
A conditional submission to arbitration was held to be a valid submission in *Savcor Pty Ltd v NSW* [2001] NSWC 596: the presence of a two-tier process – expert determination then arbitration – did not preclude a finding that there was an arbitration agreement for the purposes of s 53 (although a stay was refused in order to minimise the claims proceedings). In *Mulgrave Central Mill Co Ltd v Hagglunds Drives Pty Ltd* [2001] QCA 40, a dispute resolution mechanism (ASGC clause 47) that referred to a dispute then a conference and then said that either party “may” refer the issue to arbitration was held not to be an arbitration agreement within the meaning of the Act. In *Stevens Constructions v Zorko* [2002] SASC 42, a clause that “either party may give notice” of reference to arbitration was held not to give a right of election to either arbitrate or litigate.


An expert determination is not subject to review in the same way that arbitrations are: *Savcor Pty Ltd v NSW* [2001] NSWSC 596.

[15] International Arbitration

Note that *The New York Convention* defines international awards in terms of an award made outside the jurisdiction. *The Model Law* deals with international arbitrations occurring within the jurisdiction and the definition (in Article 1(3)) of “international” is different.


In *ACD Tridon v Tridon Australia* [2002] NSWC 896 the court said that there was no presumption in favour of arbitrability but proceeded to give a
wide operation to an arbitration clause to include corporate disputes that are “staple fare in any Australian court that conducts a Corporations List” (such as failure to give information to shareholders and oppression). Those matters that could not come within the arbitration were proposed to be referred to the arbitrator as a referee under the Rules of Court.

[42] Arbitrator’s Fees

The court has dealt with an arbitrator bringing pressure to bear in respect of fees or seeking a cancellation fee after commencement of an arbitration in *ICT Pty Ltd v Sea Containers Ltd* [2002] NSWCA 77. In ordering the removal of the arbitrators (one of whom was a retired Supreme Court judge) on findings of “serious allegations” of misconduct, the Court said that the case showed the wisdom of an arbitrator reaching agreement on remuneration upon appointment – the arbitrators had not here done that and their concern about cancellation fees assumed such importance that they allowed themselves to be swayed from their duty to maintain the appearance of acting in the interests of making an award. The Court found the arbitrators were putting undue pressure on the parties. You cannot be a protagonist and an impartial arbitrator.

[45] Expert Evidence

In *Makita (Aust) v Sprowles* (2001) 52 NSWLR 705, the court stressed the need for an expert to furnish the criteria which will enable an evaluation of the validity of the expert opinion being put forward.

[62] Appeal

The appellate courts have sanctioned appeals to them from decisions on review of arbitrators: *Energy Brix Australia v National Logistics* [2002] VSCA 113.

The court has considered the materials to be taken into account in reviewing an award (including materials outside the award): *Prizac Developments Pty Ltd v Unley Property Developments Pty Ltd* [2001] SASC 245.

[64] Setting Aside Award

In *Stadium Australia v Sodexho Venues* [2002] NSWCA 437, the court gave leave to appeal from an award where the arbitrator had made an initial finding that there was no ambiguity in the contract and when the court thought this constituted a manifest error on the face of the award. This might be compared with the decision in *Flor Australia v Anaconda Operations* [2003] VSC 276.
[66] Misconduct

An arbitrator who stated in his award that he had been asked to act as *amiable compositeur* when there was no such agreement and who acted under s 22(2) rather than s 22(1) was found to have misconducted himself: *Hewitt v McKensey* [2003] NSWC 1186.