

# HIGH COURT OF AUSTRALIA

GAGELER CJ,  
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

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TESSERACT INTERNATIONAL PTY LTD APPELLANT

AND

PASCALE CONSTRUCTION PTY LTD RESPONDENT

*Tesseract International Pty Ltd v Pascale Construction Pty Ltd*

[2024] HCA 24

*Date of Hearing: 15 November 2023*

*Date of Judgment: 7 August 2024*

A9/2023

## ORDER

- 1. Appeal allowed with costs.*
- 2. Set aside order 1 of the orders made by the Court of Appeal of the Supreme Court of South Australia on 21 October 2022 and, in its place, order that:*

*The question of law reserved, "Does Part 3 of the Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA) and/or Part VIA of the Competition and Consumer Act 2010 (Cth) apply to this commercial arbitration proceeding conducted pursuant to the legislation and the [Commercial Arbitration Act 2011 (SA)]?", be answered "Yes".*

On appeal from the Supreme Court of South Australia



**Representation**

B W Walker SC with T J Margetts KC and L J Connolly for the appellant (instructed by Macpherson Kelley)

F P Hicks SC with W V McManus for the respondent (instructed by Kennedys (Australasia) Partnership and FBR Law (as town agent))

Australian Centre for International Commercial Arbitration appearing as amicus curiae, limited to its written submissions

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.



## CATCHWORDS

### **Tesseract International Pty Ltd v Pascale Construction Pty Ltd**

Arbitration – Proportionate liability – Where contract for engineering consultancy provided for referral of disputes to arbitration – Where dispute as to performance of contract referred to arbitration – Where arbitration conducted pursuant to *Commercial Arbitration Act 2011* (SA) – Where law applicable to substance of dispute is the law of South Australia – Where respondent claims damages for breach of contract, negligence and misleading or deceptive conduct – Where appellant denies liability – Where in alternative appellant contends liability reduced by reference to alleged concurrent wrongdoing of third party in accordance with proportionate liability laws in Pt 3 of *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) ("Law Reform Act") and Pt VIA of *Competition and Consumer Act 2010* (Cth) ("CCA") – Where third party not and cannot be required to be party to arbitration – Where respondent denies applicability of proportionate liability laws in arbitration – Where appellant applied to Supreme Court of South Australia for leave to obtain determination of question of law as to applicability of proportionate liability laws in arbitration – Whether proportionate liability laws in Pt 3 of Law Reform Act and Pt VIA of CCA apply in arbitration.

Words and phrases – "apportionable claim", "arbitrability", "capable of settlement by arbitration", "capable of translation or adaptation", "choice of law", "concurrent wrongdoer", "express or implied choice of law", "joinder", "non-arbitrable subject matter", "paramount object of arbitration", "party autonomy", "proportionate liability", "public policy", "rules of law applicable to the substance of the dispute", "solidary liability".

*Competition and Consumer Act 2010* (Cth), Pt VIA.

*Commercial Arbitration Act 2011* (SA), ss 1C, 5, 16, 19, 27J, 28, 34.

*Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA), Pt 3.

UNCITRAL Model Law on International Commercial Arbitration (1985), Arts 5, 16, 19, 28, 34.



GAGELER CJ.

## Introduction

1           The United Nations Commission on International Trade Law ("UNCITRAL") adopted in 1985 and amended in 2006 the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law"). The Model Law, which applies to "international commercial arbitration",<sup>1</sup> has force of law in Australia by operation of the *International Arbitration Act 1974* (Cth) ("the International Arbitration Act").<sup>2</sup>

2           Legislation mirroring the Model Law, but applying to "domestic commercial arbitrations", exists in each Australian State and Territory.<sup>3</sup> In South Australia, that legislation is the *Commercial Arbitration Act 2011* (SA) ("the Domestic Arbitration Act"). The text of the Domestic Arbitration Act comprises text drawn from the Model Law with some local modifications and additions.

3           Like its counterparts in other States and Territories, the Domestic Arbitration Act provides that regard is to be had in its interpretation to the need to promote, so far as practicable, uniformity between its application to domestic commercial arbitration and the application by the International Arbitration Act of the Model Law to international commercial arbitration.<sup>4</sup> To that end, the Domestic Arbitration Act provides for reference to be made in its interpretation to UNCITRAL documents relating to the drafting and operation of the Model Law.<sup>5</sup>

4           This appeal arises out of a domestic commercial arbitration of a dispute which the appellant and the respondent have agreed is to be settled by arbitration. The place of the arbitration is South Australia. The law applicable to the substance of the dispute is the law of South Australia. The dispute which the appellant and the respondent have agreed is to be settled by arbitration encompasses reliance by the appellant, in answer to claims made against it by the respondent, on the proportionate liability regimes set out in both Pt 3 of the *Law Reform (Contributory*

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1     Article 1(1) of the Model Law.

2     Section 16(1) of the International Arbitration Act.

3     See Jones and Walker, *Commercial Arbitration in Australia: Under the Model Law*, 3rd ed (2022) at 11-21 [1.200]-[1.270].

4     Section 2A(1) of the Domestic Arbitration Act.

5     Section 2A(2) of the Domestic Arbitration Act.

*Negligence and Apportionment of Liability) Act 2001* (SA) ("the Law Reform Act") and Pt VIA of the *Competition and Consumer Act 2010* (Cth) ("the CCA").

5 Doubt as to whether those proportionate liability regimes apply in the arbitration led to the raising of a preliminary question of law for the determination of the Supreme Court of South Australia. The preliminary question was raised under s 27J of the Domestic Arbitration Act, which confers jurisdiction on the Supreme Court, on application made by a party to an arbitration agreement with the consent of an arbitrator or all other parties, "to determine any question of law arising in the course of the arbitration".

6 The preliminary question of law raised for the determination of the Supreme Court was: "Does Part 3 of [the Law Reform Act] and ... Part VIA of [the CCA] apply to this commercial arbitration proceeding conducted pursuant to ... [the Domestic Arbitration Act]?" The question was referred to the Court of Appeal of the Supreme Court of South Australia.

7 The answer given by the Court of Appeal to the preliminary question of law was: "No". This appeal, by special leave, is from the order of the Court of Appeal which embodied that answer. The Australian Centre for International Commercial Arbitration ("ACICA") was granted leave to file written submissions in the appeal as amicus curiae.

8 The arguments of the parties on the appeal focused primarily on whether the proportionate liability regimes applied to the arbitration through the operation of s 28 of the Domestic Arbitration Act. The parties were in conflict as to whether, and if so how, opaque notions of "arbitrability"<sup>6</sup> and of "public policy"<sup>7</sup> might bear on the application of the proportionate liability regimes to the arbitration through the operation of that provision. Helpfully, ACICA drew attention to the broader context of the Model Law.

9 For reasons to be explained, within the scheme of the Model Law as reflected in the Domestic Arbitration Act, notions of arbitrability and of public policy are not the province of Art 28 of the Model Law as reflected in s 28 of the Domestic Arbitration Act. Those notions are the subject of separate and discrete treatment in Art 34(2)(b) of the Model Law as reflected in s 34(2)(b) of the Domestic Arbitration Act. More than one question therefore needs to be asked and

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6 See Mustill and Boyd, *Commercial Arbitration: 2001 Companion Volume to the Second Edition* (2001) at 70-71.

7 See Maurer, *The Public Policy Exception under the New York Convention: History, Interpretation and Application*, 2nd ed (2022).



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answered in considering the application of the proportionate liability regimes to the arbitration.

10 The primary question is undoubtedly the question which arises under Art 28 of the Model Law as reflected in s 28 of the Domestic Arbitration Act: whether all or some of the provisions of the proportionate liability regimes form part of the law applicable to the substance of the dispute.

11 Once the provisions of the proportionate liability regimes that are applicable to the substance of the dispute through the operation of Art 28 of the Model Law as reflected in s 28 of the Domestic Arbitration Act have been identified, however, two further questions arise to be addressed by reference to Art 34(2)(b) of the Model Law as reflected in s 34(2)(b) of the Domestic Arbitration Act. One arises by reference to Art 34(2)(b)(i) as reflected in s 34(2)(b)(i): whether the subject matter of the dispute to be decided through the application of those provisions of the proportionate liability regimes is incapable of settlement by arbitration under the law of South Australia. The other arises by reference to Art 34(2)(b)(ii) as reflected in s 34(2)(b)(ii): whether an award deciding the dispute by applying those provisions of the proportionate liability regimes would be contrary to the public policy of South Australia.

12 My conclusion in relation to the primary question – that arising under Art 28 of the Model Law as reflected in s 28 of the Domestic Arbitration Act – is that the law of South Australia applicable to the substance of the dispute which has been submitted to arbitration includes those provisions of the proportionate liability regimes that would be applied to determine the rights and liabilities in dispute between the appellant and the respondent were the dispute to be heard and determined in a court of competent jurisdiction in South Australia.

13 My conclusions in relation to the two further questions – those arising by reference to Art 34(2)(b)(i) and (ii) of the Model Law as reflected in s 34(2)(b)(i) and (ii) of the Domestic Arbitration Act – are that the subject matter of the dispute to be decided through the application of the applicable provisions of the proportionate liability regimes is not incapable of settlement by arbitration under the law of South Australia and that an award deciding the dispute by applying those provisions would not be contrary to the public policy of South Australia. The consequence of those conclusions is that an award settling the dispute through the application of the applicable provisions of the proportionate liability regimes would not be liable to be set aside under Art 34(2)(b) of the Model Law as reflected in s 34(2)(b) of the Domestic Arbitration Act and that the arbitrator therefore has jurisdiction to make the award.

14 In the result, together with Gordon and Gleeson JJ, and Jagot and Beech-Jones JJ, I would allow the appeal.

### **The international context of the Model Law**

15 To appreciate the analysis required to determine whether the arbitrator can and must apply all or some of the provisions of Pt 3 of the Law Reform Act and Pt VIA of the CCA in deciding the dispute, it is necessary to appreciate the international context of the Model Law. UNCITRAL framed the Model Law to be applied to international arbitration against the background of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration in 1958 ("the New York Convention").

16 The international context needs to be borne in mind to appreciate a number of distinctions drawn in the framing of the Model Law which have been carried over into the Domestic Arbitration Act. Most of those distinctions are readily comprehensible in their original application to international arbitration. Some can seem obscure and recondite when translated to be applied to domestic arbitration. They can seem especially abstruse in a case such as the present, where the law applicable to the substance of the dispute and the law of the place of the arbitration are one and the same.

17 The distinctions nonetheless are the foundation of the framework within which the capacity of an arbitral tribunal to apply a particular law or body of law in determining the substance of a dispute which the parties have agreed is to be settled by arbitration falls to be analysed. Understanding that framework is critical not only to understanding what law is applicable to the substance of the dispute through the operation of Art 28 of the Model Law as reflected in s 28 of the Domestic Arbitration Act but also to understanding how and to what extent notions of arbitrability and of public policy can affect the capacity of the arbitral tribunal to apply that law having regard to Art 34(2)(b)(i) and (ii) of the Model Law as reflected in s 34(2)(b)(i) and (ii) of the Domestic Arbitration Act.

18 An explanation of the critical distinctions best begins with an explanation of the principle of party autonomy. That principle will be seen to be manifested in the operation of the Model Law in more than one way.

### **Party autonomy under the Model Law**

19 Having noted that the international origin and international application of the Model Law make imperative that the Model Law be construed without any assumption that the Model Law embodies common law concepts, French CJ and I

added in *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia*:<sup>8</sup>

"In common with the New York Convention, the Model Law nevertheless proceeds on a conception of the nature of an arbitral award, and a conception of the relationship of an arbitral award to an arbitration agreement, identical in substance to the conception that has for centuries underpinned the understanding of an arbitral award at common law as 'a satisfaction pursuant to [the parties'] prior accord of the causes of action awarded upon' and as thereby 'precluding recourse to the original rights the determination of which had been referred to arbitration'. That conception, in short, is that 'the foundation of arbitration is the determination of the parties' rights by the agreed arbitrators pursuant to the authority given to them by the parties'."

20 The conception that the foundation of arbitration is the determination of the rights and liabilities of the parties in dispute by an arbitral tribunal pursuant to authority given by the agreement of the parties is manifested in the Model Law giving the parties to an arbitration a number of distinct choices.

21 One choice given to the parties is to designate the law applicable to the substance of the dispute, sometimes termed the law applicable to the merits of the dispute:<sup>9</sup> the substantive law. That is the province of Art 28 of the Model Law as reflected in s 28 of the Domestic Arbitration Act. Article 28 is headed "Rules applicable to substance of dispute". Article 28(1) provides that "[t]he arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute" and that "[a]ny designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules". Article 28(2) provides that "[f]ailing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable".

22 Another choice given to the parties is to agree on the procedure to be followed by the arbitral tribunal in conducting the arbitral proceedings: the arbitral

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8 (2013) 251 CLR 533 at 545-546 [9] (footnotes omitted), quoting *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643 at 653-654 and *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich* [2003] 1 WLR 1041 at 1046 [9].

9 See Jones and Walker, *Commercial Arbitration in Australia: Under the Model Law*, 3rd ed (2022) at 364-366 [9.120]; Mustill and Boyd, *Commercial Arbitration: 2001 Companion Volume to the Second Edition* (2001) at 124; Poudret and Besson, *Comparative Law of International Arbitration*, 2nd ed (2007) at 569-574.

procedure. That is the province of Art 19 of the Model Law as reflected in s 19 of the Domestic Arbitration Act. Article 19 is headed "Determination of rules of procedure". Article 19(1) provides that "the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings". Article 19(2) provides that, "[f]ailing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate". The power conferred by Art 19(2) "enables the arbitral tribunal to meet the needs of the particular case and to select the most suitable procedure when organizing the arbitration",<sup>10</sup> including by "adopting suitable features from different legal systems and relying on techniques proven in international practice".<sup>11</sup>

23 Separate and no less important is the choice given to the parties to designate the place of the arbitration. That is the province of Art 20 of the Model Law as reflected in s 20 of the Domestic Arbitration Act, under which the parties are free to agree on the place of the arbitration.

24 The choice of the parties as to the place of the arbitration does not constrain the place where the arbitral tribunal can convene or deliberate<sup>12</sup> or the place where it can physically deliver its award.<sup>13</sup> Rather, through Art 1(2) of the Model Law as reflected in s 1(2) of the Domestic Arbitration Act, the choice of the place of the arbitration governs the overarching question of whether provisions which relevantly include Arts 16, 19, 28 and 34 of the Model Law, as reflected in this case in ss 16, 19, 28 and 34 of the Domestic Arbitration Act, apply to the arbitration at all. The choice of the parties as to the place of the arbitration supplies a singular definitive answer to that overarching question.

25 The choice of the parties as to the place of the arbitration also enlivens the jurisdiction of a designated court of that place<sup>14</sup> – here relevantly the Supreme Court of South Australia – to supervise the arbitration, including by reviewing any decision made by the arbitral tribunal as to its own jurisdiction under Art 16 of the Model Law as reflected in s 16 of the Domestic Arbitration Act and by adjudicating

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10 Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, UN Doc A/CN.9/264 (1985) at 45 [5].

11 Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, UN Doc A/CN.9/264 (1985) at 46 [6].

12 See Art 20(2) of the Model Law as reflected in s 20(3) of the Domestic Arbitration Act.

13 See Art 31(3) of the Model Law as reflected in s 31(4) and (5) of the Domestic Arbitration Act.

14 See Art 6 of the Model Law as reflected in s 6 of the Domestic Arbitration Act.

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any application to set aside an award under Art 34 of the Model Law as reflected in s 34 of the Domestic Arbitration Act.

26 The Supreme Court of the United Kingdom has explained the legal consequence of a functionally equivalent choice of parties, as to the "seat" of an arbitration, as follows:<sup>15</sup>

"[T]he seat of an arbitration is a legal concept rather than a physical one. A choice of place as the seat does not dictate that hearings must be held, or that any award must actually be issued, in that place ... The point of agreeing a seat is to agree that the law and courts of a particular country will exercise control over an arbitration which has its seat in that country to the extent provided for by that country's law. A choice of seat can in these circumstances aptly be regarded as a choice of the curial law."

27 Substituting "place" for "seat" and substituting "State or Territory" for "country", the explanation encapsulates the significance of the choice of the parties as to the place of the arbitration under the Model Law as reflected in the Domestic Arbitration Act. The choice of the place of the arbitration is a choice of the curial law.

