PARTIES:	JOVISTA PTY LTD (ACN 009 171 420) v BATEMAN PROJECT ENGINEERING PTY LTD (ACN 056 741 596) and KINHILL PACIFIC PTY LTD (ACN 010 241 620) First Defendants AND KILBORN ENGINEERING PACIFIC PTY LTD (ACN 000 864 353) Second Defendant
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	TERRITORY JURISDICTION
FILE NO:	100 of 1997 (9711670)
DELIVERED:	11 July 1997
HEARING DATES:	20 June 1997
JUDGMENT OF:	Bailey J

REPRESENTATION:

Counsel:

Plaintiff:	Mr A Wyvill
First Defendants:	Mr C. Edmonds
Second Defendant	Mr B.D. Luscombe

Solicitors:

Plaintiff:	Cridlands
First Defendants:	De Silva Hebron
Second Defendant	Elston & Gilchrist

Judgment category classification:	C
Judgment ID Number:	BAI97017
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BAI97017

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. 100 of 1997
(9711670)

BETWEEN:

JOVISTA PTY LTD
(ACN 009 171 420)
Plaintiff

AND:

BATEMAN PROJECT ENGINEERING
PTY LTD (ACN 056 741 596)
and KINHILL PACIFIC PTY LTD
(ACN 010 241 620)

First Defendants

AND

KILBORN ENGINEERING PACIFIC
PTY LTD (ACN 000 864 353)

Second Defendant

CORAM: BAILEY J

REASONS FOR JUDGMENT

(Delivered 11 July 1997)

Background

The plaintiff and the first and second defendants have sought jointly declarations on the basis of the following agreed set of facts:

1. In or about June 1996 the plaintiff as contractor and the defendants entered into the following contracts ("the Contracts") in respect of phase II of the development of the Mt Todd Gold Mine:

   PBK528-M-CC-001 (Job 1075) ("Wet") Structural/Mechanical Quaternary Crushing and Wet Plant;

   PBK528-S-CC-003 (Job 1073) ("Tanks") Tanks - (Field Erected) Thickener and Other Tanks;

   PBK528-P-CT-001 (Job 1078) ("Pipes") Piping; and

   PBK528-M-CC-008 (Job 1077) ("Dry") Structural Mechanical - Secondary Tertiary and Shutdown.

2. Each of the Contracts have general conditions in terms of annexure "A" hereto.

3. Between June 1996 and January 1997 the plaintiff undertook the works required under the Contracts.

4. The plaintiff has claims against the defendants arising out of the Contracts and the performance of the works thereunder which are disputed by the defendants.

5. On 31 January 1997, the plaintiff's solicitors wrote to each of the defendants and enclosed notices of dispute to the defendants under each of the Contracts in respect of the claims. Annexed hereto and marked "B" and "C" are true copies of the letters. Annexed hereto and marked "D", "E", "F" and "G" are true copies of the notices of disputes.

6. If (which is denied by the defendants) Article 42 of the general conditions is an arbitration agreement within the meaning of the *Commercial Arbitration Act*, the plaintiff has followed the procedure set out in Article 42, as a consequence of which, Mr A.E. Swann has been validly appointed as an arbitrator pursuant to Article 42.

[Note: It is unnecessary for present purposes to reproduce Annexures "A" to "G".]

The declarations sought are:

A. As to whether the contracts each contain an arbitration agreement within the meaning of the *Commercial Arbitration Act* (NT)*;*

B. Insofar as the contracts do each contain such an arbitration agreement, what questions, disputes or claims, (if any) other than those provided for

in Article 9, are required to be determined by arbitration in accordance with Article 42.

Article 42 of the general conditions of the four contracts referred to in para 1. of the Statement of Agreed Facts is in the following terms:

"ARTICLE 42 – ARBITRATION

1. In the event of a submission to arbitration, the submission shall be to a single arbitrator agreed by the parties, but in default of agreement to a single arbitrator appointed by the President (or person acting for the time being as President) of the Institution of Engineers, Australia, and in all cases such reference shall be deemed to be a submission to arbitration within the meaning of the law applicable in the Northern Territory."

2. The reference or submission to arbitration shall be made by the parties, but if either refuses to make or delays in making joint reference or submission, then the other may make the reference or submission which will be binding on the party so refusing or delaying.

3. A submission to arbitration shall be irrevocable except by leave of the Supreme Court of the Northern Territory or a Judge thereof and shall have the same effect in all respects as if it had been made an order or rule of the Court.

4. The witnesses upon the reference shall be examined on oath. The parties to the reference and all persons claiming through them shall, subject to any legal objection, submit to be examined by the arbitrator on oath in relation to the matters in dispute and shall subject as aforesaid produce before the arbitrator all books, papers, accounts, writing and documents within their possession or powers respectively which may be required or called for and do all other things which during the proceedings on the reference the arbitrator may require.

