

HOW REASONABLE IS A 'REASONABLE OPPORTUNITY'? THE VICTORIAN SUPREME COURT CONSIDERS THE SCOPE OF PROCEDURAL FAIRNESS IN COMMERCIAL ARBITRATIONS



Under the *Commercial Arbitration Act 2011 (Vic)* (the **Act**), parties to an arbitration must be given a reasonable opportunity of presenting their case (section 18 of the Act). This provision necessarily raises the question: what amounts to a 'reasonable opportunity' to present your case?

This was the central issue on appeal in the Victorian Supreme Court in *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd* [2016] VSC 326. Amasya Enterprises Pty Ltd (**Amasya**) appealed against an arbitral award on the basis that they were denied procedural fairness in breach of section 18 of the Act because the arbitrator made the award on the basis of a claim that was not pleaded in the Notice of Dispute served by Asta Developments (Aust) Pty Ltd (**Asta**) and was not argued in the arbitration.

The Court found that Amasya was afforded a reasonable opportunity to present their case, and dismissed the appeal. In doing so, Croft J clarified the requirements of procedural fairness applicable to commercial arbitrations.

The Dispute

Amasya and Asta entered into a construction contract which contained an arbitration agreement (**Contract**). Asta was the builder. Both parties purported to terminate the Contract after a number of disputes arose, and subsequently referred their respective claims to arbitration under the Contract. The principal issue in the arbitration was which party had rightfully determined the Contract.

The arbitrator conducted a seven-day evidentiary hearing, at which the parties were represented by senior and junior counsel, evidence was tendered and witnesses were cross-examined. Following that hearing, the parties exchanged lengthy written submissions and there was a day-long final oral hearing.

The arbitrator found that neither party was entitled to terminate the Contract, and found instead that the Contract had been mutually abandoned. The arbitrator then found that by reason of the mutual abandonment, Asta was entitled to its claim on a *quantum meruit* basis for the work which it had actually performed. The *quantum meruit* claim was an entitlement to reasonable remuneration for the work performed up to the point of abandonment.

The Appeal

Amasya sought an order to set aside the award on the grounds that it was 'unable to present its case' or alternatively, that the award was in conflict with the 'public policy of [Victoria]'. These claims were on the basis that Amasya was not afforded a sufficiently "reasonable opportunity" to

This article was originally published by the Resolution Institute and copyright belongs to CLAYTON UTZ.

CLAYTON UTZ



Amasya submitted that the *quantum meruit* claim was not a cause of action that was pleaded, developed or argued by Asta, and in particular because it was not addressed during the final oral hearing. Although Asta had claimed to be entitled to be paid on a *quantum meruit* basis in its original notice of dispute and written submissions, neither of these were on the basis that the Contract had been mutually abandoned.

In response, Asta submitted that the issue was raised in its written outline of reply submissions, and that Amasya had notice of the issue at least four days before the final oral hearing, but that neither party chose to address it during the oral hearing.

The Law

His Honour held that if the award did not comply with section 18 of the Act, this would allow the Court to set aside the award on either of the grounds pleaded by Amasya. However, his Honour made clear that a party being 'unable to present their case' or an award being in conflict with public policy was to be distinct from domestic, judicial considerations of procedural fairness. Errors of fact or law are not grounds to set aside an award under section 18.

His Honour identified the relevant test for determining whether an arbitral award falls foul of section 18:

1. Were the parties treated with equality?
2. Was each party given a reasonable opportunity of presenting their case?

The first question did not arise in the circumstances, so his Honour turned to the second question, which raised three sub-questions:

a. **What was "the party's case" in the arbitration?**

Amasya's case was that a finding that Asta was entitled to a *quantum meruit* as a consequence of finding that the Contract was mutually abandoned was contrary to law and to 'general considerations of justice and fairness'.

b. **Was there an "opportunity" to present the party's case?**

In his Honour's view, the fact that Asta pleaded the entitlement to a quantum meruit on the basis the Contract had been abandoned in their written submissions in reply was sufficient to give Amasya a chance to respond. The fact that it was not raised during oral argument does not mean that Amasya did not have an opportunity to respond to it.

c. **Did the opportunity amount to a "reasonable opportunity" to present the party's case?**

His Honour found that Amasya was provided a reasonable opportunity to respond: Asta's claim was raised three full days before the final oral hearing, the nature and complexity of the issue was not such as to require more notice, and the arbitration had been conducted in a way that allowed the parties to amend or supplement their claims once the core issues in dispute had been crystallised.

HOW REASONABLE IS A 'REASONABLE OPPORTUNITY'? CONT...

The Implications

This case is important for all domestic arbitrations. Section 18 of the Act is modelled on Article 18 of the Model Law, and equivalent provisions appear in other domestic arbitration acts. This case provides guidance to parties to an arbitration about what constitutes a 'reasonable opportunity' to present one's case.

As arbitrators are not bound by the common law principles of procedural fairness and natural justice, this case provides further clarification of the procedural entitlements of arbitrating parties.

Note: The above material provides a summary only of the subject matter covered, without an assumption of a duty of care by Resolution Institute or Clayton Utz. The material is not intended to be nor should it be relied upon as a substitute for legal or other professional advice. Copyright in the material is owned by Clayton Utz.



**GLOBAL POUND
CONFERENCES**
2016-17

SHAPING THE FUTURE OF DISPUTE RESOLUTION & IMPROVING ACCESS TO JUSTICE

- Full participant engagement with PowerVote interactive voting technology in multiple languages.
- 4 Stakeholder Groups involved in commercial and civil disputes: users, Providers, Advisors, Influencers.

***Be part of the Global
Pound Conference Series
and help shape the future
of dispute resolution.***

Launching in Singapore, March 17-18, and finishing in London, the GPC Series will convene all stakeholders in dispute resolution - commercial parties, chambers of commerce, business executives, entrepreneurs, lawyers, academics, judges, arbitrators, mediators, policy makers, government officials, and others - at local conferences around the world.

**38 CITIES, 29 COUNTRIES
ATTEND YOUR LOCAL EVENT**

www.GlobalPoundConference.org