28 The important point for present purposes is that the Model Law as reflected in the Domestic Arbitration Act gives parties who have agreed to submit a dispute to arbitration distinct choices as to:

- the substantive law, under Art 28 as reflected in s 28;
- the arbitral procedure, under Art 19 as reflected in s 19; and
- the curial law, under Art 1(2) as reflected in s 1(2).

29 Whether an arbitral tribunal can and must apply a particular rule of law in determining a dispute which parties have agreed is to be settled by arbitration turns on the scope and consequence of each of those three choices of the parties and on the relationship between those consequences. To explain those consequences and the relationship between them, reference needs to be made to aspects of the history of UNCITRAL's drafting of the Model Law.

### **The scope and consequence of the choice as to arbitral procedure**

30 UNCITRAL framed the Model Law to ensure that the power of an arbitral tribunal to determine the arbitral procedure under Art 19(2) was not to be

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15 *Enka Insaat ve Sanayi AS v OOO "Insurance Company Chubb"* [2020] 1 WLR 4117 at 4139 [68]; [2021] 2 All ER 1 at 23.

constrained by the substantive law, whether that substantive law was chosen by the parties under Art 28(1) or determined by the tribunal under Art 28(2). So much is clear from the drafting history. It was recognised during the drafting process that rules of procedure (such as those governing the admissibility or weight of evidence) are in many legal systems regarded as rules of substantive law. Against the background of that recognition, a proposal was advanced that Art 19(2) should be amended "to conform to the wording of [Art] 28".<sup>16</sup> UNCITRAL rejected the proposal, stating that "the objective of [Art 19(2)] was to recognize a discretion of the arbitral tribunal which would not be affected by the choice of law applicable to the substance of the dispute".<sup>17</sup>

31 The consequence of UNCITRAL's rejection of the amendment proposal for the relationship between Art 19(2) and Art 28 of the Model Law has been understood to be that "[a]s a matter of interpretation, the specific provision in [Art] 19(2) should prevail over the general one in [Art] 28".<sup>18</sup> Put in other words, rules of procedure prescribed to be followed in the conduct of proceedings between parties are carved out of the substantive law determined under Art 28. Absent agreement by the parties under Art 19(1) on the procedure to be followed by the arbitral tribunal in conducting the proceedings, the rules of procedure that are to apply in the conduct of arbitral proceedings are within the exclusive power of the arbitral tribunal to determine under Art 19(2).

32 Moreover, the power of an arbitral tribunal to determine a rule of procedure under Art 19(2) of the Model Law extends to making a procedural order on a topic that would be regarded as governed by a substantive rule of law under the substantive law or the curial law. An example, drawn from the decision of the Court of Appeal of Singapore in *Republic of India v Vedanta Resources plc*,<sup>19</sup> is that the power enables an arbitral tribunal to fashion procedural orders governing confidentiality and disclosure of information to third parties. The fact that an obligation of confidentiality was imposed on parties to an arbitral proceeding "as

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16 Holtzmann and Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (1994) at 587.

17 Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session, UN GAOR, 40th sess, Supp No 17, UN Doc A/40/17 (1985) at 34 [174].

18 Holtzmann and Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (1994) at 567.

19 [2021] 2 SLR 354.

a substantive rule of the common law" was said not to take such procedural orders outside the scope of arbitral procedure governed by Art 19.<sup>20</sup>

33 What then is the distinguishing feature of a rule of procedure carved out of the substantive law determined under Art 28 of the Model Law and within the exclusive power of the arbitral tribunal to determine under Art 19(2)? In the language of the Court of Appeal of Singapore in *Bloomberry Resorts and Hotels Inc v Global Gaming Philippines LLC*,<sup>21</sup> it is that a rule of procedure is a rule that does not purport to determine the parties' disputed rights and liabilities conclusively.<sup>22</sup> The Court of Appeal also there emphasised that the power conferred by Art 19(2) is broad enough to enable an arbitral tribunal, in an appropriate case where necessary to accomplish justice, "to order a party to take steps vis-à-vis third parties to prevent or accomplish specified actions".<sup>23</sup>

34 The significance of recognising the exclusive province of Art 19(2) of the Model Law as reflected in s 19(2) of the Domestic Arbitration Act in the present case is that a provision within Pt 3 of the Law Reform Act or Pt VIA of the CCA which prescribes a rule of procedure which would be applicable in proceedings to determine the rights and liabilities of the parties in a court of competent jurisdiction in South Australia is not applicable to the arbitration proceedings by operation of Art 28 of the Model Law as reflected in s 28 of the Domestic Arbitration Act even if the rule might also be characterised as a rule of substantive law. Unless applied by agreement of the parties under Art 19(1) of the Model Law as reflected in s 19(1) of the Domestic Arbitration Act, any such rule of procedure is applicable in the arbitration proceedings only if it is replicated as a procedural order through the exercise of the arbitral tribunal's power under Art 19(2) of the Model Law as reflected in s 19(2) of the Domestic Arbitration Act.

### **The relevant consequence of the choice as to the curial law**

35 It has been seen that the choice of the parties under Art 20 of the Model Law as to the place of the arbitration invokes through Art 1(2) of the Model Law the application of Arts 19 and 28 of the Model Law of that place together relevantly with Arts 16 and 34 of the Model Law of that place and that each of those provisions of the Model Law is replicated in the Domestic Arbitration Act. The present focus of attention is on the relationship between Art 28 and Art 34 of the Model Law.

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20 [2021] 2 SLR 354 at 367 [28]-[29].

21 [2021] 2 SLR 1279.

22 [2021] 2 SLR 1279 at 1318 [109].

23 [2021] 2 SLR 1279 at 1317 [105].

36 Article 34 of the Model Law is headed "Application for setting aside as exclusive recourse against arbitral award". Article 34(1) provides that "[r]ecourse to a court against an arbitral award may be made only by an application for setting aside in accordance with" Art 34(2) or (3). Article 34(2)(b)(i) and (ii) set out grounds on which an arbitral award may be set aside by a designated court of the place of the arbitration. The ground set out in Art 34(2)(b)(i) is if the court finds that "the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State". The ground set out in Art 34(2)(b)(ii) is if the court finds that "the award is in conflict with the public policy of this State".

37 Article 34 of the Model Law must be understood in the context of Arts 35 and 36 of the Model Law. Article 35 is headed "Recognition and enforcement". Article 35(1) provides that "[a]n arbitral award, irrespective of the country in which it was made, shall be recognized as binding and ... shall be enforced subject to the provisions of [Arts 35 and 36]". Article 36(1)(b)(i) and (ii) use language substantially the same as that in Art 34(2)(b)(i) and (ii) to express grounds on which recognition or enforcement of an arbitral award may be refused irrespective of the place of the arbitration. The substantially common language was drawn in the drafting of the Model Law from Art V(2) of the New York Convention, which allows for recognition and enforcement of an arbitral award to be refused if a competent authority in a country where recognition and enforcement is sought finds that "[t]he subject matter of the difference is not capable of settlement by arbitration under the law of that country" or "[t]he recognition or enforcement of the award would be contrary to the public policy of that country".

38 The potential for inconsistent outcomes between the application of Art 34(2)(b)(i) and (ii) by the supervising court in the place of the arbitration and the application of Art 36(1)(b)(i) and (ii) by a court in any jurisdiction where an award might be sought to be recognised and enforced is ameliorated by the "global effect" that the setting aside of an award under Art 34(2)(b)(i) and (ii) has through Art 36(1)(a)(v) of the Model Law: an award set aside by the supervising court in the place of the arbitration cannot be enforced in the place of the arbitration or anywhere else.<sup>24</sup> In recognition of the global effect given to an order of the supervising court in the place of the arbitration setting aside an award, Art 36(2) of the Model Law allows another court to defer its decision on an application for recognition or enforcement of an award pending a decision by the supervising court on an application to set the award aside.

39 Relevant to the relationship between Art 28 and Art 34, the drafting history of the Model Law reveals that the issue of whether the law and public policy of the place of the arbitration should govern a question as to the amenability of a dispute

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24 Holtzmann and Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (1994) at 918, 1062-1063.



to settlement by arbitration or as to whether a resultant award would be contrary to public policy was an issue in respect of which strongly divergent views engendered considerable debate. The ultimate resolution of that issue, through the retention of Art 34(2)(b) in the form in which it has remained, was for those questions to be governed by the law as to non-arbitrability and the public policy of the place of the arbitration. That resolution of the issue involved rejection of two specific alternative proposals. One was for the provision in Art 34(2)(b)(i), allowing an award to be set aside for non-arbitrability under the law of the place of the arbitration, to be deleted altogether. The other was to limit the public policy to which Art 34(2)(b)(ii) refers as a ground for setting an award aside to "international public policy".<sup>25</sup>

40 For present purposes, it is the history of the first of these alternative proposals which is most important. The history has been summarised as follows:<sup>26</sup>

"The first of these proposals – to delete the reference to arbitrability – was based on the view that the law of the Model Law State should not necessarily govern the question of arbitrability. Some suggested that this question should be governed by the law applicable to the substance of the dispute on that issue. This concern was heightened by the fact that, unlike in the context of recognition and enforcement, application of the forum's law for this purpose in a setting aside procedure gave that law 'global effect', since an award that had been set aside could not be enforced. While this view attracted 'considerable support', the Working Group agreed to retain the existing text with a view to inviting consideration of the matter by the Commission.

The Commission also decided to retain the provision. Deletion of the provision – or merely of the reference to the forum's law, as was also proposed – was said to 'be contrary to the need for predictability and certainty [on] that important issue'. It was noted in support of this conclusion that the provision allowed parties – by choosing their place of arbitration carefully – to ensure that their dispute would not be set aside for nonarbitrability."

41 UNCITRAL's decision to retain Art 34(2)(b)(i) of the Model Law in the form in which Art 34(2)(b)(i) was adopted and has remained therefore entailed its

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25 See Holtzmann and Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (1994) at 918.

26 Holtzmann and Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (1994) at 918 (footnotes omitted). See also at 1001.

considered rejection of a specific suggestion that a question as to the non-arbitrability of the subject matter of the dispute should be governed by the law applicable to the substance of the dispute determined through the operation of Art 28 of the Model Law. The suggestion which was rejected had been couched in terms that the global effect which the setting aside of an award was to have through Art 36(1)(a)(v) of the Model Law operating to prevent recognition or enforcement of the award once set aside "should obtain only from a finding that the subject-matter of the dispute was not capable of settlement by arbitration under the law applicable to that issue".<sup>27</sup>

42           UNCITRAL's decision to retain Art 34(2)(b)(i) of the Model Law accordingly entailed its considered acceptance of the view that the law of the place chosen as the place of the arbitration under Art 20 was to govern a question of non-arbitrability to the exclusion of the law applicable to the substance of the dispute chosen under Art 28. The choice of the parties concerning the place of the arbitration was by those means and to that extent to prevail over the choice of the parties concerning the substantive rules of law to be applied by the arbitral tribunal, having regard to "the need for predictability and certainty".

43           How then is Art 28 of the Model Law to be reconciled with Art 34(2)(b)? Does Art 28 compel the arbitral tribunal to apply the substantive law in deciding the dispute even if the dispute encompassing the application of that law is incapable of resolution by arbitration under the curial law such that the resultant award would be set aside by the supervising court under Art 34(2)(b)(i) or even if the resultant award will be in conflict with the public policy of the place of the arbitration such that the award would be set aside by the supervising court under Art 34(2)(b)(ii)?

44           The written submissions of ACICA argue that Art 28 of the Model Law requires the arbitral tribunal to apply the substantive law without any "outer limit" being imposed through the operation of Art 34(2)(b) of the Model Law. Whether the resultant award would be liable to be set aside under Art 34(2)(b)(i) or (ii) of the Model Law, ACICA argues, are questions "external" to the arbitration in the sense that they are questions which only the supervising court can consider and determine and are not questions that the arbitral tribunal can consider at all. I cannot accept that argument.

45           Article 28 of the Model Law should not be construed to compel an arbitral tribunal to engage in the futile exercise of applying the substantive law to produce an award which, by reason of its application of that law, would be liable to be set aside by a supervising court under Art 34(2)(b)(i) or (ii) of the Model Law applying

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27   Holtzmann and Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (1994) at 966.

the law or public policy of the place chosen by the parties as the place of the arbitration.

46 The harmonious construction of Art 28 of the Model Law and Art 34(2)(b) of the Model Law is that suggested by the Court of Appeal of Singapore in *Tomolugen Holdings Ltd v Silica Investors Ltd*<sup>28</sup> in taking the view that an agreement to arbitrate a dispute concerning a non-arbitrable subject matter within the scope of Art 34(2)(b)(i) of the Model Law would be an agreement that was, if not "null and void", at least "inoperative" or "incapable of being performed" within the meaning of Art II(3) of the New York Convention and Art 8 of the Model Law. The view so taken can be seen to accord with a view taken in the United States of the relationship between Art II(3) and Art V(2)(b) of the New York Convention according to which a court of the place of an arbitration can refuse to order parties to arbitration on the basis that the public policy of that place would preclude recognition of the resultant award such as to render the arbitral agreement "null and void, inoperative or incapable of being performed".<sup>29</sup>

47 If the non-arbitrability of the subject matter of a dispute within the meaning of Art 34(2)(b)(i) of the Model Law and the susceptibility of a resultant award to being set aside as contrary to public policy under Art 34(2)(b)(ii) of the Model Law are sufficient to render the arbitration agreement "inoperative" or "incapable of being performed" within the meaning of Art 8 of the Model Law, then those matters of non-arbitrability and public policy are necessarily matters which go to the jurisdiction of the arbitral tribunal, which the arbitral tribunal can determine for itself under Art 16 of the Model Law subject to review by the supervising court. The duty of the arbitral tribunal under Art 28 of the Model Law is a duty to be exercised within jurisdiction.

48 The consequence is that the arbitral tribunal will lack jurisdiction, and the substantive law will have no application, if and to the extent that the dispute encompassing the application of that law is a dispute:

- which is incapable of resolution by arbitration under the curial law – such that the resultant award would be susceptible to being set aside under Art 34(2)(b)(i) of the Model Law as reflected in s 34(2)(b)(i) of the Domestic Arbitration Act; or

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28 [2016] 1 SLR 373 at 402-403 [72]-[74].

29 See *Restatement of the Law: The US Law of International Commercial and Investor-State Arbitration* §2.17. But see *Escobar v Celebration Cruise Operator Inc* (2015) 805 F 3d 1279, refusing to overrule *Lindo v NCL (Bahamas) Ltd* (2011) 652 F 3d 1257.

- the determination of which would result in an award which would conflict with the public policy of the place of the arbitration – such that the resultant award would be susceptible to being set aside under Art 34(2)(b)(ii) of the Model Law as reflected in s 34(2)(b)(ii) of the Domestic Arbitration Act.

49 Questions as to whether application of provisions within Pt 3 of the Law Reform Act and Pt VIA of the CCA, applicable by operation of Art 28 of the Model Law as reflected in s 28 of the Domestic Arbitration Act, would render the dispute non-arbitrable or in conflict with public policy might therefore have been determined by the arbitrator as preliminary questions of jurisdiction under Art 16 of the Model Law as reflected in s 16 of the Domestic Arbitration Act. Those further questions are encompassed within the preliminary question of law raised under s 27J of the Domestic Arbitration Act.

**The primary question arising under Art 28 of the Model Law as reflected in s 28 of the Domestic Arbitration Act: does the law of South Australia applicable to the substance of the dispute include provisions within Pt 3 of the Law Reform Act and Pt VIA of the CCA?**

50 Section 28(1) of the Domestic Arbitration Act mirrors the first sentence of Art 28(1) of the Model Law in providing that "[t]he arbitral tribunal must decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute". Section 28(2) adapts the second sentence of Art 28(1) to the Australian legal system in providing that "[a]ny designation of the law or legal system of a given State or Territory must be construed, unless otherwise expressed, as directly referring to the substantive law of that State or Territory and not to its conflict of laws rules". Section 28(3) reflects Art 28(2) in providing that "[f]ailing any designation by the parties, the arbitral tribunal must apply the law determined by the conflict of laws rules which it considers applicable".

51 It is uncontroversial in the present case that the law applicable to the substance of the dispute between the appellant and the respondent is the law of South Australia. It is unclear whether that uncontroversial application of the law of South Australia to the substance of the dispute is attributable to a choice made by the parties for the purpose of s 28(1), which choice might have been made expressly or impliedly in the contract pursuant to which the dispute between them is agreed to be settled by arbitration<sup>30</sup> or might have been made by subsequent agreement, or is attributable to the residual operation of s 28(3). That lack of clarity is of no moment. Absent any suggestion by either the appellant or the respondent of the existence of any agreement between them to add to or subtract from the rules of the substantive law of South Australia to be applied in the arbitration, the result

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30 See *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418 at 441.

is the same no matter which of s 28(1) or s 28(3) is the operative provision: the "rules of law" referred to in s 28(1) equate to the "law" referred to in s 28(3).

