issue to which thought should be given, and not merely assumed.

Conclusion

92. That is all I have to time to traverse this evening. That leaves me only to thank you all for your attention this evening and to again thank the Society for inviting me to speak.

Hon. Justice Michael Lundberg
Supreme Court of Western Australia
9 October 2024

[23] For example, see Gordon and Gleeson JJ [92].

RELEVANT FRAMEWORK