Gas dispute to be aired in arbitration

The Supreme Court of Western Australia in *Power and Water Corporation v Eni Australia B V [2022] WASC 376* considered whether a party to a gas supply agreement was justified in attempting to avoid an arbitration clause. On the facts, the application (based on an exception to the arbitration clause) for urgent declaratory relief was not met. Arbitration had to proceed as provided for in the contract.

By Richard Pidgeon

Background

This was an application by Eni Australia BV (**Eni**) under section 8(1) of the Commercial Arbitration Act 2012 (WA) to stay the court proceedings filed by the Power and Water Corporation (**PWC**) in the Western Australian Supreme Court.

PWC is a government owned corporation established under the Power and Water Corporation Act 1987 (NT). It operates in the Northern Territory of Australia. PWC adduced unchallenged evidence that it supplies gas to two main customer segments: 'Tier 1' customers, the gas-fired power generators supplying power for the residential sector in the Northern Territory; and 'Tier 2' customers, being industrial customers.[1]

Eni is a Dutch company with an Australian office in Perth, hence the forum of the proceedings. The parties to the court proceedings were connected by a Gas Sale Agreement dated 1 June 2006, subsequently amended and varied (the **contract**) with an arbitration clause in schedule 4. The arbitration was to be conducted in accordance with the arbitration rules of the Australian Centre for International Commercial Arbitration (**ACICA rules**).[2] These rules provided for expedited hearings.

The contract[3] permitted the court to be the forum for dispute resolution if either party could seek "*urgent interlocutory or declaratory relief*" from a court where "*in that Party's reasonable opinion, that action is necessary to protect that Party's rights*".[4]

PWC alleged Eni had breached the contract when it issued a curtailment notice based on a force majeure incident, yet failed to provide certain information behind the notice, which PWC sought. Eni claimed full particulars of the force majeure event relied on (that excuses non-performance of certain of its obligations under the agreement)[5] were given at a meeting of both sides' executives on 14 December 2021. A slide show presentation given at the meeting was relied on.

PWC wished to inspect Eni's records to verify the information supporting the force majeure notice and sent notices to do so, on 12 November 2021 and 22 June 2022. In summary, Eni continued to provide information to PWC but did not provide access to its records.[6]

There was a delay in bringing the application in

1 *Power and Water Corporation v Eni Australia B V* [2022] WASC 376 at [52].
2 At [22].
3 Item 5 of schedule 4 of the contract.
4 At [3].
5 At [69].
6 At [45].

the Western Australian Supreme Court, which proved unhelpful to PWC. There had been an ongoing curtailment to Eni's supply of gas since April 2021. As a result, Eni had been unable to supply PWC with its full contractual entitlement and this had disrupted PWC's ability to meet Tier 1 and Tier 2 customer demand.[7]

PWC gave evidence that the Northern Territory government needed to plan and undertake steps in mitigation, such as obtaining replacement sources of gas and electricity, especially as the wet season was approaching.

The legal arguments

Eni was supplying less gas and electricity than PWC needed.[8]

Justice Allanson, as sole judge in the matter (noting the Supreme Court in Western Australia is the equivalent of New Zealand's High Court), commented:[9]

> The issue joined between the parties in their correspondence is whether PWC has sufficiently specified and confined the categories of records it seeks to inspect. At the heart of the dispute, as I understood the submissions of counsel for PWC, is the reliance by Eni on the same matters in its Notice of Curtailment and its Force Majeure Notice, and its reliance on the information presented in the meeting of 14 December 2021 in providing information about the Curtailment.

Competing affidavits were filed on substantive issues, and one witness for PWC was briefly cross-examined. Each party also adduced evidence, through affidavits of its solicitors, addressing the anticipated time to complete an arbitration process compared to seeking declaratory relief in the court. PWC led evidence that it would take approximately 6 months if the arbitration was convened under the ACICA rules and 10 to 12 months if it was a regular arbitration. Eni's evidence estimated it would take 4 months and 14 days if under the ACICA Rules; if not under the ACICA Rules, it would take approximately 10 and a half months.

Eni submitted that:

> [94]…But the question of urgency must be tied to the relief sought. The declaratory relief, to the extent it may determine the scope of the right of inspection under cl 15.5 and facilitate access to Eni's records, must be objectively urgent so that the claim requires immediate attention by the court.

It was agreed between the parties that Eni would succeed in staying the substantive court application unless PWC's application could be properly characterised as seeking urgent interlocutory or declaratory relief.[10]

The test for urgency was an objective one and had two limbs: first, that the relief was in fact urgent; second, that the party claiming the relief form the reasonable opinion that the relief was necessary to protect that party's rights.[11]

Judge's decision

The relief sought was not shown to be urgent. The Judge held that showing a real issue to be determined was not enough and found:

- There was a delay in bringing the proceedings in the Western Australian Supreme Court.
- A bare declaration that Eni had breached the requirement to provide documentary material, did not address a continuing breach. The PWC pleading did not raise any crystallised issue of construction for determination.
- Speed - assuming that the matter could be

7 At [59].
8 At [55].
9 At [78].
10 At [89].
11 *AED Oil Ltd v Puffin FPSO Ltd* (2010) 27 VR 22, [2010] VSCA 37 at [27]; and *Green v Econia Pty Ltd* [2016] SASC 153.

dealt with more swiftly in court - the evidence did not indicate how the difference (whatever it was) materially affected PWC.[12]
- An arbitrator would not be confined to making a bare declaration.[13]

The judge further noted two points about the evidence led by PWC:

1. It did not demonstrate how the information obtained from access to Eni's records was immediately needed for the purpose of those [gas supply mitigation] arrangements;[14] and
2. The evidence adduced by PWC was too general to satisfy the court that the relief it sought required immediate attention.[15]

Eni succeeded in staying the court application and the matter was referred to arbitration.

Conclusion

This was a case where the Court upheld the value of arbitration in the face of a concerted effort to have PWC's case dealt with in a court context.

New Zealand has similar provisions on stay applications where a matter should be referred to arbitration, and a leading case on this point is *Zurich Australian Insurance Ltd v Cognition Education Ltd* [2014] NZSC 188. In New Zealand, under art 8(1), a stay must be granted unless the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed or it is immediately demonstrable either that the defendant is not acting bona fide in asserting that there is a dispute or that there is, in reality, no dispute.[16]

The New Zealand Dispute Resolution Centre can happily accommodate the need for expedience and urgency with the services it provides.

About the author

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He is a Doctor of Law, and previously practiced as a general civil litigation barrister in Auckland.

12 At [105].
13 At [106].
14 At [98].
15 At [105].
16 *Zurich Australian Insurance Ltd v Cognition Education Ltd* [2014] NZSC 188, [2015] 1 NZLR 383 at [52].