52 The parties and ACICA all took up a post-hearing invitation to make submissions on the relevance, if any, to the application of s 28(1) of the Domestic Arbitration Act of the statement of Lord Hoffmann in *Fiona Trust & Holding Corporation v Privalov*<sup>31</sup> that "the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal". All correctly pointed out that the statement has not been adopted as part of the Australian law of contractual construction.<sup>32</sup> None argued that the assumption referred to in the statement, if adopted, could be employed to exclude any rule of law from the rules of law otherwise chosen by the parties to an arbitration to be applicable to the substance of the dispute. They were correct to abstain from making such an argument.

53 To import the assumption into the application of s 28(1) of the Domestic Arbitration Act would not be to apply the statement of Lord Hoffmann in *Fiona Trust* but to extend it. The statement was directed to the problem of determining the scope of a dispute which it has been agreed is to be settled by arbitration. The statement was not directed to the problem of determining the rules of law chosen by the parties to be applicable to the substance of the dispute.

54 More fundamentally, as ACICA pointed out, to import any assumption into the application of s 28(1) of the Domestic Arbitration Act would be wrong in principle given that s 28(1), conformably with Art 28(1) of the Model Law, expressly contemplates that the parties might pick and choose between rules of law or sets of rules of law. Where, as here, the applicable rules of law are identified as those of a particular legal system, there can be no justification for importing an assumption the application of which would be to exclude a rule of law which forms part of that system.

55 The law of South Australia applicable to the substance of the dispute through the operation of either s 28(1) or s 28(3) of the Domestic Arbitration Act is the same law as would be applicable to the substance of the dispute in a court in South Australia. The law applicable to the substance of the dispute in the arbitration therefore includes Commonwealth statute law as well as South Australian statute law. It excludes conflict of laws rules, either through the express operation of s 28(2) in relation to s 28(1) or through the antecedent application of conflict of laws rules to determine the applicable law in the operation of s 28(3).

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31 [2007] 4 All ER 951 at 958 [13].

32 See *Rinehart v Hancock Prospecting Pty Ltd* (2019) 267 CLR 514 at 527-528 [19]-[21].

And, given that the scheme of the Model Law as reflected in the Domestic Arbitration Act requires arbitrability to be addressed distinctly from s 28 by reference to s 34(2)(b)(i), it necessarily excludes such rules limiting or excluding the arbitrability of the dispute as might be expressed or implied in a Commonwealth or South Australian statute.<sup>33</sup>

56 If and to the extent that a Commonwealth or South Australian statute applicable in the determination of the dispute in a court in South Australia performs the "double function"<sup>34</sup> of conferring a power on a South Australian court and making a legal right or liability dependent on the making of an order by the court in the exercise of that power, the language of the statute as applied in the arbitration through the operation of either s 28(1) or s 28(3) of the Domestic Arbitration Act needs to be translated to place the arbitral tribunal in the position of the court and to place the parties to the arbitration in the position of parties to a proceeding before the court. That modest recasting of statutory language aligns the operation of the Domestic Arbitration Act with the principle illustrated by *Government Insurance Office of New South Wales v Atkinson-Leighton Joint Venture*,<sup>35</sup> according to which the authority of an arbitral tribunal can extend to the exercise for the purpose of determining a dispute of a power conferred by statute on a court. The difference is that the principle is worked out as an explication of the statutory text purposively construed to give effect to the principle of party autonomy conformably with the Model Law<sup>36</sup> rather than as an implication of the agreement of the parties.

57 Subject to the distinct questions of arbitrability and public policy which would arise on an application to set aside an award under s 34(2)(b)(i) or (ii) of the Domestic Arbitration Act and which for that reason bear on the jurisdiction of the arbitral tribunal, a provision of a Commonwealth or South Australian statute which makes a disputed right or liability dependent on the making of an order by a South Australian court is applicable in the arbitration through the operation of s 28(1) or s 28(3) of the Domestic Arbitration Act provided only that the provision applied

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33 Compare *Mastrobuono v Shearson Lehman Hutton Inc* (1995) 514 US 52 at 63-64.

34 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141 at 165-166.

35 (1981) 146 CLR 206 at 235, 247. See also *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160 at 166-167; *Rinehart v Welker* (2012) 95 NSWLR 221 at 267 [214]-[215].

36 Compare *Wealands v CLC Contractors Ltd* [2000] 1 All ER (Comm) 30 at 38 [17], referring to s 46 of the *Arbitration Act 1996* (UK), a provision loosely modelled on Art 28 of the Model Law. See also *Fulham Football Club (1987) Ltd v Richards* [2012] Ch 333 at 360 [96].

by the arbitrator would have the same legal operation as the provision would have were the provision applied by a court.

58 Applying that approach, the central provisions within Pt 3 of the Law Reform Act and Pt VIA of the CCA which empower a court to limit a defendant's liability in a case of apportionable liability (ss 8 and 9 of the Law Reform Act and ss 87CB, 87CC and 87CD of the CCA) are applicable and exercisable in the arbitration through the operation of s 28(1) or s 28(3) of the Domestic Arbitration Act. Each provision limits the liability of a concurrent wrongdoer for harm that is claimed to have resulted from that concurrent wrongdoer's contravention of a legal norm. By force of each, the liability of the concurrent wrongdoer is limited in proportion to the wrongdoer's assessed responsibility for the harm.

59 Indeed, those central provisions within Pt 3 of the Law Reform Act and Pt VIA of the CCA are applicable and exercisable in the arbitration through the operation of s 28(1) or s 28(3) of the Domestic Arbitration Act in the same way as is the provision within Pt 2 of the Law Reform Act which empowers a court to limit a claimant's entitlement to damages in a case of contributory negligence (s 7 of the Law Reform Act). There is no controversy between the parties that that other provision is applicable and exercisable in the arbitration.

60 That does not mean that every provision within Pt 3 of the Law Reform Act or Pt VIA of the CCA needs to be, or is, applicable in the arbitration through the operation of s 28(1) or s 28(3) of the Domestic Arbitration Act.

61 As has been foreshadowed,<sup>37</sup> there are provisions within Pt 3 of the Law Reform Act and Pt VIA of the CCA which are designed to facilitate determination of the substantive proportionate liability of all concurrent wrongdoers in one proceeding which are outside the scope of s 28 of the Domestic Arbitration Act because they set out rules of procedure. The excluded provisions are those within each of Pt 3 of the Law Reform Act and Pt VIA of the CCA which require a defendant to notify a plaintiff of a concurrent wrongdoer of whom the defendant is aware (s 10 of the Law Reform Act and s 87CE of the CCA) and a provision within Pt VIA of the CCA (s 87CH) which confers power on the court to join another concurrent wrongdoer as a party to proceedings.

62 There are also provisions within Pt 3 of the Law Reform Act and Pt VIA of the CCA according to which a judgment first given can affect the rights or liabilities of third parties in subsequent proceedings (s 11 of the Law Reform Act and s 87CG of the CCA) which are outside the scope of s 28 because they have nothing to say about how the substance of the dispute between the parties to the arbitration is to be determined.

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37 See [34] above.

63 What is important to the application of the central provisions within Pt 3 of the Law Reform Act and Pt VIA of the CCA (ss 8 and 9 of the Law Reform Act and ss 87CB, 87CC and 87CD of the CCA) through the operation of s 28(1) or s 28(3) of the Domestic Arbitration Act is that the legal operation of those provisions on the rights or liabilities of the parties in dispute is not altered by the inapplicability of the other provisions within Pt 3 of the Law Reform Act and Pt VIA of the CCA (ss 10 and 11 of the Law Reform Act and ss 87CE, 87CH and 87CG of the CCA). The operation of the central provisions does not depend on all concurrent wrongdoers being parties to one proceeding for a determination to be made as to the proportionate liability of any one concurrent wrongdoer. Nor does their operation as between the parties to a dispute depend on any effect that the resolution of the dispute between those parties might have on third parties.

64 Hence, the law of South Australia applicable to the substance of the dispute through the operation of either s 28(1) or s 28(3) of the Domestic Arbitration Act includes the central provisions within Pt 3 of the Law Reform Act and Pt VIA of the CCA which empower a court to limit a defendant's liability in a case of apportionable liability (ss 8 and 9 of the Law Reform Act and ss 87CB, 87CC and 87CD of the CCA). The inapplicability of the other provisions within Pt 3 of the Law Reform Act and Pt VIA of the CCA (ss 10 and 11 of the Law Reform Act and ss 87CE, 87CH and 87CG of the CCA) bears at most on the distinct questions of arbitrability and public policy which arise by reference to s 34(2)(b)(i) or (ii) of the Domestic Arbitration Act.

65 Before turning to considerations of arbitrability and public policy, however, two practical observations should be made concerning the inapplicability of those other provisions through the operation of either s 28(1) or s 28(3) of the Domestic Arbitration Act.

66 The first is that, in the absence of some other agreement between the parties as to the procedure to be followed, the notice provisions of s 10 of the Law Reform Act and s 87CE of the CCA can reasonably be expected to be replicated in procedural orders made by the arbitrator under s 19(2) of the Domestic Arbitration Act, which reflects Art 19(2) of the Model Law. Section 19(6) of the Domestic Arbitration Act makes a procedural order made by an arbitral tribunal enforceable by leave of the Supreme Court in the same manner as if it were an order of that Court.

67 The second is that, as Jagot and Beech-Jones JJ point out,<sup>38</sup> an award can be accorded the status of a judgment through recognition and enforcement under

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38 At [362], [382]-[383].



Art 35 of the Model Law as reflected in s 35 of the Domestic Arbitration Act<sup>39</sup> so as to be capable of engaging s 11 of the Law Reform Act and s 87CG of the CCA in any event.

**The further question arising under Art 16 of the Model Law as reflected in s 16 of the Domestic Arbitration Act by reference to Art 34(2)(b)(i) of the Model Law as reflected in s 34(2)(b)(i) of the Domestic Arbitration Act: is the subject matter of the dispute incapable of settlement by arbitration under the law of South Australia?**

68 Questions about the capacity of the subject matter of a dispute to be settled by arbitration have often been seen to overlap with, or to be informed by, questions of public policy.<sup>40</sup> Within the context of the Model Law as reflected in the Domestic Arbitration Act, it is apparent that non-arbitrability and public policy raise separate questions.

69 By making plain that an award is liable to be set aside if the subject matter of the dispute is not capable of settlement by arbitration under the law of the place of the arbitration, Art 34(2)(b)(i) of the Model Law as reflected in s 34(2)(b)(i) of the Domestic Arbitration Act equally makes two things plain. One is that the question is whether the subject matter of the dispute is not capable of settlement by arbitration, not whether the dispute is capable of settlement by arbitration. The other is that the question is a question of law as distinct from a question of public policy. The legal nature of the question is reinforced by the juxtaposition of Art 34(2)(b)(i) as reflected in s 34(2)(b)(i) with Art 34(2)(b)(ii) as reflected in s 34(2)(b)(ii). The legal nature of the question is further reinforced by s 1(5) of the Domestic Arbitration Act, which, adapting Art 1(5) of the Model Law, provides that the Domestic Arbitration Act "does not affect any other Act by virtue of which certain disputes may not be submitted to arbitration".

70 Where, as here, the place of the arbitration also supplies the law applicable to the substance of the dispute and the relevant law is statutory, the question of non-arbitrability of the subject matter of the dispute reduces to a single question of statutory interpretation: does anything in the statutory text or structure or subject matter or purpose evince a legislative intention to exclude arbitration of the statutory rights or liabilities in issue in the arbitration? Here, the answer to that question is: no.

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39 *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 at 552 [24].

40 See Blackaby, Partasides and Redfern, *Redfern and Hunter on International Arbitration*, 7th ed (2022) at 86 [2.130].

71 Neither Pt 3 of the Law Reform Act nor Pt VIA of the CCA is expressed to exclude arbitration of rights and liabilities arising under its provisions. Nor is the subject matter of Pt 3 of the Law Reform Act or Pt VIA of the CCA of such public interest as distinct from private interest as to indicate a legislative intention that the substantive rights and liabilities for which each provides should be litigated only in a court.<sup>41</sup> Rather, the subject matter of Pt 3 of the Law Reform Act and Pt VIA of the CCA governs the determination of substantive rights and liabilities as between private parties.

**The further question arising under Art 16 of the Model Law as reflected in s 16 of the Domestic Arbitration Act by reference to Art 34(2)(b)(ii) of the Model Law as reflected in s 34(2)(b)(ii) of the Domestic Arbitration Act: would an arbitral award conflict with the public policy of South Australia?**

72 UNCITRAL explained in its Final Report on the Model Law in 1985:<sup>42</sup>

"In discussing the term 'public policy', it was understood that it was not equivalent to the political stance or international policies of a State but comprised the fundamental notions and principles of justice. It was noted, however, that in some common law jurisdictions that term might be interpreted as not covering notions of procedural justice while in legal systems of civil law tradition, inspired by the French concept of 'ordre public', principles of procedural justice were regarded as being included."

And further:<sup>43</sup>

"It was understood that the term 'public policy', which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects. Thus, instances such as corruption, bribery or fraud and similar serious cases would constitute a ground for setting aside. It was noted, in that connection, that the wording 'the award is in conflict with the public policy

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41 See *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 at 97-98 [200]; *Pipeline Services WA Pty Ltd v ATCO Gas Australia Pty Ltd* [2014] WASC 10 at [80].

42 Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session, UN GAOR, 40th sess, Supp No 17, UN Doc A/40/17 (1985) at 57 [296].

43 Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session, UN GAOR, 40th sess, Supp No 17, UN Doc A/40/17 (1985) at 58 [297].

of this State' was not to be interpreted as excluding instances or events relating to the manner in which an award was arrived at."

73 The design of the Model Law to make the public policy to which Art 34(2)(b)(ii) refers as a ground for setting an award aside the public policy of the place of the arbitration rather than "international public policy" means that little is to be gained from surveying the variety of circumstances in which public policy has been found to impact on arbitration in other jurisdictions, including in the application of Art 34(2)(b)(ii) of the Model Law and Art V(2)(b) of the New York Convention,<sup>44</sup> beyond noting that "[t]he modern trend both domestically and internationally is to facilitate and promote the use of arbitration and to minimise judicial intervention in the process".<sup>45</sup>

74 The public policy of South Australia is informed by both the object of the International Arbitration Act "to facilitate international trade and commerce by encouraging the use of arbitration as a method of resolving disputes"<sup>46</sup> and the paramount object of the Domestic Arbitration Act "to facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense".<sup>47</sup>

75 The public policy of South Australia as so informed provides no justification for treating a dispute about rights or liabilities arising under a Commonwealth statute or a South Australian statute as incapable of settlement by arbitration where those statutes on their proper construction do not themselves render the dispute incapable of settlement by arbitration.

### **Disposition**

76 For these reasons, the appeal should be allowed with costs and order 1 of the orders made by the Court of Appeal should be set aside. The preliminary question of law should instead be answered "Yes".

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44 See Maurer, *The Public Policy Exception under the New York Convention: History, Interpretation and Application*, 2nd ed (2022).

45 *Larkden Pty Ltd v Lloyd Energy Systems Pty Ltd* (2011) 279 ALR 772 at 783 [65].

46 Section 2D(a) of the International Arbitration Act.

47 Section 1C(1) of the Domestic Arbitration Act.

GORDON AND GLEESON JJ.

**Introduction**

77 The central question in this appeal is whether, in a commercial arbitration where the laws governing the substance of the dispute for the purposes of s 28 of the *Commercial Arbitration Act 2011* (SA) ("the Arbitration Act") are the substantive laws of South Australia and those substantive laws include the proportionate liability laws in Pt 3 of the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) ("the Law Reform Act") and Pt VIA of the *Competition and Consumer Act 2010* (Cth) ("the Consumer Act") (together, "the proportionate liability laws"), the arbitrator is required to apply the proportionate liability laws. The answer to that question is "Yes".

78 The appellant, Tesseract, and the respondent, Pascale, entered into a contract for the provision of engineering consultancy work by Tesseract in connection with building works comprising Pascale's design of a multilevel warehouse at Windsor Gardens in South Australia ("the contract"). A dispute arose between the parties as to whether Tesseract's work was done to the standard required under the contract.

