Doing business in AUSTRALIA?

Then you need to know when you still might have to pick up the whole tab

WRITTEN BY MARIA COLE

If you have a commercial contract in Australia, it's probably governed by Australian law, which includes the proportionate liability regime.[1] Broadly, proportionate liability means if there are multiple parties to a contract and things go wrong, a court will only find you liable for your fair share of the loss/damage caused, not the whole cost of putting things right. Proportionate liability turned the traditional system of joint and several liability (where each party found to have contributed to the problem would become independently liable for the entire loss/damage caused) on its head.[2] But, do proportionate liability regimes apply to arbitrations? A recent appeal decision out of the Supreme Court of South Australia, *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* [2022] SASCA 107, has confirmed that proportionate liability does not apply to arbitral disputes unless expressly provided for.

Joint and several liability – the default in arbitrations.

↑ Unless agreed to between parties to a dispute, proportionate liability regimes do not apply in the case of arbitrations in Australia.

Background

Pascale Construction Pty Ltd (**Pascale**) entered into a contract to build a warehouse for Bunnings in South Australia. It sub-contracted with Tesseract International Pty Ltd (**Tesseract**) for Tesseract to provide engineering and consultancy services in relation to the design of the warehouse. A dispute arose between Pascale and Tesseract. Their contract provided that if the dispute could not be resolved by conciliation, it was to go to arbitration. They could not reach agreement and so Pascale issued a notice of dispute, referring the matter to arbitration.

Pascale's claims against Tesseract were for breach of contract, in negligence, and for misleading and deceptive conduct. There was a denial of liability by Tesseract and an argument that any damages payable should be reduced by reason of contributory negligence (under the Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA) (**Law Reform Act**) and the Competition and Consumer Act 2010 (Cth) (**CCA**)).

Tesseract also put forward an alternative argument that any damages should be reduced to reflect the proportionate liability of a *third party concurrent wrongdoer* (under both the Law Reform Act and the CCA). In response to this alternative argument, Pascale said that Tesseract could not rely on proportionate liability as a defence in the arbitration. Tesseract accordingly applied for leave from the Supreme Court of South Australia for the Court to answer the following question of law:

> *Does Part 3 of the Law Reform Act and/or Part VIA of the CCA apply to this commercial arbitration proceeding conducted pursuant to the legislation and the Commercial Arbitration Act 2011 (SA)?*

The arguments before the Court

The parties' arguments put to the Court were as follows:

> [Tesseract submitted] … *first, that the proportionate liability provisions constitute applicable rules of law as part of the substantive law of South Australia; secondly, that properly construed the provisions in the Law Reform Act apply to arbitration proceedings by force of their own terms; and thirdly, that the provisions are able to be applied in the proceedings by reason*

of an implied term that the Arbitrator has authority to grant the parties any relief that would have been available in a court of appropriate jurisdiction.

[Pascale] … emphasise[d] the private and consensual nature of arbitration, the incongruity inherent in binding third parties not subject to those proceedings, and that the language of the provisions tells against the application of those provisions to arbitration proceedings.

The Court answered the question put to it "No". It found that while the proportionate liability regimes under the Law Reform Act and CCA formed part of the substantive law governing the resolution of the parties' dispute under the Commercial Arbitration Act of South Australia, the relevant section of that Act did not require that every substantive law within those regimes applied to arbitration proceedings. It was therefore necessary for the provisions to apply either by force of their own terms, or by reason of an implied term in the arbitration agreement. The Court held:

The proportionate liability provisions in the Law Reform Act and the CCA do not apply to arbitration proceedings by force of their own terms in arbitration proceedings.

The parties have, through the dispute resolutions provisions in the contract, impliedly conferred the arbitrator with the power to determine their dispute as though it were being determined in a court of law with appropriate jurisdiction.

However, this conferral of power was subject to such qualifications as required by statute. There are features of the proportionate liability regimes under both the Law Reform Act and the CCA that indicate an objective intention on the part of the relevant legislature that they not apply to arbitration proceedings.

A significant factor underpinning the Court's response to the question was that there is no opportunity for a plaintiff to join additional 'wrongdoers' to an arbitration unless those wrongdoers agree (arbitration is consensual and a third party cannot be joined to an arbitration unless they consent). This means a plaintiff would lose the opportunity to recover the entirety of its losses in one set of proceedings. Justice Doyle found that the very nature of the proportionate liability regimes in the Law Reform Act and CCA was that they had been designed to govern the resolution of disputes involving multiple wrongdoers, rather than the usual *bipartite arbitration proceedings*. However, he concluded by noting the following:

This is not to say, however, that the parties might not agree between themselves to permit some partial application of the relevant proportionate liability regimes in question in arbitration proceedings between them. While this would result in a different regime from the ones intended by the relevant legislatures, there would be no difficulty with this in circumstances where it is plain that that is what the parties have agreed to do.

Conclusion

If an arbitration clause in a contract merely gives an arbitrator the ability to apply the substantive law of any State or Territory in Australia, it is now unlikely that the proportionate liability regimes in any statute that applies to the substance of a potential dispute could be applied. The arbitration clause will need to spell out clearly that the parties intend for the arbitral tribunal to make an award on the basis of proportionate liability, otherwise a liable party could end up having to pick up the whole tab.

About the author

Maria Cole works as a Knowledge Manager in The ADR Centre's Knowledge Management Team, working with BDT. She was previously a civil litigation barrister for over a decade, where she gained experience in arbitration and mediation.

1 Legislation in relation to proportionate liability has been enacted in all Australian jurisdictions, although it is not uniform. See, for example, Civil Liability Act 2002 (NSW); Civil Liability Act 2002 (TAS); Civil Liability Act 2003 (QLD); Civil Law (Wrongs) Act 2002 (ACT); and the Civil Liability Act 2002 (WA). For an interesting paper on its history and development in Australia, see the lecture paper presented by Professor Doug Jones, *Proportionate Liability Revisited*, 8th Pinsent Masons Lecture, 17 November 2020.

2 Joint and several liability remains the system in place in New Zealand. This means a plaintiff can recover 100% of its losses from a single 'wrongdoer' who is found liable, regardless of there being others who contributed to the losses.