5. The costs of the submission, reference and award (including the fees of the arbitrator) shall be at the discretion of the arbitrator who may direct to and by whom and in what manner those costs or any part of

them shall be paid and may tax or settle the amount of the costs to be so paid or any part thereof and may award costs to be paid as between solicitor and client.

6. The award made by the arbitrator shall be final and binding on the parties to the reference and the parties claiming under them respectively and shall be enforceable as if it were a judgement or order of the said Supreme Court to the same effect.

7. Neither party shall be entitled to commence or maintain any action upon the question until such matter shall have been submitted and determined as hereinbefore provided and then only for the amount found due on such arbitration.

8. Pending the submission to arbitration and thereafter until the arbitrator publishes its award, the parties shall continue to perform all their obligations under the Contract without prejudice to a final adjustment in accordance with the said award."

For convenience, I have numbered the paragraphs of Article 42 for the purposes of these reasons.

Aside from Article 42, the only other express reference to arbitration in the general conditions of the contracts between the parties appears in Article 9:

"ARTICLE 9 – DEVIATION FROM PLANS, DRAWINGS AND SPECIFICATIONS

CM reserves the right to correct any errors or omissions in, and to make any changes to, deductions from, or additions to the Work. Contractor shall not depart from the requirements of the Work unless first directed in writing by CM; and thereafter Contractor agrees to immediately comply with such directions and proceed therewith. Within five (5) days after receipt of such directions or such other time stipulated by CM, Contractor will furnish to CM a statement of its estimate of the net increase or decrease in the cost and time for completion of the Work resulting from its compliance with such directions. CM shall consider the statement so submitted and, upon the basis thereof and of such other matters as may be relevant, shall submit in writing to Contractor the proposed amount of

> increase or decrease in Contract Compensation and time. If Contractor objects to CM's proposal, Contractor shall so notify CM in writing within three (3) days, and then the parties shall forthwith confer in an endeavour to settle the matter, but if they fail to agree within a further five (5) days, then the question shall be referred to arbitration in accordance with Article 42.
>
> This article shall not restrict CM's right to award additional work to other parties within the general scope of the work to be performed by Contractor."

The reference in Article 9 to "CM" and "Contractor" are references to the first and second defendants (as joint venturers) and the plaintiff respectively.

Article 10D of the contracts (headed "CONTROL BY AND DECISIONS OF CM") refers to the defendants' right to require the plaintiff to repair remove or replace materials used in carrying out the contracts and provides that in specified circumstances "...such repair, removal or replacement shall be treated as a variation of Work under Article 9".

The Opposing Positions of the Parties

It is the plaintiff's submission that, on a proper construction of Article 42 in the context of the contracts as a whole, Article 42 is an arbitration agreement within the meaning of section 4 of the *Commercial Arbitration Act.* The effect of Article 42 according to the plaintiff is that all disputes arising under the contracts are intended to be both capable of being referred to arbitration and required to be referred to arbitration if either party to the contracts insists upon that course.

The defendants, on the other hand, submit that on its proper construction Article 42 is not an "arbitration agreement", but simply a set of procedural provisions applicable to arbitration pursuant to Article 9 (and by reference that part of Article 10D to which reference is made above). On the defendants' submissions, Article 9 (and by reference Article 10D) read together with Article 42 constitute an "arbitration agreement" within the meaning of section 4 of the *Commercial Arbitration Act*. The effect, in the defendants' submissions, is that it is **only** disputes arising under Article 9 (and the relevant part of Article 10D) which are **required** to be the subject of arbitration proceedings pursuant to the contracts at the option of either party. In addition, upon this construction of the contracts, the parties would also, of course, be free to agree to the use of the Article 42 procedure for disputes falling outside Articles 9 and 10D.

"Arbitration Agreement"

Section 4 of the *Commercial Arbitration Act* provides, inter alia:

> "In this Act, unless the contrary intention appears —
> 'arbitration agreement' means an agreement in writing to refer present or future disputes to arbitration;"

Plaintiff's Submissions

For the plaintiff, Mr Wyvill identified the key issue in relation to Article 42 as being:

> "...the only difficulty that arises in respect of Article 42 is the failure of the drafter to give any precise indication as to the nature of the disputes that are covered by Article 42. We know that matters in dispute are referred to there, but it's given no precise meaning."

At the risk of not doing justice to Mr Wyvill's submissions, these may be summarised as follows:

(a) Paragraph 2 of Article 42 imposes the power in each of the parties to the contract to compel arbitration and the corresponding obligation in the other party to accept that form of dispute resolution; and

(b) While paragraph 2 does not define the scope of the agreement to arbitrate, it is the reference to "matters in dispute" in paragraph 4 of Article 42 (an admittedly procedural provision) which this Court is required to interpret in determining the ambit of disputes covered by Article 42.