79 The contract provides for conciliation of any dispute between the contracting parties "in connection with" the contract and, if such a dispute is not resolved by dispute conciliation, either party is permitted to refer the dispute to arbitration ("the arbitration agreement"). It makes provision for an arbitration, including for the appointment of an arbitrator; the qualification of the arbitrator as a member of the Institute of Arbitrators; for the arbitrator to "handle the dispute as he or she wishes" except as required by the contract; for the arbitrator to give their decision in writing, stating the issues in dispute and their decision on them; and for the decision to be binding on the contracting parties. Pascale referred the dispute to arbitration, pursuant to the dispute resolution provision in the contract.

80 In the arbitration, Pascale claims damages for breach of contract and negligence and, pursuant to s 236 of the *Australian Consumer Law*,<sup>48</sup> for misleading or deceptive conduct in contravention of s 18 of the *Australian Consumer Law*. In its defence, Tesseract denies liability. In the alternative, Tesseract contends that any damages payable by it should be reduced by reference to Pascale's contributory negligence in accordance with Pt 2 of the Law Reform Act, or in accordance with the proportionate liability regimes established by Pt 3 of the Law Reform Act in relation to Pascale's contract and negligence claims and, further or alternatively, Pt VIA of the Consumer Act in relation to Pascale's claims under the *Australian Consumer Law*. These alternative defences are based on

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48 Which appears in Sch 2 to the Consumer Act.

Tesseract's contention that a Mr Penhall is responsible for part, or all, of the losses claimed by Pascale in the arbitration, by reason of his negligence in assisting Pascale to prepare its tender for the design and construction of the warehouse.

81 Pascale agrees that those defences form part of the dispute between the parties but denies the applicability of the proportionate liability laws to the resolution of that aspect of the dispute. According to Pascale, Tesseract is not entitled to the benefit of the proportionate liability laws against Pascale in any forum. Tesseract may not litigate the proportionate liability defences in court proceedings because it is contractually bound to arbitrate the dispute; and Tesseract may not avail itself of the benefit of the proportionate liability laws because Pascale is not entitled to join any other alleged concurrent wrongdoer to the arbitration who might otherwise be found partially responsible for Pascale's losses in accordance with those laws. Pascale accepts that it could bring separate proceedings to recover losses from a concurrent wrongdoer but contends that the opportunity for a plaintiff to recover all of its losses in a single proceeding is integral to the proportionate liability laws.

82 In order to resolve the question of the applicability of the proportionate liability laws, the arbitrator ordered Tesseract to apply to the Supreme Court of South Australia, pursuant to s 27J of the Arbitration Act, for leave to obtain a determination by that Court of the following question of law:

"Does Part 3 of the [Law Reform Act] and/or Part VIA of the [Consumer Act] apply to this commercial arbitration proceeding conducted pursuant to the legislation and the [Arbitration Act]?"

The Court of Appeal of the Supreme Court of South Australia granted Tesseract leave and answered the question of law in the negative.

83 The Court of Appeal found that Tesseract's defences based upon the proportionate liability laws form part of the dispute that the parties agreed to have settled by arbitration. There is no appeal from that finding. The Court of Appeal also found, and there is no issue between the parties, that the substantive laws to be applied by the arbitrator to resolve the dispute are the substantive laws of South Australia, and the proportionate liability laws form part of the substantive laws of South Australia.

84 The Court of Appeal accepted that the key operative provisions in the proportionate liability laws would be capable of operating in arbitration proceedings – that is, the provisions limiting the defendant's liability to its share in the responsibility for the plaintiff's harm. Even so, the Court of Appeal concluded that the arbitrator was not able to apply the proportionate liability laws to the resolution of the dispute between the parties. In reaching that conclusion, the Court of Appeal relied upon two matters: (1) that both regimes contemplate that the

plaintiff will have the opportunity to join all wrongdoers in the one set of proceedings; and (2) the inability to join all wrongdoers to an arbitration except by consent. In short, the Court of Appeal concluded that the proportionate liability laws were not amenable to arbitration because the arbitrator could not apply the laws except in a manner that would differ materially from the regimes intended by the relevant legislatures.

85 For the following reasons, the Court of Appeal erred in reaching that conclusion. Once it is accepted that, under s 28 of the Arbitration Act, the law applicable to the resolution of the substance of the dispute is the law of South Australia and the proportionate liability laws form part of that law, it follows that s 28 of the Arbitration Act requires the arbitrator to apply the proportionate liability laws with such modifications as to take account of characteristics which distinguish an arbitration from court proceedings<sup>49</sup> unless the effect of the modifications is that the laws could no longer be described as part of the substantive laws of South Australia. Here, the proportionate liability laws are capable of application with modifications such that the laws can still be described as the substantive laws of South Australia.

#### **Laws applied by arbitrator to resolve substance of dispute**

86 The Arbitration Act forms part of a national statutory framework for domestic and international commercial arbitrations comprised of Pt III of the *International Arbitration Act 1974* (Cth) ("the IAA") and uniform State and Territory laws governing domestic commercial arbitrations. These laws each adopt – with some modifications – the UNCITRAL Model Law on International Commercial Arbitration (as adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006) ("the Model Law").

87 Foundational to the Model Law – and, in turn, to the Arbitration Act – is the principle of party autonomy. One of the clearest expressions of that principle is that the parties to an arbitration agreement are generally free to choose for themselves the law or legal rules applicable to that agreement. The substantive law applicable to the parties' dispute is determined by reference to s 28 of the Arbitration Act. Section 28(1) of that Act imposes a duty upon an arbitral tribunal to decide the dispute referred to arbitration "in accordance with such *rules of law* as are chosen by the parties as applicable to the substance of the dispute". Issues of substance include "the existence, extent or enforceability of the rights or duties

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49 *Government Insurance Office of New South Wales v Atkinson-Leighton Joint Venture* (1981) 146 CLR 206 at 235 ("GIO").

of the parties to an action".<sup>50</sup> Section 28(2) provides that any designation of the law or legal system of a given State or Territory must be construed, unless otherwise expressed, as directly referring to the *substantive law* of that State or Territory and not to its conflict of laws rules.

88 In the absence of any choice of substantive law by the parties to which s 28(1) applies, s 28(3) provides:

"Failing any designation by the parties, the arbitral tribunal must apply *the law* determined by the conflict of laws rules which it considers applicable."

89 The proceedings in the court below and in this Court were conducted on the basis that the parties accepted that the contract did not specify the rules of law applicable to the substance of the dispute and that s 28(3) governed the identification of the applicable substantive law. In response to a direct question from the Court after the hearing, the parties confirmed their position on these two points. Whether s 28(1) or s 28(3) of the Arbitration Act applies, the answer is the same – the law of South Australia. These reasons address s 28(3).

90 Under the relevant conflict of laws rules, the proper law of the contract is the legal system with which the contract is most closely connected.<sup>51</sup> The parties accepted that, by s 28(3), the arbitrator is required to determine the dispute referred to arbitration in accordance with the substantive laws of South Australia based on: (1) the parties' and the contract's connections with South Australia; and (2) the absence of any equivalent connections with any other legal system.<sup>52</sup>

91 Section 28(3) mirrors Art 28(2) of the Model Law. Article 28(2) is one of several default provisions within the Model Law, which serve to fill gaps in the agreement between the parties.<sup>53</sup> Having regard to the need to promote practicable uniformity between the Arbitration Act, in its application to domestic commercial arbitrations, and the Model Law (given effect by the IAA and the Arbitration Act), in its application to international commercial arbitrations, it is pertinent that the

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50 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 543 [99].

51 *Bonython v The Commonwealth* (1950) 81 CLR 486 at 498; [1951] AC 201 at 219; *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 217.

52 *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* (2022) 140 SASR 395 at 414 [58].

53 *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 at 547 [11].

parties identified no international case law which construed Art 28(2) inconsistently with the following case law and analysis.

92 Where parties accept that s 28(3) is invoked, with the result that the relevant substantive laws to be applied in the arbitration comprise substantive laws of a particular jurisdiction, submission to arbitration impliedly confers on the arbitrator authority to identify and apply the substantive law that would be applied by a court of competent jurisdiction dealing with the dispute, subject only to the parties' agreement to the contrary. If statutory defences form part of the relevant substantive law, a consideration in support of the implication stated above is that the parties are "unlikely to have intended that different disputes should be resolved before different tribunals, or that the appropriate tribunal should be determined by fine shades of difference in the legal character of individual issues, or by the ingenuity of lawyers in developing points of argument".<sup>54</sup> Conversely, parties to an arbitration agreement are free to exclude the application of otherwise relevant substantive laws.

93 The implication was first identified by this Court in *Government Insurance Office of New South Wales v Atkinson-Leighton Joint Venture ("GIO")*, which found, by majority, that an arbitrator may award interest where interest would have been recoverable had the dispute been determined in a court.<sup>55</sup> In that case, the arbitrator's power extended to an award of interest in accordance with s 94 of the *Supreme Court Act 1970* (NSW), which conferred upon the Supreme Court the power to award interest. Stephen J identified a common law principle that "arbitrators must determine disputes according to the law of the land", so that, subject to exceptions not presently relevant, "a claimant should be able to obtain from arbitrators just such rights and remedies as would have been available to him were he to sue in a court of law of appropriate jurisdiction".<sup>56</sup> Mason J (Murphy J agreeing) found that there was implied in the submission to arbitration an authority in the arbitrator to award interest "conformably" with s 94, based on the Supreme Court's supervisory function in relation to an arbitration, and the enforceability of an arbitral award as if it were a judgment or order of the Court pursuant to s 14 of the *Arbitration Act 1902* (NSW).<sup>57</sup> Although in dissent, Barwick CJ accepted the general proposition that the agreement of the parties was that the arbitrator should

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54 *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160 at 165.

55 (1981) 146 CLR 206.

56 *GIO* (1981) 146 CLR 206 at 235.

57 *GIO* (1981) 146 CLR 206 at 247.



decide the matter before them "according to the law of the land".<sup>58</sup> For Barwick CJ, the law of the land was that some, but not all, tribunals could award interest.

94 The decision in *GIO* followed the Court of Appeal of England and Wales in *Chandris v Isbrandtsen-Moller Co Inc*,<sup>59</sup> which found that an arbitrator was empowered to award interest in accordance with a statutory provision in terms similar to s 94, where interest was not recoverable at common law. In reaching that conclusion, Tucker LJ referred,<sup>60</sup> by analogy, to the duty of an arbitrator to give effect to legal defences and cited the following passage from the decision of the Privy Council in *Ramdutt Ramkissen Das v E D Sassoon & Co*:<sup>61</sup>

"Although the Limitation Act does not in terms apply to arbitrations, they [their Lordships of the Judicial Committee] think that in mercantile references of the kind in question it is an implied term of the contract that the arbitrator must decide the dispute according to the existing law of contract, and that every defence which would have been open in a Court of Law can be equally proponed for the arbitrator's decision unless the parties have agreed – which is not suggested here – to exclude that defence. Were it otherwise, a claim for breach of a contract containing a reference clause could be brought at any time, it might be twenty or thirty years after the cause of action had arisen."

95 In *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*, this Court applied *GIO* and Mason J (Stephen, Aickin and Wilson JJ agreeing) endorsed the conclusion of the court below that s 94 "should be regarded as defining the powers of an arbitrator [to award interest] with such variations as the nature of the circumstances requires, subject of course to any specific provision in that behalf which may be contained in the contract constituting the submission to arbitration".<sup>62</sup> Expounding upon the manner in which s 94 was to be modified when imported into the submission to arbitration, Mason J said:<sup>63</sup>

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58 *GIO* (1981) 146 CLR 206 at 224. cf *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc* (1985) 473 US 614 at 636-638.

59 [1951] 1 KB 240.

60 [1951] 1 KB 240 at 261.

61 (1929) 98 LJ(PC) 58 at 62.

62 (1982) 149 CLR 337 at 368.

63 *Codelfa* (1982) 149 CLR 337 at 368-369 (emphasis added).

"The terms of s 94 are necessarily modified when they are imported into the submission in order to take account of those characteristics which distinguish an arbitration from court proceedings. For the purpose of exercising his implied authority to award interest the Arbitrator proceeds on the footing that the arbitration and the award are to be assimilated to court proceedings and to a curial judgment respectively. The hypothesis is that his award which determines the dispute or difference is the equivalent of a judgment which determines a cause of action.

...

The obverse of this picture is that the parties by arming the Arbitrator with implied authority to award interest have recognized that the arbitration has taken the place of court proceedings. *The statutory power is therefore to be moulded so that it is expressed in terms appropriate to, and capable of being exercised in, an arbitration.* It should be read accordingly as authorizing the Arbitrator to award interest for the period from the date when the dispute or difference arose to the date when the award became effective for the award settles the dispute or difference, not the cause of action."

96 In *President of India v La Pintada Compania Navigacion SA*,<sup>64</sup> the House of Lords held that "[w]here parties refer a dispute between them to arbitration in England, they impliedly agree that the arbitration is to be conducted in accordance in all respects with the law of England, unless, which seldom occurs, the agreement of reference provides otherwise".<sup>65</sup> Lord Brandon identified this principle as the basis for the decision in *Chandris*, and observed, with apparent approval, that the decisions in *GIO* and *Codelfa* adopted the approach in *Chandris*.<sup>66</sup>

97 In the United Kingdom, the approach in *Chandris* was applied by the Court of Appeal to a statutory right of contribution expressed by the statute to be conferred upon a court, where the arbitration agreement was silent as to the application of the statutory right to the resolution of the dispute referred to arbitration.<sup>67</sup> In Australia, the general principle has been applied to the resolution

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64 [1985] AC 104.

65 [1985] AC 104 at 119.

66 *President of India* [1985] AC 104 at 119.

67 *Wealands v CLC Contractors Ltd* [2000] 1 All ER (Comm) 30 at 39-40 [22]-[24]; *Fulham Football Club (1987) Ltd v Richards* [2012] Ch 333 at 360 [96].

of arbitral disputes under statutory claims;<sup>68</sup> declaratory relief;<sup>69</sup> and statutory contribution.<sup>70</sup>

98 In the United States, the United States Supreme Court construed "the laws of the State of New York" in a choice of law contractual provision "to encompass substantive principles that New York courts would apply, but not to include special rules limiting the authority of arbitrators".<sup>71</sup> Delivering the opinion of the Court, Stevens J referred to the Supreme Court's earlier authority which made "clear that if contracting parties agree to *include* claims for punitive damages within the issues to be arbitrated, the [Federal Arbitration Act] ensures that their agreement will be enforced according to its terms even if a rule of state law would otherwise exclude such claims from arbitration".<sup>72</sup>

99 The principle stated in *GIO* and expounded by Mason J in *Codelfa* is instructive. In this case, the substantive laws comprise all of the substantive laws of South Australia that are relevant to the resolution of the dispute referred to arbitration and are expressed in terms appropriate to, or capable of being applied in, the arbitration. Whether a substantive law is capable of application depends upon whether it can be adapted to the arbitral context without altering its effect such that what is applied can still be described as the substantive laws of South Australia.

100 Understood in this way, s 28(3) of the Arbitration Act limits the substantive laws, once identified by the relevant conflict of laws rules, in only two respects: (1) the language of the law sought to be applied must be capable of translation or adaptation into the arbitration context; and (2) once translated or adapted, the law must not be so altered that it can no longer be described as part of the substantive laws identified by the relevant conflict of laws rules. This form of analysis is not unknown to the law. In *Attorney-General (Cth) v Huynh*, this Court held that where a Commonwealth law applied State and Territory laws for arrest and custody "so far as they are applicable" to Commonwealth offenders, the text of those laws could not be applied in a manner divorced from their statutory context, such as to

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68 *IBM Australia Ltd v National Distribution Services Ltd* (1991) 22 NSWLR 466; *Francis Travel Marketing* (1996) 39 NSWLR 160.

69 *Cufone v Cruse* (2000) 210 LSJS 238.

70 *Incitec Ltd v Alkimos Shipping Corporation* (2004) 138 FCR 496 at 504 [37]-[39]; *Passlow v Butmac Pty Ltd* [2012] NSWSC 225.

71 *Mastrobuono v Shearson Lehman Hutton Inc* (1995) 514 US 52 at 64.

