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# CASE NOTE

***Pipeline Services WA Pty Ltd v ATCO Gas Australia Pty Ltd***

The Supreme Court in Pipeline Services WA Pty Ltd v ATCO Gas Australia Pty Ltd[1] provides an excellent overview on the construction of arbitration clauses. This decision affirms the common law approach to give effect to the intention between contracted parties to use a dispute resolution clause even where the contract has terminated. Crucially, the case upholds the principle that arbitration agreements are independent of the contract in which they are contained and that the intention of the parties must be assessed in the context of the entire agreement.

The Supreme Court of Western Australia upheld the operation of a dispute resolution clause where the underlying contract was terminated. This case provides valuable insight on the way courts look to the intention of parties when constructing the meaning of contractual terms.

**I. Facts:**

The plaintiff, Pipeline Services WA Pty Ltd (Pipeline), had a contract with ATCO Gas Australia Pty Ltd (ATCO) for the installation of a pipeline in Western Australia. During the performance of works, Pipeline was advised that an unexploded ordinance had been found and that the site had been previously used for weapons training.[2] ATCO advised that a search be carried out for safety reasons.[3] Pipeline adjusted its tender to reflect the revised scope of works required in the project.[4] ATCO subsequently terminated the agreement and re-opened the tender process for a new contract.[5] Pipeline was not successful in finalising the new contract and stopped work.[6] Pipeline then sought to recover the monies owed from ATCO for the work it had completed.

Clause 25 of the contract was a dispute resolution clause which relevantly provided that: [7]

> **25.1 General**
>
> (a) Any party may, by written notice, notify the other of a dispute.
>
> (b) Unless a party has complied with this Clause 25 that party may not commence court proceedings relating to any dispute under this Agreement…
>
> **25.2 Escalation to Contract Manager**
>
> (a) Any outstanding dispute must initially be put forward to the Contract Manager for resolution.
>
> **25.3 Escalation to Chief Executive Officers**

[1] *Pipeline Services WA Pty Ltd v ATCO Gas Australia Pty Ltd,* [2014] WASC 10.
[2] Ibid [11].
[3] Ibid [11].
[4] Ibid [11].
[5] Ibid [12].
[6] Ibid [13].
[7] Ibid [9].

> If a resolution of the dispute acceptable to both parties cannot be achieved at the special meeting required in Clause 25.2, the dispute will be escalated to the respective Chief Executive Officers (or their delegates) of the parties, who must endeavour to resolve the dispute.
>
> **25.4 Escalation to Arbitration**
>
> (a) If the dispute is still to be resolved within two weeks of having to be referred to the Chief Executive Officers then either party may by notice to the other party refer the dispute to arbitration… and for the purposes of the Commercial Arbitration Act, the parties agree that this Agreement is an arbitration agreement.

Pipeline commenced legal proceedings against ATCO in the Western Australia Supreme Court without first seeking to resolve the dispute under Clause 25. ATCO subsequently applied for a stay of proceedings.

**II. Determinative Issues:**

Pipeline, for reasons unknown, sought to avoid having the matter referred to arbitration. It made submissions to the effect that Clause 25 did not survive the termination of the contract, was void for uncertainty and could not be used because ATCO had waived its entitlement to insist upon it.

**A. Stay of Proceedings**

ATCO entered on a conditional appearance and applied for a stay of proceedings under s 53 of the *Commercial Arbitration Act 1985* (WA) (1985 Act). One week before the hearing commenced, the *Commercial Arbitration Act 2012* (WA) (2012 Act) came into force. The 2012 Act applied to any arbitration commenced after 7 August 2013, regardless of the date of the contract containing the arbitration or dispute resolution clause. Pipeline asserted that ATCO's application should be dismissed while ATCO submitted that it its application should be referred under the equivalent provision of the 2012 Act. The Court accepted ATCO's submission because it promotes the purpose of the 2012 Act; the 'facilitation of the fair and final resolution of commercial disputes by impartial arbitral tribunals…'.[8]

**B. Survival of Termination**

The Supreme Court rejected Pipeline's contention that Clause 25 of the agreement did not survive the termination of the contract and implied an intention between the parties that Clause 25 would continue to govern the handling of disputes in the event of termination. The Supreme Court placed emphasis upon the common law presumption that 'an arbitration clause is considered to be a contract independent of the underlying contract... and... in the absence of any evidence to the contrary intention of the parties... survives termination of the underlying contract'.[9]