In the plaintiff's submission, a number of matters support the contention that the parties to the contracts intended all disputes between them to be resolved by arbitration pursuant to Article 42. Again at the risk of doing injustice to Mr Wyvill's comprehensive and detailed submissions, these may be summarised as follows:

(i) If it was intended by the parties to confine arbitrations to disputes arising under Article 9 (and 10D) one would expect to find such a limitation expressly in Article 42;

(ii) The only Articles in the general conditions of the contract dealing with disputes are Articles 42 and 46 (concerning "NOTIFICATION OF CLAIMS"). By providing a detailed procedure for dispute resolution, the parties have implicitly excluded other procedures for settling disputes or differences between them;

(iii) If Article 42 is confined to disputes arising under Article 9 (and 10D), it is possible that parallel Court proceedings in respect of the same factual matter could produce different outcomes. This would not only be commercially irrational, but would tend to defeat the purpose of paragraph 7 of Article 42;

(iv) Similarly, by confining the application of Article 42 to disputes arising under Article 9 (and 10D) the operation of paragraph 8 of Article 42 would be substantially limited and its purpose substantially defeated;

(v) The failure of the contract to limit "the matters in dispute" in paragraph 4 of Article 42 to disputes arising *under the contract* does not militate against the plaintiff's construction as the Court will necessarily read down the provision in such a manner;

(vi) By limiting Article 42 to disputes arising under Article 9 (and 10D), irrational distinctions would be created for resolution of disputes concerning similar subject matters;

(vii) Similarly, such an interpretation would create commercially irrational distinctions as to the nature of disputes; and

(viii) The express reference to Article 42 in Article 9 is not rendered meaningless by applying Article 42 to all disputes between the parties; the express reference in Article 9 is simply a mandatory requirement to negotiate for a specified period before proceeding to arbitration in accordance with generally applicable provisions of Article 42.

In support of his submissions, Mr Wyvill cited several passages from the judgment of the High Court in *PMT Partners Pty Ltd v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 in addition to authorities dealing with the general principles applicable to construction of commercial agreements and, in particular, building contracts containing arbitration agreements.

I do not consider that it is necessary to canvass these authorities in any detail in the present case. I accept that the authorities referred to by Mr Wyvill provide a good deal of support in general terms for the plaintiff's submissions that a broad construction of Article 42 would accord with commercial reality and logic. Nevertheless, I am mindful of the observation by Brennan CJ, Gaudron and McHugh JJ in the *PMT Partners* case, supra, at p311 that:

> "It may be accepted that contracts will only be constructed as limiting the rights of the parties to pursue their remedies in the courts if it clearly appears that that is what was agreed."

In the present context, the difficulty – as cogently identified by Mr Wyvill – is the failure of Article 42 to define the ambit of disputes which it is intended to cover. The scope of the parties' agreement for arbitration is necessarily important since, inter alia, it provides "the fundamental foundation and charter for the arbitration which may be conducted": Dorter and Sharkey: Building and Construction Contracts in Australia, 2nd Edition, Volume 2 at para 14,270.

The plaintiff submits that Article 42 is intended to be of general application to contractual disputes between the parties, but even on the plaintiff's submissions neither Article 42 nor the contracts as a whole give any precise indication as to the nature of the disputes that are covered by Article 42. As the authors of Building and Construction Contracts in Australia, supra, at para 14.370 note, many arbitration clauses are drawn in wide terms, but "nonetheless, the precise words used are important". The authors then identify a number of commonly used formulations for disputes clauses in wide terms, for example:

(a) "under this agreement";

(b) "touching the rights and liabilities of the parties hereunder";

(c) "touching this agreement";

(d) "anything arising out of this agreement";

(e) "in respect of, or with regard to, this agreement"; and

(f) "in connection with this agreement".

The precise formulation of a widely drawn arbitration clause will, of course, control its application – in particular as Dorter and Sharkey note "given a sufficiently wide arbitration clause the subject matter is not limited to claims under the overall contract but has a very generous nexus with most related subjects...". Examples suggested include:

- whether the contract has been frustrated (*Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337);

- whether the contract has been rescinded in futuro (*Grason Homes Pty Ltd v Murdoch* [1974] VR 745 at 749);

- rectification of the contract (*Roose Industries Ltd v Ready Mixed Concrete Ltd* [1974] 2 NZLR 246);

- related claims on quantum meruit (*Government of Gibraltar v Kenney* [1956] 2 QB 410 and see the *Codelfa Construction* case, supra);

- claims in tort which have a sufficiently close nexus with the contract (W*oolf v Collis Removal Service*) [1948] 1 KB 11); and

- issues subsequent to the contract, including issues arising out of a supplemental contract (*Graham v Seagoe* [1964] 2 Lloyd's Rep. 564 at

567), a dispute about whether a contractual claim has been settled (*James Wallace Pty Ltd v Abbey Orchard Property Investments Pty Ltd* – unreported, NSW Supreme Court, CA, 21 October 1980), estoppel and waiver (*Kathmer Investment Pty Ltd v Woolworths Pty Ltd* [1970] 2 SA 498), and claims under the Trade Practices Act (*IBM Australia Ltd v National Distribution Services Pty Ltd* (1991) 22 NSWLR 466 (CA)).