72 *Mastrobuono* (1995) 514 US 52 at 58 (emphasis in original).

give the State and Territory laws "a substantively different legal operation".<sup>73</sup> In a similar way, in translating or adapting the operation of substantive laws to an arbitration, the meaning of the law must not be distorted.<sup>74</sup>

### **Procedural versus substantive laws**

101 Another expression of the principle of autonomy in the Model Law, and the Arbitration Act,<sup>75</sup> is the choice given to the parties to agree on the procedural rules, or "curial law",<sup>76</sup> that are to be followed by the arbitral tribunal in conducting the arbitral proceedings (Model Law, Art 19, as reflected in s 19 of the Arbitration Act). The procedural rules have been variously described as "the manner in which the reference is to be conducted; the procedural powers and duties of the arbitrator; questions of evidence; the determination of the proper law of the contract"<sup>77</sup> and as the "law governing the arbitration or the tribunal's 'remedial' authority".<sup>78</sup>

102 Domestically, this Court in *John Pfeiffer Pty Ltd v Rogerson*<sup>79</sup> recognised that the distinction between substantive and procedural rules is "sometimes doubtful or even artificial".<sup>80</sup> Others have described it as "elusive".<sup>81</sup> That uncertainty, as Born writes, is further magnified in the international context of the Model Law, as "multiple differing characterizations may exist in different legal systems".<sup>82</sup> As the *Guide to the UNCITRAL Model Law on International*

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73 (2023) 97 ALJR 298 at 314 [66]; 408 ALR 684 at 700.

74 cf *Huynh* (2023) 97 ALJR 298 at 312-314 [59]-[66], 329-330 [150]-[156], 335-336 [183], 351-352 [269]-[272]; 408 ALR 684 at 698-700, 719-721, 728, 749-751.

75 See [87] above.

76 Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England*, 2nd ed (1989) at 59-62.

77 Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England*, 2nd ed (1989) at 62.

78 Born, *International Arbitration: Law and Practice*, 3rd ed (2021) at 291.

79 (2000) 203 CLR 503 at 543 [98].

80 (2000) 203 CLR 503 at 542-543 [97], citing *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1 at 40.

81 Born, *International Arbitration: Law and Practice*, 3rd ed (2021) at 291.

82 Born, *International Arbitration: Law and Practice*, 3rd ed (2021) at 291.

*Commercial Arbitration: Legislative History and Commentary* likewise records, "[u]nder some legal systems, the admissibility, relevance, materiality, and weight of evidence are considered questions of substantive law".<sup>83</sup> Similarly, the way damages and other remedies have been characterised has differed across legal systems. As Born observes, "the historic position in many common law jurisdictions was that questions of remedy ... were governed by the law of the forum. The civil law position was generally that issues of remedy were assimilated to the substance."<sup>84</sup>

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In Singapore, for example, the powers exercisable by an arbitral tribunal are recognised as comprising *procedural* powers, *substantive* powers and *remedial* powers. Using that system of classification, procedural powers "do not purport to determine the parties' rights and liabilities conclusively".<sup>85</sup> The last category – remedial powers – is an aspect of the relief or remedial phase of the arbitration and, in that context, although the contractual nature of the arbitral process implies that the tribunal's authority is limited to the parties to the arbitration and would not extend to ordering the attachment of assets in the custody and control of a non-party,<sup>86</sup> an arbitral tribunal "would have the power to order *a party* to take steps vis-à-vis third parties to prevent or accomplish specified actions"<sup>87</sup> which might extend, for example, to ordering a corporate entity to direct its subsidiary to take certain steps such as the return or preservation of specified property.<sup>88</sup> Born states that although these orders test the limits of arbitral powers, the arbitral tribunal has the authority to issue them "where necessary to accomplish justice".<sup>89</sup> Remedial powers or orders were not in issue in this appeal.

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83 Holtzmann and Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (1994) at 567.

84 Born, *International Arbitration: Law and Practice*, 3rd ed (2021) at 292.

85 *Bloomberry Resorts and Hotels Inc v Global Gaming Philippines LLC* [2021] 2 SLR 1279 at 1318 [108]-[109].

86 *Bloomberry* [2021] 2 SLR 1279 at 1317 [105], citing Born, *International Commercial Arbitration*, 2nd ed (2014), vol 2 at 2445.

87 *Bloomberry* [2021] 2 SLR 1279 at 1317 [105] (emphasis added), citing Born, *International Commercial Arbitration*, 2nd ed (2014), vol 2 at 2446.

88 *Bloomberry* [2021] 2 SLR 1279 at 1317 [105], citing Born, *International Commercial Arbitration*, 2nd ed (2014), vol 2 at 2446.

89 *Bloomberry* [2021] 2 SLR 1279 at 1317 [105], citing Born, *International Commercial Arbitration*, 2nd ed (2014), vol 2 at 2446.

104 There was no dispute between the parties that the proportionate liability laws, in their entirety, form part of the "rules of law",<sup>90</sup> "the substantive law"<sup>91</sup> and "the law"<sup>92</sup> of South Australia, within the meaning of s 28 of the Arbitration Act,<sup>93</sup> rather than the rules of procedure governing the conduct of the arbitral proceedings. In the Court of Appeal, Tesseract contended that the laws were substantive and the Court agreed.<sup>94</sup> That conclusion was not reagitated before this Court; each of the parties and the amicus expressly stated, and the argument proceeded in this Court on the basis, that the proportionate liability laws are substantive. And, in any case, as explained below, the proportionate liability provisions within each regime that are capable of being expressed in terms appropriate, or of being translated or adapted, to arbitration in such a way that the laws can still be described as the substantive laws of South Australia are not procedural, but substantive – they purport to determine the parties' rights and duties conclusively. They do not engage s 19 of the Arbitration Act (which is based on Art 19 of the Model Law).

### **Arbitration may be precluded**

105 It is important to recognise that certain laws are not capable of application by an arbitral tribunal because the laws operate to prohibit settlement of a dispute by arbitration.<sup>95</sup> The proportionate liability laws do not, in terms, provide that they do not apply to a dispute submitted to arbitration.

106 In the United States, Congress may preclude arbitration of the causes of action it creates, but to do so its intent must be either "deducible from [the law's] text or legislative history"<sup>96</sup> or apparent from an inherent conflict between arbitration and the "underlying purposes of that other statute".<sup>97</sup> Whether a

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90 Arbitration Act, s 28(1) (cf Art 28(1) of the Model Law).

91 Arbitration Act, s 28(2) (cf Art 28(1) of the Model Law).

92 Arbitration Act, s 28(3) (cf Art 28(2) of the Model Law).

93 See [83] above.

94 *Tesseract v Pascale* (2022) 140 SASR 395 at 410 [41(1)], 414-415 [59]-[63].

95 cf Arbitration Act, ss 1(5), 34(2)(b)(i), 36(1)(b)(i); *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 at 97-98 [200]-[201].

96 *Mitsubishi* (1985) 473 US 614 at 628.

97 *Rodriguez de Quijas v Shearson/American Express Inc* (1989) 490 US 477 at 483, citing *Shearson/American Express Inc v McMahon* (1987) 482 US 220 at 226-227.

statutory prohibition on arbitration extends to an arbitrator's consideration of defences is ultimately a matter of statutory interpretation.<sup>98</sup> The most plausible construction of an arbitrability limitation will often be that it bars only the assertion in arbitration of claims based on the statute, in contradistinction to defences based on the statute.<sup>99</sup> On the other hand, there is considerable United States authority to the effect that the applicability of a statute of limitations to arbitration depends on the language in which the time limitation is couched.<sup>100</sup>

107 In this case, these issues do not arise because Pascale accepted that parties to an arbitration agreement could agree to the application by the arbitral tribunal of South Australia's proportionate liability laws, in which event the arbitral tribunal would be required to decide the relevant dispute in accordance with those laws pursuant to s 28(1) of the Arbitration Act. For example, Pascale accepted that the laws could be applied in an arbitration by the consent of the parties, in a tripartite arbitration, or in an arbitration in which other alleged wrongdoers agree to be joined.

### **The proportionate liability laws**

108 The proportionate liability laws, in substance, limit a defendant's liability for the plaintiff's loss according to the defendant's responsibility for that loss. Proportionate liability, as provided for by the proportionate liability laws, represents a departure from the common law principle of "solidary liability", under which a defendant whose tortious conduct caused loss or damage to a plaintiff was liable to compensate the plaintiff for the whole of that loss or damage.<sup>101</sup> As a practical matter, proportionate liability laws operate to shift the burdens and risks of seeking contribution from other wrongdoers for loss from the defendant (the position at common law) to the plaintiff. Consequently, under a regime of proportionate liability, a plaintiff must sue all wrongdoers in order to recover their total loss.<sup>102</sup>

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98 *Restatement of the Law: The US Law of International Commercial and Investor-State Arbitration* §4.15, Comment a, Reporters' Note (vii).

99 *Restatement of the Law: The US Law of International Commercial and Investor-State Arbitration* §2.16, Comment a, Reporters' Note (ii).

100 *Restatement of the Law: The US Law of International Commercial and Investor-State Arbitration* §2.21, Comment a.

101 *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613 at 645 [80].

102 *Hunt & Hunt* (2013) 247 CLR 613 at 624 [10].

109 There was no dispute that the proportionate liability laws do not apply to an arbitration by force of their own terms. The question is whether the proportionate liability laws can be expressed in terms appropriate, or be translated or adapted, to arbitration in such a way that the laws can still be described as the substantive laws of South Australia.

110 The parties accepted that the key operative provision in each proportionate liability law, limiting the liability of a defendant to an amount that is fair and equitable<sup>103</sup> or to an amount that the tribunal considers just having regard to the extent of the defendant's responsibility for the damage or loss,<sup>104</sup> could be capable of application in arbitral proceedings, including where only one of several wrongdoers is a party to the arbitration.<sup>105</sup>

111 By way of example, it is useful to explain the key operative provision under Pt 3 of the Law Reform Act. Part 3 comprises s 8 (limitation of defendant's liability in cases of apportionable liability), s 9 (contribution), s 10 (procedural provision) and s 11 (separate proceedings).

112 Sub-sections (1) and (2) of s 8 provide:

- "(1) If a defendant's liability on a claim for damages is apportionable, the liability is limited under this section.
- (2) If the limitation applies, the defendant's liability is limited to a percentage of the plaintiff's notional damages that is fair and equitable having regard to—
- (a) the extent of the defendant's responsibility for the harm; and
  - (b) the extent of the responsibility of other wrongdoers (including wrongdoers who are not party to the proceedings) whose acts or omissions caused or contributed to the harm."

113 The language of "claim" is equally referable to arbitral and court proceedings. Arguably, the language of "defendant" is more referable to court proceedings than to arbitral proceedings. In any event, other provisions in Pt 3 are plainly expressed to apply to court proceedings and not to arbitral proceedings, such as s 8(4), set out below. If the word "defendant" is understood to refer to a respondent in an arbitration, s 8(1) and (2) are capable of being read as providing

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**103** Law Reform Act, s 8(2).

**104** Consumer Act, s 87CD(1)(a).

**105** *Tesseract v Pascale* (2022) 140 SASR 395 at 449 [190].



for a limitation of liability rule, equally applicable in court and arbitral proceedings, to the effect that joint or several tortfeasors at common law are liable to a particular extent and no more.

114 Section 8(4) provides:

"In a case involving apportionable liability, the court must proceed as follows:

- (a) the court first determines the plaintiff's notional damages;
- (b) the court gives judgment against any defendant whose liability is not subject to limitation under this section for damages calculated without regard to this Part;
- (c) the court determines, in relation to each defendant whose liability is limited under this section, a proportion of the plaintiff's notional damages equivalent to the percentage representing the extent of that defendant's liability;
- (d) the court then gives judgment against each such defendant based on the assessment made under paragraph (c) (but in doing so must give effect to any special limitation of liability to which any of them may be entitled)."

115 Notwithstanding that s 8(4) is expressed as a direction to the court, it supports the "existence, extent or enforceability" of the substantive rule by which a tortfeasor's liability at common law is limited.

116 The acknowledged capacity of parties to agree to the application of this limitation of liability rule in an arbitration, and the cases referred to earlier, demonstrate the competence of an arbitral body to apply laws such as s 8(1), (2) and (4) that are not applicable on their face to arbitration and, more particularly, to apply laws expressed to apply in court proceedings by adapting the language used to the arbitral context. Once it is accepted that the parties may choose that the proportionate liability laws apply to the resolution of their dispute, there is no reason why those laws cannot equally apply, in the absence of express agreement, pursuant to s 28(3). Provisions including words such as "court", "judgment", "plaintiff" and "defendant" can be understood in the context of an arbitration as referring variously to "arbitral proceeding" or "arbitration", "arbitral award", "claimant" and "respondent".

117 As the parties accepted, the operative provisions of the proportionate liability laws affect the existence, extent or enforceability of the rights and duties of the parties to an action and an arbitrator can apply those aspects with limited

adaptations to fit the arbitral context without altering the substance of the provisions.

118 The issue then is whether other provisions in the proportionate liability laws which contemplate or are directed to the joinder of all wrongdoers in the one proceeding can be adapted to apply in an arbitration or, if not, whether those provisions are so integral to each of the proportionate liability laws that the operative provisions could not operate as the legislatures intended. As will be seen, the ability to compel the joinder of all wrongdoers in one proceeding is not such an integral feature of the laws.

*Law Reform Act*

119 Pascale's argument ultimately focussed upon ss 10 and 11 of the Law Reform Act. Section 10, headed "Procedural provision", facilitates the identification of all relevant wrongdoers. It provides:

- "(1) If a defendant entitled to a limitation of liability under this Part has reasonable grounds to believe that a person who is not a party to the action may be liable on the plaintiff's claim, the defendant must, as soon as practicable, provide the plaintiff with information that is in the defendant's possession, or reasonably available to the defendant (and not equally available to the plaintiff), about—
- (a) the other person's identity and whereabouts; and
  - (b) the circumstances giving rise to the other person's liability.
- (2) If a defendant fails to comply with its obligation under this section, a court may order the defendant to pay costs incurred in proceedings that could have been avoided if the obligation had been carried out.
- (3) A court may order that costs payable under this section be assessed on the basis of an indemnity."

120 Section 11, headed "Separate proceedings", provides:

"If a plaintiff brings separate actions for the same harm against wrongdoers who are entitled to a limitation of liability under this Part, the judgment first given (or that judgment as varied on appeal) determines for the purpose of all other actions—

- (a) the amount of the plaintiff's notional damages; and
- (b) the proportionate liability of each wrongdoer who was a party to the action in which the judgment was given; and

- (c) whether the plaintiff was guilty of contributory negligence and, if so, the extent of that negligence."

121 As foreshadowed above, although s 10 is headed "procedural provision", as a matter of legal characterisation s 10(1) is substantive and not a procedural rule of the kind governed by s 19. This is because it is directed to the defendant, not the tribunal (whether a court or an arbitral tribunal). The tribunal has no role to play under s 10(1) except with respect to the later question of costs under s 10(2) and (3) if the defendant fails to give the required information to the plaintiff.

122 The same analysis holds true for s 11, which is directed not to the tribunal but to the plaintiff if they choose to institute separate proceedings. Again, the tribunal has no role to play.

*Part VIA of the Consumer Act*

123 Similarly, Pascale's argument focussed on ss 87CE, 87CG and 87CH of the Consumer Act. Section 87CE requires a defendant to give notice to the plaintiff about the identity of any concurrent wrongdoer and so is functionally equivalent to s 10 of the Law Reform Act. Section 87CG, headed "Subsequent actions", is functionally equivalent to s 11 of the Law Reform Act, but does not have the same potentially adverse operation in relation to a wrongdoer who is not a party to an arbitration in which Pt VIA is applied. Section 87CG provides:

- "(1) In relation to an apportionable claim, nothing in this Part or any other law prevents a plaintiff who has previously recovered judgment against a concurrent wrongdoer for an apportionable part of any damage or loss from bringing another action against any other concurrent wrongdoer for that damage or loss.
- (2) However, in any proceedings in respect of any such action, the plaintiff cannot recover an amount of damages that, having regard to any damages previously recovered by the plaintiff in respect of the damage or loss, would result in the plaintiff receiving compensation for damage or loss that is greater than the damage or loss actually sustained by the plaintiff."

124 Section 87CH deals directly with joinder. It provides:

- "(1) The court may give leave for any one or more persons to be joined as defendants in proceedings involving an apportionable claim.
- (2) The court is not to give leave for the joinder of any person who was a party to any previously concluded proceedings in respect of the apportionable claim."