Regard was also paid to case authorities establishing that courts should adopt a broad, liberal and flexible approach to the interpretation of arbitration agreements and afford a construction which provides a single forum for the adjudication for disputes.[10] The court preferred an interpretation that would not necessitate

[8] Ibid [36]. The Supreme Court also noted that an interpretation of a provision promoting the purpose of the law is to be preferred where the language permits, *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 [69] (McHugh, Gummow, Kirby & Hayne JJ).
[9] Ibid [42].
[10] Ibid [44]–[46].

the parties to determine, first in court, whether the provisions of the contract remained operative before recourse to an arbitral tribunal.[11]

The Supreme Court further rejected Pipeline's argument that the failure of Clause 25 to expressly state that it survives in the event of termination is evidence of an intention that it does not survive. Reliance was placed on Clause 26.14 that presumed an intention for Clause 25 to survive. Relevantly, clause 26.14 provided that:

> '… any clauses which need to survive in order to protect the presumed intention of the parties as expressed in the agreement are to survive termination even though they are not expressly stated to survive termination…'[12]

Martin CJ held that Pipeline's contention was inconsistent with the clear and unequivocal manifestation of the parties that Clause 25 can survive termination without an express provision to that effect.[13]

**C. Contract Void for Uncertainty**

Pipeline asserted that uncertainty arose from:[14]

a) the meaning of notice of dispute;
b) the requirement to put the dispute forward to the Contract Manager;
c) the failure of Clause 25.2 to mandate the convening of a special meeting whilst escalation to the Chief Executive Officer is conditional upon a special meeting having been convened;
d) the requirement that the Chief Executive Officers 'endeavour' to resolve the dispute; and
e) the ability for either party to refer the matter for arbitration, but no requirement for either to do so.

The Supreme Court rejected Pipeline's submissions. In doing so, emphasis was placed on the common law principle that a construction which renders a commercial agreement certain is to be preferred to one which does not.[15] In relation to specific dispute resolution clauses, the court also applied authorities in favour of adopting a construction that provides them with enforceable content.[16]

On a plain and ordinary construction, the Supreme Court found the expression used in questions (a), (b), (d) and (e) was sufficiently clear to give effect to Clause 25.[17] Although a literal construction of question (c) could give rise to ambiguity, the court found that there was no reason to afford such an interpretation when the words can be given an obvious meaning which accords with the intention of the parties.[18] This conclusion upholds the general philosophy that parties should be held to their bargain to arbitrate, or to invoke other mechanisms of dispute resolution, in the absence of a good cause.[19]

**D. Waiver**

[11] Ibid [47].
[12] Ibid [51].
[13] Ibid [51].
[14] Ibid [54].
[15] Ibid [55].
[16] Ibid [56].
[17] Ibid [60],[61], [64]–[65].
[18] Ibid [62]-[63].
[19] Ibid [58].

Pipeline's allegation that ATCO waived its right to arbitrate arose from ATCO's failure to invoke Clause 25 in the threat of Pipeline's imminent court action. The Supreme Court rejected this argument as Pipeline was the claimant in the dispute and compliance with Clause 25 was a pre-requisite to the commencement of any court proceedings.[20] In the evidence before the court, ATCO had no intention to commence legal proceedings and the fact that it did not invoke Clause 25 does not show an election to waive its rights.[21] The court also noted that waiver in the sense of arbitration clauses refers to waiver being used in a strong sense.[22]

**III. Conclusion:**

The Supreme Court in *Pipeline Services WA Pty Ltd v ATCO Gas Australia Pty Ltd* provides an excellent overview on the construction of arbitration clauses. This decision affirms the common law approach to give effect to the intention between contracted parties to use a dispute resolution clause even where the contract has terminated. Crucially, the case upholds the principle that arbitration agreements are independent of the contract in which they are contained and that the intention of the parties must be assessed in the context of the entire agreement.

The facts of this case serve as a reminder that parties to a commercial agreement should ensure that all terms are drafted with sufficient clarity to limit the scope of argument in litigation. Much of this dispute could have been avoided if the dispute resolution clause expressly stated that it was to apply in the event of a contractual termination.

Although the circumstances of the 2012 Act coming into force one week before commencement of the trial is unusual, it serves to illustrate the fact that parties to a dispute must be abreast of the legislative regime including any future amendments.

[20] Ibid [74].
[21] Ibid [74].
[22] Ibid [69].