Mr Edmonds for the first defendant and Mr Luscombe for the second defendant submit, in the absence of any indication that Article 42 was intended to extend as a mandatory arbitration agreement beyond its application to Article 9 (and by reference, Article 10D), there is no basis for interpreting Article 42 as an "arbitration agreement" of general application to contractural disputes between the parties. On its face, Article 42 provides a set of procedural provisions applicable to Article 9 and 10D disputes and may (but not must) be employed in relation to other disputes by agreement. In their submissions, the non-binding nature of Article 42 (aside from its mandatory application to disputes arising under Articles 9 and 10D) is evident from the opening words of its first paragraph: "*In the event of a submission to arbitration…*". In their submission, this, coupled with the lack of definition of the scope of the agreement alleged by the plaintiff is fatal to the suggestion that Article 42 is intended to be of general and mandatory application.

At a practical level, the defendants submit that there is nothing unusual in parties to a building contract providing that disputes of a particular kind (here

those under Articles 9 and 10D) are required to be arbitrated while the appropriate method of resolving other disputes is left open until such time as they may arise. On the contrary, they submit that it would be unusual for the parties to have agreed that all disputes under the present contracts should be submitted in the absence of agreement to a single arbitrator appointed by the President of the Institute of Engineers. Such disputes might encompass subject matters far removed from the expertise of an engineer – albeit Article 42 does not confine the President's choice of an arbitrator to a member of the Institute.

Conclusion

Counsel for both the plaintiff and defendants have referred to a substantial number of authorities illustrating general principles of contract construction and, more particularly, building contracts and arbitration clauses. Neither counsel nor I have been able to locate any authority which deals with a contract containing a clause similar to Article 42 – that is, one providing detailed procedures for arbitration but devoid of any indication of the nature of the disputes intended to be covered by it. An observation of Kirby P in *IBM Australia Ltd v National Distribution Services Ltd*, supra, at p473C in interpreting an arbitration clause is particularly appropriate in the circumstances:

> "Necessarily, each decision must depend upon its language and context. The task of construction, being unmechanical and partly impressionistic, care must be taken, in endeavouring to derive the meaning of a particular provision from what has been said by judges concerning other provisions in other contexts and in earlier times."

In the present case, my initial"impression" was that Article 42 was not intended to be confined to a mandatory application to disputes arising under Articles 9 and 10D and to other disputes by agreement only. However, there is nothing in Article 42 itself, alone or when considered in the context of the contracts as a whole, which can provide any support for such an impression. On its face Article 42 is entirely procedural in nature and the opening words of its first paragraph ("*In the event of a submission to arbitration*...") is strongly indicative of its permissive scope (subject to any specific mandatory applications by the contract).

The plaintiff has placed a great deal of weight on the reference to "the matters in dispute" in paragraph 4 of Article 42, but in the context that it is employed the phrase is equally apt for a permissive arbitration clause as for the general mandatory construction advanced by Mr Wyvill. If the mandatory application of Article 42 is confined to disputes arising under Articles 9 and 10D, paragraphs 7 and 8 of Article 42 lose some, but by no means all, of their force – and, of course, such provisions would operate with full force and effect in relation to disputes which the parties agree should be the subject of arbitration. I consider that the arguments advanced by the parties as to the alleged commercial advantages or disadvantages of there being potentially parallel dispute resolution proceedings concerning similar or related claims are balanced evenly. In short, the arguments in favour of a single dispute resolution mechanism are similar in strength to a 'wait and see' approach to choice of settling disputes by arbitration or by litigation.

It is evident that Article 9 (and by reference Article 10D) together with Article 42 can constitute an "arbitration agreement" within the meaning of the Territory's Act. The general terms of Article 42 can also stand alone as a permissive arbitration clause which is available for the use of the parties by agreement. Taken as a whole (and it must be said with some hesitation on my part) I am not able to discern anything in the contract which would give the arbitration agreement a wider scope.

Accordingly, I am satisfied that:

A. the contracts each contain an arbitration agreement within the meaning of section 4 of the *Commercial Arbitration Act*; and

B. no claims, disputes or questions other than those provided for in Article 9 (and by reference Article 10D) are required to be determined by arbitration in accordance with Article 42.