*Joinder*

125 As can be seen, the proportionate liability laws contemplate the possibility for joinder of all parties in one proceeding.<sup>106</sup> Under the Consumer Act, the court is expressly empowered to join any other wrongdoer(s) to the proceedings under s 87CH. As s 87CH is not capable of being expressed in terms appropriate, or of being translated or adapted, to arbitration, it is not necessary to address whether s 87CH is to be considered substantive or procedural. There is no direct analogue of s 87CH in the Law Reform Act. However, s 10(1) of the Law Reform Act is evidently geared towards the potential joinder of other wrongdoers, under the court rules for joinder.<sup>107</sup> It (mirrored in s 87CE of the Consumer Act) imposes an obligation on the defendant, where they have reasonable grounds to believe that another person may be liable, to give the plaintiff information about that other person.

126 In contrast to court proceedings, no third party may be joined to arbitration proceedings without the consent of that third party and each of the parties to the arbitration. But that does not mean that the proportionate liability laws are not capable of applying in an arbitration.

127 Both of the proportionate liability laws provide for the possibility and the fact of non-joinder of third parties, but neither of the proportionate liability laws require joinder.<sup>108</sup> Each scheme permits the possibility of joinder but accepts that joinder may not always be possible. Indeed, s 11 of the Law Reform Act and s 87CG of the Consumer Act not only contemplate that there can be and will be separate proceedings but provide what is to happen when there are subsequent proceedings. Section 8(2)(b) of the Law Reform Act and s 87CD(4) of the Consumer Act both provide for the defendant's liability to be limited, in accordance with their responsibility for the harm and the responsibility of other wrongdoers, *including those not a party to the proceedings*. Section 11 of the Law Reform Act and s 87CG of the Consumer Act both recognise that there may well be a "judgment first given" or a "previously recovered judgment". Those provisions may be adapted to refer to an arbitral award which, subject to ss 35 and

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**106** The South Australian proportionate liability laws have similar statutory counterparts across Australia. See *Civil Liability Act 2002* (NSW), Pt 4; *Civil Liability Act 2002* (Tas), Pt 9A; *Wrongs Act 1958* (Vic), Pt IVAA; *Civil Liability Act 2002* (WA), Pt 1F; *Civil Law (Wrongs) Act 2002* (ACT), Ch 7A; *Proportionate Liability Act 2005* (NT).

**107** *Uniform Civil Rules 2020* (SA), r 22.1.

**108** See s 8(2)(b) of the Law Reform Act and s 87CD(4) of the Consumer Act.

36 of the Arbitration Act, is to be recognised in South Australia as binding and, on application in writing to the Supreme Court, is to be enforced.<sup>109</sup>

128 The possibility of joinder is not an integral feature of the laws. In this respect, the potential application of the proportionate liability laws is no different from their application in court proceedings, where a plaintiff may choose to sue a single wrongdoer for reasons that include the insolvency or lack of assets of another wrongdoer. The proportionate liability laws do not require a plaintiff to sue all wrongdoers in a single proceeding or assume that a plaintiff will wish to or be able to sue all wrongdoers in a single proceeding.

129 Section 10 of the Law Reform Act can be adapted to apply in an arbitration. The Court of Appeal overlooked the potential benefits of s 10 in the context of an arbitration by failing to see how it could be sensibly applied except in court proceedings on the basis that its sole benefit was to furnish information for the purposes of joinder of other wrongdoers to the proceeding.<sup>110</sup> While s 10(1) is evidently geared towards the joinder of other wrongdoers to a court proceeding, there are significant potential uses of information provided in accordance with s 10 in the context of arbitration, including seeking to join a third party to an ad hoc arbitration and identifying evidence within the knowledge or possession of a third party that may be deployed against the respondent. In any event, any lack of utility for s 10 in an arbitration does not affect the applicability of s 8 in that arbitration.

130 Section 11 of the Law Reform Act applies if a plaintiff brings a separate action against a wrongdoer who is entitled to a limitation of liability under s 8. In that way, s 11 reinforces the point, made explicitly by s 8(2)(b), that s 8 may apply in proceedings involving only one of several wrongdoers. Part 3 of the Law Reform Act does not require joinder of all potential wrongdoers to a single proceeding and the mere possibility of joinder is not an integral feature of the scheme of Pt 3. Accordingly, the absence of a right of joinder in an arbitration does not affect the application of the limitation of liability rule and, to the extent that the Supreme Court of Western Australia decided differently in *Curtin University of Technology v Woods Bagot Pty Ltd*,<sup>111</sup> that case was wrongly decided.

131 To the extent that a plaintiff would be disadvantaged by s 11, South Australian law does not prevent a party from contracting out of the proportionate liability laws in any arbitration clause.

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**109** Arbitration Act, s 35(1).

**110** *Tesseract v Pascale* (2022) 140 SASR 395 at 430 [121], 431 [125].

**111** [2012] WASC 449 at [85].

132 Pascale's case is no stronger in relation to Pt VIA of the Consumer Act. The case is arguably weaker because Pt VIA does not displace any pre-existing common law right to damages, and the statutory right to damages under s 236 of the *Australian Consumer Law*, to which Pt VIA applies, must be understood in its statutory context, which includes Pt VIA.<sup>112</sup> Section 87CB(5) also makes it clear that Pt VIA applies even where it is unlikely that the plaintiff will seek to recover against another wrongdoer, namely where that wrongdoer is insolvent, is being wound up or has ceased to exist or died.

133 The inability of a claimant to join wrongdoers to arbitration proceedings (except by agreement), and the consequential need to bring multiple proceedings to recover all losses, are not matters that tell in favour of a conclusion that the proportionate liability laws do not fall within the scope of s 28(3) of the Arbitration Act. To the contrary, they simply reflect the nature of arbitration pursuant to a bi-partite arbitration agreement, known to the parties to that agreement. Moreover, on Pascale's approach, it would obtain a right to solidary liability that no longer forms part of the laws of South Australia (including the common law of Australia) in circumstances where the parties have not expressly agreed to forgo the right to limit liability in accordance with the proportionate liability laws.

134 The effect of Pascale's argument is that, by submitting their disputes to two-party arbitration, Tesseract effectively waived its entitlement to rely on the proportionate liability laws. Pascale accepted that the proportionate liability defences formed part of the dispute submitted to arbitration but then argued that those defences must be settled at arbitration adversely to Tesseract because the proportionate liability laws could not be applied in that forum. However, the mere fact of an arbitration agreement between two parties does not demonstrate that the parties contracted out of the application of the proportionate liability laws to the resolution of their dispute. To the contrary, the parties can be taken to have known, when making that agreement, that a two-party arbitration would not afford rights or remedies against a third party. That fact is not inconsistent with the respondent raising a successful proportionate liability defence in the arbitration. It simply means that, in that event, the claimant would need to decide whether to commence court proceedings to recover from any concurrent wrongdoer.

135 The absence of any finding that the parties to the arbitration agreement contracted out of the proportionate liability laws distinguishes this case from *Aquagenics Pty Ltd v Break O'Day Council*.<sup>113</sup> There, the Full Court of the Supreme Court of Tasmania found that the parties' express agreement to the effect that their rights and liabilities were the same as they would have been at common

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112 Consumer Act, s 87CB(1).

113 (2010) 20 Tas R 239.

law was incompatible with an application of Tasmanian proportionate liability laws to their dispute.<sup>114</sup> Evans J found that the parties had wholly contracted out of the Tasmanian proportionate liability laws, so his Honour's observations about the operation of those analogous laws were expressed as obiter dicta.<sup>115</sup>

*Effect of proportionate liability laws on third parties*

136 Section 11 of the Law Reform Act has the potential to operate adversely to a third party to earlier proceedings, whether those proceedings are court or arbitral proceedings. That is because a party to an arbitration governed by the Arbitration Act can apply to the Supreme Court to have the award recognised as binding and enforced.<sup>116</sup> However, s 11 may equally operate to the benefit of a third party depending upon the precise findings made in the earlier proceedings. In particular, the potential prejudice does not extend to affecting a third party's right to deny liability and, accordingly, it cannot be said that an arbitral award which applies the proportionate liability laws purports to bind a third party.<sup>117</sup> The potential prejudice to a third party arising from an arbitral award does not exceed the potential prejudice from a judgment in court proceedings to which a third party has not been joined. This conclusion is reinforced by the removal from the Arbitration Act of the previous discretionary power to refuse to stay court proceedings in answer to the potential for fragmentation of a dispute as a result of the involvement of a third party.<sup>118</sup>

137 In contrast to s 11, s 87CG of the Consumer Act does not have a potential adverse impact on third parties. To the contrary, it ensures that a plaintiff who brings separate proceedings may not recover compensation that would result in recoveries that exceed the damage or loss actually sustained.

138 In sum, the application of the proportionate liability laws in an arbitration, where there is no power of joinder in the absence of consent, would therefore not change the legal operation of those laws to such an extent that the laws cannot be described as the substantive laws of South Australia.

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114 *Aquagenics* (2010) 20 Tas R 239 at 252-253 [21].

115 *Aquagenics* (2010) 20 Tas R 239 at 253 [25] (Wood J agreeing).

116 Arbitration Act, s 35.

117 cf Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England*, 2nd ed (1989) at 149; Born, *International Commercial Arbitration*, 3rd ed (2021), vol 1 at 1029.

118 cf Arbitration Act, s 8; *Commercial Arbitration Act 1986* (SA), s 53.

### Arbitrability and public policy

139 Issues of arbitrability and public policy are separate but interrelated.<sup>119</sup> Each may be raised before the arbitral tribunal as a question going to jurisdiction.<sup>120</sup> Each may be raised before a court *after* an arbitral award has been handed down by a party seeking to set aside an arbitral award,<sup>121</sup> or by the party against whom an arbitral award is invoked as a ground for a court to refuse to recognise or enforce the arbitral award.<sup>122</sup>

140 In the present case, to the extent any issue of arbitrability was said to have been raised before the arbitral tribunal and then by the preliminary question of law, that is answered by the fact that the proportionate liability laws are not expressly excluded from a dispute submitted to arbitration and, as a matter of statutory construction, those laws do not evince an intention to exclude arbitration. On the contrary, the proportionate liability laws can be modified to apply to an arbitration whilst still retaining the integrity of the scheme of the proportionate liability laws. No question of public policy was raised by the parties in these proceedings.

### Conclusion

141 For those reasons, the appeal will be allowed with costs. The order of the Court of Appeal of the Supreme Court of South Australia made on 21 October 2022 determining a question of law pursuant to s 27J of the Arbitration Act will be set aside and, in its place, order that the question of law:

"Does Part 3 of the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) and/or Part VIA of the *Competition and Consumer Act 2010* (Cth) apply to this commercial arbitration proceeding conducted pursuant to the legislation and the [*Commercial Arbitration Act 2011* (SA)]?"

be answered "Yes".

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119 See Blackaby, Partasides and Redfern, *Redfern and Hunter on International Arbitration*, 7th ed (2022) at 86 [2.130].

120 Arbitration Act, s 16.

121 Arbitration Act, s 34(2)(b).

122 Arbitration Act, s 36(1)(b).



EDELMAN J.

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<b>X. Postscript</b>	[225]-[227]

## I. Introduction and a paramount object of arbitration

142 In 2012, a proposal to make "proportionate liability legislation expressly referable to arbitrations seated in Australia" was said to be a threat to "[t]he future of domestic arbitration in Australia" and was opposed by the leading arbitral institutions in Australia.<sup>123</sup> The proposal was never adopted. But if this appeal were to be allowed it would mean that the unpopular proposal had already come into effect. Allowing the appeal would mean that, contrary to the widespread view of courts<sup>124</sup> and commentators<sup>125</sup> at the time concerning the applicability of proportionate liability laws to arbitration, the appellant and the respondent by their general choice of substantive South Australian law in their 2015 contract: (i) had impliedly agreed to adopt, for their arbitration, schemes of inextricable substantive and procedural rules of proportionate liability in South Australia that could not be applied in their terms to the arbitration and which detracted from a paramount object of arbitration, or (ii) must be treated as having made no choice of *any* substantive law but nevertheless are required to adopt the proportionate liability schemes for their arbitration by the applicable conflict of laws rules.

143 The 2015 contract between the appellant and the respondent ("the main Contract") contains, in cl 21, an arbitration agreement (conventionally treated as a separate agreement from the main contract). The arbitration agreement contains no

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123 Monichino, "Arbitration Law in Victoria Comes of Age" (2012) 31(1) *The Arbitrator & Mediator* 41 at 60, 62.

124 *Savcor Pty Ltd v Solomon Corrosion Control Services Pty Ltd* [2001] VSC 428 at [14]; *Wealthcare Financial Planning Pty Ltd v Financial Industry Complaints Service Ltd* (2009) 69 ACSR 418 at 427 [27]-[28], 429-433 [37]-[47]; *Aquagenics Pty Ltd v Break O'Day Council* (2009) 18 Tas R 364 at 367 [6]; *Curtin University of Technology v Woods Bagot Pty Ltd* [2012] WASC 449 at [96]-[97].

125 Stephenson, "Proportional Liability in Australia—the Death of Certainty in Risk Allocation in Contract" (2005) 22 *International Construction Law Review* 64 at 66; Levin, "Proportionate Liability in Arbitrations in Australia?" (2009) 25 *Building and Construction Law Journal* 298; Monichino, "Arbitration Law in Victoria Comes of Age" (2012) 31(1) *The Arbitrator & Mediator* 41 at 61.

express choice of the applicable substantive rules of law of the arbitration. Nor does it contain any express choice of the procedural rules applicable to the arbitration. However, the main Contract plainly contains a choice of South Australian law as the substantive law of the main Contract. That choice is either: (i) an express term of the main Contract, by interpretation of cl 19.2 in its context, or (ii) clearly implied from cl 19.2 and other clauses. That express or implied choice of the substantive law of South Australia for the main Contract provides general support for an implied choice of the same law as the substantive rules of law of the arbitration agreement. But the implied choice need not necessarily include all of the South Australian substantive rules of law if the context of arbitration suggests otherwise. Further, a choice of substantive law for the main Contract does not support an implied choice of any of the procedural rules of the jurisdiction.

144 The issue on this appeal reduces to whether the implied choice of the parties to adopt the laws applicable in South Australia generally as the substantive rules of law of the arbitration agreement included a choice to adopt the substantive rules of proportionate liability laws applicable in South Australia, to be applied together with only some of the inextricable, but unchosen, procedural rules of the same schemes of proportionate liability only if the arbitral tribunal "considers [it] appropriate".<sup>126</sup>

145 Proportionate liability, where it applies, is typically not confined to a principle that limits the liability of wrongdoers. It typically also operates by way of substantive and procedural rules to distribute liability among wrongdoers, and therefore to enlarge a dispute between an applicant and a respondent into a dispute that also includes third parties. A dispute between A and B becomes a dispute between A (on the one hand) and B and C (on the other). The effect of proportionate liability in an arbitration is therefore that if wrongdoer C is not a party to the arbitration agreement, and is not able to be consensually joined in the arbitration, then the arbitration will not finally resolve the (enlarged) dispute. The applicant, A, can only resolve the dispute and recover the remainder of the distributed liability by bringing court proceedings against wrongdoer C. The dispute, which has become one between A, B and C, is, in effect, distributed between the arbitration and the court proceedings.

146 By contrast with a proportionate liability scheme, principles of solidary liability ensure full resolution of a dispute between an applicant and a respondent to an arbitration agreement. A dispute between A and B, both parties to an arbitration agreement, remains a dispute between A and B even if there is a third party, C, who might also have been liable to A. If A is unable to recover from B and brings separate court proceedings against C, then the dispute is a separate dispute between A and C. Similarly, if the respondent to the arbitration, B, is found

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126 *Commercial Arbitration Act 2011 (SA)*, s 19(2).

liable to A in the arbitration and later seeks contribution in court from a third party, C, then that is a separate dispute to which the applicant, A, need not be a party.

147 A paramount object of arbitration is to facilitate final resolution of commercial disputes between parties to an arbitration agreement.<sup>127</sup> Although it is not absolute, that paramount object is sufficiently widespread and accepted that it is taken to be the objective intention of the parties in the absence of a clear indication to the contrary. That paramount object of arbitration is therefore manifest in a strong interpretative principle for arbitration agreements that "provides appropriate respect for party autonomy"<sup>128</sup> by recognising that parties are unlikely "to have intended that only some of the questions arising out of their relationship were to be submitted to arbitration [while] others were to be decided by national courts".<sup>129</sup>

148 By distributing potential liability, and therefore distributing a dispute, to non-parties to an arbitration, the inclusion of the substantive law component of proportionate liability schemes as part of the substantive rules of law of an arbitration agreement can detract from the paramount object of facilitating final resolution of disputes between the parties. This does not make an arbitration agreement invalid. An arbitration can nevertheless achieve the partial resolution of what has effectively become (under proportionate liability legislation) a multi-party dispute. Hence, an arbitration agreement could expressly provide that the applicable law of a particular jurisdiction includes the proportionate liability provisions of that jurisdiction. But in light of the paramount object of facilitating final resolution of disputes between the parties it would be a surprising inference to draw from the silence of the parties that they had chosen legal rules that would lead only to the partial resolution of their dispute.

149 The ultimate question on this appeal concerns whether the scope of the implied choice of a jurisdiction's substantive rules of law for an arbitration extends to the substantive and inextricable procedural rules of proportionate liability. The question should be expressed as follows: were the schemes of proportionate liability laws, being Pt 3 of the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) ("the Law Reform Act") and Pt VIA of the *Competition and Consumer Act 2010* (Cth) ("the CCA"), chosen by the parties

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**127** See, relevantly, *Commercial Arbitration Act 2011* (SA), s 1C(1). See also Sourdin, *Alternative Dispute Resolution*, 6th ed (2020), [6.85] at 209, 211.

**128** *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 at 88 [165]. See also *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160 at 165.

**129** *Fiona Trust & Holding Corporation v Privalov* [2007] 4 All ER 951 at 957 [7].

as applicable to their arbitration agreement,<sup>130</sup> in the absence of any choice by the parties of the inextricable, and sometimes inapplicable, procedural aspects of those schemes and contrary both to a paramount object of arbitration and to the usual powerful inference that parties to an arbitration agreement are not taken to have intended to fragment their disputes? The answer to this question should be "No".

150 The Court of Appeal of the Supreme Court of South Australia was correct to answer the question reserved to the effect that the proportionate liability provisions in the Law Reform Act and the CCA do not apply to the arbitration. However, one complication with the reasoning that I have summarised is that in the Court of Appeal the parties' argument proceeded on the assumption, inconsistent with the main Contract, that there had been no express or implied choice of law in the arbitration agreement. If no implied choice could be attributed to the parties, two different questions would arise. The first question would be whether the arbitral tribunal considered the substantive and procedural laws of South Australia to be applicable to the arbitration.<sup>131</sup> The close connection of the arbitration agreement with South Australia would likely lead the arbitral tribunal to apply the applicable "conflict of laws rules" to recognise the substantive law of the arbitration agreement as generally being the laws of South Australia (including applicable Commonwealth laws). And, in relation to the procedural rules, the arbitral tribunal would be likely to adopt those rules that allow it to conduct the arbitration "in such manner as it considers appropriate". The second question would then be whether, in light of the substantive and procedural rules chosen by the arbitral tribunal, the tribunal would consider that such significant modification would be required to apply the proportionate liability provisions in the Law Reform Act and the CCA to an arbitration that it could no longer be said that *those* South Australian laws were being applied.

151 A majority of this Court concludes in this appeal that the proportionate liability provisions in the Law Reform Act and the CCA: (i) should apply because they were impliedly chosen by the parties, or (ii) should apply as a consequence of a choice of the relevant conflict of laws rules attributed by this Court to the arbitral tribunal. In dissent from that view, like Steward J, I consider that those proportionate liability provisions should not apply. I reach that conclusion by focusing on the scope of the implied choice of the parties of the substantive law of South Australia for the main Contract and the absence of any choice of procedural rules by the parties. Those two matters, singly or in combination, preclude the application of the proportionate liability provisions of the Law Reform Act and the CCA to the arbitration.

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130 *Commercial Arbitration Act 2011* (SA), s 28(1).

131 *Commercial Arbitration Act 2011* (SA), ss 19(2) and 28(3).

152 If, however, no substantive rules of law had been impliedly chosen in the arbitration agreement by the parties, there would be much to be said for the reasoning of Steward J that the magnitude of the modification required to adapt for arbitration the proportionate liability laws applicable in South Australia may change the essential meaning of those laws, leading to the conclusion that it was no longer those South Australian laws that would be applied by the conflict of laws rules. This would be especially so if an arbitral tribunal, lacking the power to join third parties to an arbitration, made the sensible choice that it was not "appropriate" within s 19(2) of the *Commercial Arbitration Act 2011* (SA) ("the Arbitration Act") to conduct the arbitration by reference to the procedural rules required for the operation of the proportionate liability schemes.

153 Despite the difference in outcome, my conclusion, like that of the majority, is only a default rule. After this decision, parties who wish to have arbitrations in Australia that fully resolve the disputes between them will generally be able to do so by including in an arbitration agreement an express exclusion of any proportionate liability laws of the applicable jurisdiction.<sup>132</sup> Unfortunately, however, a consequence of today's decision may be that those parties to agreements concluded prior to this Court's decision, who may have relied upon the pre-existing legal position in Australia in not including an express exclusion of proportionate liability laws, could find themselves as parties to agreements where those rules apply. Unless they revise the terms of their arbitration agreement prior to arbitration, it would seem that their dispute will be resolved by substantive rules of proportionate liability which they did not adopt, which an arbitral tribunal might not have considered appropriate, and which detract from a paramount object of arbitration in facilitating final resolution of commercial disputes. Parties retain the ability, even during an arbitration, to change the rules of procedure governing their arbitration to exclude the procedural rules of proportionate liability. But how the substantive rules of proportionate liability would operate without the procedural rules could be another legal conundrum.

## II. What this case is *not* about

154 Neither of the parties, nor the amicus curiae (the Australian Centre for International Commercial Arbitration), suggested that proportionate liability schemes, with significant adaptation, were *incapable* of application in an arbitration if the parties so chose. They are capable of applying with significant adaptation as part of any chosen substantive and procedural law for the arbitration agreement. There was also no suggestion that a proportionate liability scheme that was significantly adapted and amended so that it applied in an arbitration would be contrary to the public policy of South Australia as the curial law.

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132 See, for instance, the clause in *Transurban WGT Co Pty Ltd v CPB Contractors Pty Ltd* [2020] VSC 476 at [44].

155 It is, therefore, neither necessary nor appropriate in this case to essay whether any expressly or impliedly chosen substantive rules of law of the arbitration agreement are subject to constraints which would permit an arbitral award to be set aside, including constraints where the "subject matter" of the dispute is incapable of settlement by arbitration<sup>133</sup> or where arbitration would be contrary to public policy.<sup>134</sup>

156 On the other hand, it is appropriate in these reasons to address a different issue even though that issue was also not the subject of any submissions. The assumption of the parties to this appeal was that all the provisions that form part of the schemes of proportionate liability were substantive rules of law within s 28 of the Arbitration Act ("rules of law ... applicable to the substance of the dispute"). I had initially expressed my reasons on the basis of that assumption, although expressing some doubts about it. In circumstances, however, in which three members of this Court have now rejected the assumption, it is appropriate to express my conclusions on a more precise basis which does not entirely accept the parties' assumption. Indeed, a departure from the assumption fortifies my conclusion that the proportionate liability schemes were not chosen for the parties' arbitration.

### III. Party autonomy and a concern with unchosen domestic legal rules

157 In 1981, the United Nations Secretary-General's report on the possible features of a model law on international commercial arbitration<sup>135</sup> described the principle of party autonomy as "[p]robably the most important principle on which the model law should be based".

158 Four different aspects of party autonomy must be separated, although those aspects, or parts of them, are often mistakenly conflated.<sup>136</sup> Each of these four aspects is treated separately in the UNCITRAL Model Law on International Commercial Arbitration ("the UNCITRAL Model Law"), upon which the

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133 *Commercial Arbitration Act 2011* (SA), s 34(2)(b)(i).

134 *Commercial Arbitration Act 2011* (SA), s 34(2)(b)(ii).

135 United Nations Secretary-General, *Report of the Secretary-General: possible features of a model law on international commercial arbitration*, UN Doc A/CN.9/207 (1981) at [17], quoted in Binder, *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions*, 4th ed (2019) at 338.

136 See the useful discussion in *Enka Insaat ve Sanayi AS v OOO "Insurance Company Chubb"* [2020] 1 WLR 4117 at 4189-4190 [234], 4191-4192 [241]; [2021] 2 All ER 1 at 72-73, 74.

Arbitration Act was based.<sup>137</sup> First, there is party autonomy concerning the selection of the place or seat of the arbitration.<sup>138</sup> Secondly, there is party autonomy concerning the selection of the curial or supervisory law of the arbitration.<sup>139</sup> That curial or supervisory law is distinct from the seat of the arbitration in theory, although in practice the seat is a "reliable indicator"<sup>140</sup> of the curial law and is often assimilated with it. Thirdly, there is party autonomy concerning the procedure that governs the arbitration and the powers of the tribunal.<sup>141</sup> Fourthly, there is party autonomy concerning the substantive rules of law of the arbitration.<sup>142</sup> This case is concerned with the third and fourth aspects, namely the content of the applicable procedural and substantive rules of law of the arbitration.

159 In an Explanatory Note on the UNCITRAL Model Law, prepared by the secretariat of the United Nations Commission on International Trade Law (UNCITRAL),<sup>143</sup> it was explained that "[r]ecurrent inadequacies" were to be found in national laws that "equate the arbitral process with court litigation and fragmentary provisions that fail to address all relevant substantive law issues". The note continued:<sup>144</sup>

"Frustration may also ensue from non-mandatory provisions that may impose undesired requirements on unwary parties who may not think about the need to provide otherwise when drafting the arbitration agreement. Even the absence of any legislative provision may cause difficulties simply by leaving unanswered some of the many procedural issues relevant in arbitration and not always settled in the arbitration agreement. The Model Law is intended to reduce the risk of such possible frustration, difficulties or surprise."

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137 *Commercial Arbitration Act 2011* (SA), Pt 1A.

138 UNCITRAL Model Law on International Commercial Arbitration, adopted 1985, incorporating 2006 amendments ("UNCITRAL Model Law"), Art 20.

139 UNCITRAL Model Law, Art 1(2).

140 Briggs, *Private International Law in English Courts*, 2nd ed (2023) at 841.

141 UNCITRAL Model Law, Art 19(1).

142 UNCITRAL Model Law, Art 28(1).

143 *UNCITRAL Model Law on International Commercial Arbitration 1985, With amendments as adopted in 2006* (2008), Pt 2 at 24 [6].

144 *UNCITRAL Model Law on International Commercial Arbitration 1985, With amendments as adopted in 2006* (2008), Pt 2 at 25 [7].



160 The UNCITRAL Model Law aims to reduce the risk of surprise through Arts 19 and 28. Articles 19(1) and 19(2) relevantly provide that subject to the Model Law "the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings" and that "[f]ailing such agreement" the arbitral tribunal has power to "conduct the arbitration in such manner as it considers appropriate". The same approach is taken in relation to the substantive rules of law applicable to a dispute. Article 28(1) relevantly provides that "[t]he arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute". Article 28(2) provides that "[f]ailing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable".

161 There is a significant difference between a choice by the parties of "rules of law" pursuant to Art 28(1) and an application by the arbitral tribunal of the "law" determined by the applicable conflict of laws rules pursuant to Art 28(2). The choice by the UNCITRAL Model Law of "rules of law", an expression used in the 1965 Washington Convention<sup>145</sup> and the arbitration laws of France and Djibouti, was intended to be wider than "law" so that the parties could designate rules of more than one legal system, including international laws.<sup>146</sup>

162 The UNCITRAL Final Report concerning the UNCITRAL Model Law explained that the reference to a choice of "rules of law" was intended to provide flexibility to the parties to subject their relationship to the most suitable rules of law for their specific case: "[i]t would enable them, for example, to choose provisions of different laws to govern different parts of their relationship, or to select the law of a given State *except for certain provisions*".<sup>147</sup> The centrality of party autonomy in arbitration is reflected in this ability to select the relevant rules of law applicable to a dispute, a choice that is frequently influenced by considerations that include whether a rule of law will be "favo[u]rable" or "advantageous" to the parties, or the desirability of application of mandatory

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145 Convention on the settlement of investment disputes between States and nationals of other States (1965), Art 42.

146 Binder, *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions*, 4th ed (2019) at 399.

147 United Nations General Assembly, *Report of the United Nations Commission on International Trade Law on the work of its eighteenth session*, 40th sess, Supp No 17, UN Doc A/40/17 (3–21 June 1985) at 45 [232] (emphasis added). See also *UNCITRAL Model Law on International Commercial Arbitration 1985, With amendments as adopted in 2006* (2008), Pt 2 at 33 [39].

national laws to local aspects of the transaction.<sup>148</sup> Parties may select multiple or overlapping national laws to govern particular contractual provisions, or select different "laws to apply to different sets of contractual provisions within a single contract or contractual relationship".<sup>149</sup>

#### **IV. The *Commercial Arbitration Act*, ss 19 and 28**

163 The Arbitration Act generally follows Art 19 and Art 28 of the UNCITRAL Model Law in the relevant parts of s 19 and in s 28 as follows:

##### **"19 Determination of rules of procedure**

- (1) Subject to the provisions of this Act, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.
- (2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Act, conduct the arbitration in such manner as it considers appropriate.

...

##### **28 Rules applicable to substance of dispute**

- (1) The arbitral tribunal must decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute.
- (2) Any designation of the law or legal system of a given State or Territory must be construed, unless otherwise expressed, as directly referring to the substantive law of that State or Territory and not to its conflict of laws rules.
- (3) Failing any designation by the parties, the arbitral tribunal must apply the law determined by the conflict of laws rules which it considers applicable.
- (4) The arbitral tribunal must decide the dispute, if the parties so agree, in accordance with such other considerations as are agreed to by the parties.

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**148** Born, *International Commercial Arbitration*, 3rd ed (2021), vol II at 2960. See also at 2958-2959.

**149** Born, *International Commercial Arbitration*, 3rd ed (2021), vol II at 2961-2962.

- (5) In all cases, the arbitral tribunal must decide in accordance with the terms of the contract and must take into account the usages of the trade applicable to the transaction."

#### V. Procedural rules chosen by the parties to an arbitration agreement: s 19

164 The provisions of Art 19 of the UNCITRAL Model Law, replicated in s 19 of the Arbitration Act, were described by the United Nations Secretary-General as the "[m]agna [c]arta of Arbitral Procedure" and said to be designed "to suit the great variety of needs and circumstances of international cases, unimpeded by local peculiarities and traditional standards which may be found in the existing domestic law of the place [of arbitration]".<sup>150</sup>

165 There is "no uniformly accepted definition of 'procedural law'".<sup>151</sup> Neither the Arbitration Act nor the UNCITRAL Model Law upon which it is based contains any provision which explains the difference between "the substance of the dispute" (to which s 28 applies) and "the procedure to be followed by the arbitral tribunal" (to which s 19 applies). As an international Model Law, the difference must be determined autonomously from particular Australian approaches to substance and procedure. Born helpfully describes the procedural law of the arbitration as:<sup>152</sup>

"the law governing all aspects of the conduct of the arbitral proceedings, including the internal procedures of the arbitration ... and the external relationship between the arbitration and the courts and law of the arbitral seat".

166 Clearly, from Art 19(2) and s 19(3), procedural matters will include the admissibility, relevance, materiality and weight of any evidence. The "procedure to be followed" by the arbitral tribunal in its "conduct [of] the arbitration" would also include any orders or directions by the arbitral tribunal that a respondent provide information to an applicant concerning third party liability. In this way, the rules concerning the procedure to be followed by the arbitral tribunal complement the rules concerning the substance of the dispute between the parties.

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**150** United Nations General Assembly, United Nations Commission on International Trade Law, Eighteenth session, *International Commercial Arbitration: Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration* (3–21 June 1985) at 44 [1].

**151** Born, *International Commercial Arbitration*, 3rd ed (2021), vol II at 1723.

**152** Born, *International Commercial Arbitration*, 3rd ed (2021), vol II at 1724.

167 On the other hand, however, even where the parties choose for their arbitration both the substantive and the procedural rules of a legal system there will be some rules which are concerned with neither the "substance of the dispute" between the parties (and hence are not applicable to the dispute pursuant to s 28) nor the procedure to be followed by the arbitral tribunal. An example is the rules that are concerned with ensuring consistency of findings in one court proceeding with any findings in another court proceeding, such as the rules found in s 11 of the Law Reform Act. The parties to an arbitration agreement cannot, by their agreement, agree upon a procedure that will bind the courts of their chosen jurisdiction.

168 Another example is that an arbitral tribunal cannot adopt a procedure of a legal system, whether chosen by the parties or not, that would require third parties against whom the applicant might have a claim to be joined to the arbitration. For instance, Art 17(5) of the UNCITRAL Arbitration Rules permits the arbitral tribunal, at the request of any party, to join third parties to the arbitration but only where certain conditions are satisfied, including that "such person is a party to the arbitration agreement".

169 A further example is a provision such as s 10(1) of the Law Reform Act, entitled "Procedural provision", which imposes obligations of disclosure upon a defendant. That provision is not concerned with the substance of a dispute but nor is it concerned with the procedure to be followed by a court (or, translated to arbitration, by an arbitral tribunal). It is, instead, a provision which imposes procedural obligations upon a defendant. An arbitral tribunal could, in its discretion to "conduct the arbitration in such manner as it considers appropriate", impose such an obligation upon a respondent. But the existence of a legal rule requiring such disclosure as part of the procedure for the courts of the jurisdiction of the chosen substantive law of the arbitration does not require the arbitral proceedings to be conducted in accordance with that rule merely because the procedural rules of that legal system are chosen by the parties. It is not a rule about the procedure of an arbitral tribunal.

## **VI. Substantive rules of law chosen by the parties to an arbitration agreement: s 28(1)**

### *(i) Substantive rules of law included by implied choice*

170 The importance of party autonomy in arbitration requires that no narrow approach be taken to the interpretation or application of Art 28(1) or s 28(1). Section 28(1) includes any rules of law that are impliedly chosen by the parties: "[a]n implied choice is still a choice which is just as effective as a choice made

expressly".<sup>153</sup> Whether a choice is express or whether it is implied, the choice is to be ascertained objectively.<sup>154</sup> A party's uncommunicated, subjective thoughts are irrelevant. Hence the courts will infer "intention even in circumstances where it was unlikely that the parties gave choice of law any thought".<sup>155</sup>

171 Since parties' choice of substantive rules of law is, by definition, an agreed choice, the objective identification of express or implied choice will generally be an exercise of interpretation of the arbitration agreement in the context of the contract as a whole. In doing so, s 28(5) of the Arbitration Act requires consideration of the terms of the contract and any "usages of the trade". In less common circumstances, the parties might subsequently vary the arbitration agreement or enter into a new agreement that provides for a new express or implied choice of substantive rules of law. There was no suggestion that this case was one of those uncommon circumstances.

172 An implied choice is sometimes described as an "inferred choice",<sup>156</sup> but a choice that is inferred is simply the mirror image of one that has been implied. An inference (drawn by the court) is the process by which an implication (made by the parties) is identified.<sup>157</sup> The context of a contract might permit an inference to be drawn, and an implied choice to be recognised, where the contract is entirely silent on a matter. As Professor Briggs has said of the proposition that nothing can be inferred if the express terms are silent on the subject:<sup>158</sup>

"That is a proposition with which nobody should agree, ever. The idea that intention and expression are coterminous, or that expression is a full and complete statement of intention, is achingly difficult ... [T]he idea that parties cannot intend something which they did not say would challenge the common law conflict of laws, which infers an intention as to proper law

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153 *Enka Insaat ve Sanayi AS v OOO "Insurance Company Chubb"* [2020] 1 WLR 4117 at 4129 [35]; [2021] 2 All ER 1 at 14.

154 *Taylor v Johnson* (1983) 151 CLR 422 at 428-429; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 179-180 [40]-[41]; *Byrnes v Kendle* (2011) 243 CLR 253 at 275 [59], 285 [100]; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at 116 [46].

155 Davies et al, *Nygh's Conflict of Laws in Australia*, 10th ed (2020) at 478 [19.23].

156 *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418 at 440.

157 *Realestate.com.au Pty Ltd v Hardingham* (2022) 277 CLR 115 at 147-148 [84]-[85].

158 Briggs, "The Sound of Silence" [2023] *Lloyd's Maritime and Commercial Law Quarterly* 355 at 357 (footnote omitted).

when the parties' focus on the issue of dispute resolution had been expressed in agreement, but only upon a choice of court."

173 One factor that, together with other circumstances, can support an implication of a choice of substantive rules of law despite silence on the subject is where the parties have expressly chosen the place of arbitration. In *President of India v La Pintada Compania Navigacion SA*,<sup>159</sup> the House of Lords appeared to treat the choice of a place of arbitration as conclusive for an implication of choice of substantive rules of law. Although an express choice of the place of arbitration is properly now recognised as being only one relevant factor,<sup>160</sup> this recognition emphasises that an implication of a choice of substantive rules of law can be made without any express provision for a place of arbitration or curial or supervisory law. Indeed, Lord Brandon in *President of India* referred to a decision of this Court based on an implied choice of substantive rules of law by the parties, which had identified the implication in the absence of any express choice of a place of arbitration.<sup>161</sup>

174 The decision of this Court to which Lord Brandon referred was *Government Insurance Office of New South Wales v Atkinson-Leighton Joint Venture*.<sup>162</sup> In that case, an insurance contract was entered between joint venturers operating in New South Wales and the Maritime Services Board of New South Wales. The contract concerned work to be done in New South Wales. The contract contained an arbitration agreement by which the parties relevantly agreed that "[a]ll differences arising out of this Policy shall be referred to the decision of an Arbitrator".<sup>163</sup> One question was whether there was implied in the arbitration agreement a choice by the parties of the law of New South Wales, including a statutory provision concerning the payment of interest on judgment debts. That provision, s 94 of the *Supreme Court Act 1970* (NSW), empowered the Supreme Court to award interest on a judgment debt for the whole or any part of a period between the date that the cause of action arose and the date of judgment. As Mason J recognised, although s 94 was expressed in terms of the power of the Court, its effect was upon the

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159 [1985] AC 104 at 119.

160 *Enka Insaat ve Sanayi AS v OOO "Insurance Company Chubb"* [2020] 1 WLR 4117 at 4168 [170(vii)]; [2021] 2 All ER 1 at 51.

161 [1985] AC 104 at 119.

162 (1981) 146 CLR 206.

163 *Government Insurance Office of New South Wales v Atkinson-Leighton Joint Venture* (1981) 146 CLR 206 at 211.

substantive law, altering the common law as to interest, rather than to confer a power upon the Court or to govern or regulate a power of the Court.<sup>164</sup>

175 A majority of this Court (Stephen J, Mason J and Murphy J) held that an arbitrator could award interest under the rules contained in s 94 of the *Supreme Court Act 1970* (NSW). Stephen J held that this power arose, subject to "qualifications" required by statute law and "certain exceptions",<sup>165</sup> by virtue of the arbitrator's "implied authority to follow the ordinary rules of law".<sup>166</sup> Mason J (with whom Murphy J agreed) considered the question to be whether there was "implied in the parties' submission to arbitration a term that the arbitrator is to have authority to give the claimant such relief as would be available to him in a court of law having jurisdiction with respect to the subject matter".<sup>167</sup> The expression of the implied term as one that is based upon the powers of the arbitrator, by an analogy with the powers of a judge, was later described as "misconceived".<sup>168</sup> But, if the statement by Mason J is seen instead as a statement only about the content of the substantive rules of law of the arbitration, the analysis of an implied term involves no such misconception or conflation.

176 A circumstance where an inference of choice of law will be considerably stronger than in *Government Insurance Office of New South Wales v Atkinson-Leighton Joint Venture* is where the parties expressly or impliedly choose a substantive law to govern the contract of which the arbitration agreement forms a part. The inference that the same substantive law has been (impliedly) chosen for the arbitration agreement is particularly strong where there is no suggestion that any different choice has been made for the seat or place of arbitration or the usually associated curial or supervisory law. As the majority of the Supreme Court of the United Kingdom recently explained, "[w]here the law applicable to the arbitration

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164 *Government Insurance Office of New South Wales v Atkinson-Leighton Joint Venture* (1981) 146 CLR 206 at 247.

165 *Government Insurance Office of New South Wales v Atkinson-Leighton Joint Venture* (1981) 146 CLR 206 at 235.

166 *Government Insurance Office of New South Wales v Atkinson-Leighton Joint Venture* (1981) 146 CLR 206 at 235, quoting *Russell on Arbitration*, 19th ed (1979) at 356.

167 *Government Insurance Office of New South Wales v Atkinson-Leighton Joint Venture* (1981) 146 CLR 206 at 246.

168 Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England*, 2nd ed (1989) at 294, cited in Law Commission of New Zealand, *Arbitration*, Report No 20 (1991) at 147 [253]. Compare *IBM Australia Ltd v National Distribution Services Ltd* (1991) 22 NSWLR 466 at 480-481.

agreement is not specified, a choice of governing law for the contract will generally apply to an arbitration agreement which forms part of the contract".<sup>169</sup>

(ii) *Substantive rules of law excluded by, or not contained within, implied choice*

177 The expressly chosen substantive rules of law of an arbitration agreement can impliedly *include* rules of law from different legal systems. So too, as the UNCITRAL Final Report concerning the UNCITRAL Model Law explained, the expressly chosen substantive rules of law of an arbitration agreement can impliedly *exclude* rules of law from particular legal systems. Dépeçage can involve exclusion of rules of law from one legal system and their replacement with rules of law from another legal system.<sup>170</sup>

178 An example given by the amicus curiae on this appeal is where the parties choose a system of law which contains a provision that expressly provides that the provision does not apply to arbitration proceedings. Even if the legislative provision stating that the law "does not apply" to arbitration is not interpreted as a mandatory law of the seat of the arbitration to mean "must not apply", an inference may be drawn that the parties had not chosen that particular law in their express choice of the substantive laws of that jurisdiction in an arbitration agreement.<sup>171</sup>

179 If the choice of substantive rules of law of an arbitration agreement is itself implied, then, in the usual course, an implied choice under s 28(1) of the Arbitration Act concerning the substantive rules of law of a legal system will include most of that legal system's substantive laws. But it will not necessarily include all of them. The exclusion of some laws from the implication of choice of substantive rules of law is not a matter of identifying a positive choice by the parties to the arbitration agreement to exclude those laws. Rather, it is a matter of identifying the scope of the implication concerning the substantive rules of law that the parties did include. If some of the laws of that legal system operate in a manner that militates against the paramount object of arbitration to facilitate final resolution of the parties' disputes, then the natural implication may be that those rules of law would not be included within the scope of the implied choice.

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169 *Enka Insaat ve Sanayi AS v OOO "Insurance Company Chubb"* [2020] 1 WLR 4117 at 4167 [170(iv)]; [2021] 2 All ER 1 at 50.

170 United Nations General Assembly, *Report of the United Nations Commission on International Trade Law on the work of its eighteenth session*, 40th sess, Supp No 17, UN Doc A/40/17 (3–21 June 1985) at 45-46 [232]-[234].

171 But compare *Mastrobuono v Shearson Lehman Hutton Inc* (1995) 514 US 52 at 58-64.



*(iii) Substantive rules of law imposed by the conflict of laws rules: s 28(3)*

180 By contrast with a choice by the parties of "rules of law" under s 28(1) of the Arbitration Act, s 28(3) involves a selection by the tribunal of the "law" determined by the applicable conflict of laws rules in the event that the parties have not designated a substantive law of the dispute. On the assumption that s 28(3) applied, there was no dispute in this case that the applicable conflict of laws rules establish the substantive law to be applied as the law of South Australia. The law of South Australia is the law with which the transaction has the "closest and most real connection".<sup>172</sup>

181 The question of an implied (or inferred) choice that falls within s 28(1) of the Arbitration Act, and the question of closest and most real connection in s 28(3), have traditionally been treated by the common law as separate questions. Nevertheless, as Lord Wilberforce recognised in *Amin Rasheed Shipping Corporation v Kuwait Insurance Co*,<sup>173</sup> the two "merge into each other". In many cases, there may be no difference between, on the one hand, inferring the objective intention of the parties and, on the other hand, considering all relevant facts to identify the law with the closest and most real connection with the contract.

182 In *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*,<sup>174</sup> Mason J recognised that the incorporation into an arbitration of the substantive rules of law of a jurisdiction may require a substantive law to be "modified ... in order to take account of those characteristics which distinguish an arbitration from court proceedings". In many cases the modification will be trivial, such as the substitution of "award" where legislation refers to "judgment", or "arbitration" where legislation refers to "proceedings".<sup>175</sup> But in other cases the modification may be so substantial that it could no longer be said that the law being applied was that which was "determined by the conflict of laws rules".<sup>176</sup>

183 Whether the modification is sufficiently substantial is a matter of judgment. As Doyle JA (with whom Livesey P and Bleby JA agreed) correctly said in the Court of Appeal, although s 28(3) of the Arbitration Act identifies the system of law relevant to the arbitrator's determination of the dispute, "it does not operate to

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172 *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418 at 443.

173 [1984] AC 50 at 69. See also *Australian Competition and Consumer Commission v Valve Corporation [No 3]* (2016) 337 ALR 647 at 662-663 [70]-[71].

174 (1982) 149 CLR 337 at 368-369.

175 *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 369.

176 *Commercial Arbitration Act 2011* (SA), s 28(3).

require that every substantive law within that system be applied".<sup>177</sup> The judgment as to whether a modification is sufficiently substantial to make the law being applied a different law from that identified by the conflict of laws rules is to be made through an assessment of whether the modification changes the essential meaning of the law.<sup>178</sup> If it does, then it is no longer the law identified by the conflict of laws rules that is being applied.

184 Since, in my opinion, this appeal should be resolved by reference to s 28(1) of the Arbitration Act, it is unnecessary to consider whether the essential meaning of the proportionate liability laws is changed by the necessary modifications required in order to apply South Australian proportionate liability legislation to an arbitration. It suffices to say that, given the centrality of the joinder provisions to the proportionate liability legislation, there is much to be said for the view of Steward J that by severing the joinder provisions of that legislation its essential meaning is altered and there is "left substantially a different law as to the subject-matter dealt with from what it would otherwise be".<sup>179</sup>

## **VII. The rules of law impliedly chosen by the parties to the arbitration agreement**

### *(i) The arguments of the parties*

185 Before the Court of Appeal, and before this Court, there was little or no attention given to two matters. The first matter is the relevance of a lack of any choice by the parties of any procedural rules of law in circumstances in which the schemes of proportionate liability are an inextricable mix of procedural and substantive rules of law. Since the parties to this appeal assumed that the schemes of proportionate liability were entirely substantive, a difficult issue that was not addressed by the parties was how any choice by the parties of substantive rules of proportionate liability could be supplemented by the implementation by an arbitral tribunal of the rules of procedure that are inextricably part of the schemes of proportionate liability. The particular difficulty is that some of the procedural rules that are part of the proportionate liability schemes cannot be replicated by any procedure "to be followed by the arbitral tribunal" under s 19 of the Arbitration Act in the tribunal's conduct of the arbitration.

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<sup>177</sup> *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* (2022) 140 SASR 395 at 417 [70].

<sup>178</sup> See, by analogy, *Attorney-General (Cth) v Huynh* (2023) 97 ALJR 298 at 346-347 [237]-[245]; 408 ALR 684 at 742-744.

<sup>179</sup> *Attorney-General (Cth) v Huynh* (2023) 97 ALJR 298 at 346 [239]; 408 ALR 684 at 743, quoting *Harrington v Lowe* (1996) 190 CLR 311 at 328.

186 The second matter is whether the substantive rules of law in South Australia applied under s 28(1) of the Arbitration Act by reason of the choice of the parties, rather than in default of choice by the application of the rules of the conflict of laws under s 28(3). Perhaps on the assumption that either approach would lead to the same conclusion, the argument by the parties was, at times, presented on the basis that the applicable substantive law of the arbitration was to be determined by s 28(3) of the Arbitration Act. No issue arose in the Court of Appeal concerning any difference in effect between s 28(1) and s 28(3) and the Court of Appeal therefore appeared to proceed on the basis that s 28(3) applied due to "the parties' and the [main] Contract's connections with South Australia (and the absence of any equivalent connections with any other jurisdiction or legal system)".<sup>180</sup>

187 Following oral submissions in this Court, the parties provided this Court with a copy of the main Contract, including the arbitration agreement between the parties. The main Contract was an exhibit in the Court of Appeal. The terms of the main Contract make it plain that, contrary to the assumption of the parties to this appeal, the parties expressly or impliedly chose South Australian substantive law as the proper law of the main Contract and impliedly chose the rules of substantive law in South Australia as the law of the arbitration agreement. The parties and the amicus curiae were therefore invited to address this issue in further written submissions.

188 As the appellant properly, and correctly, recognised in its supplementary submissions, cl 19.2 of the main Contract, and the surrounding circumstances, "may be said to weigh in favour of an inference that the parties intended that their contract be governed by the laws of South Australia". For the reasons below, that inference of a choice of South Australian substantive law as the proper law of the main Contract, whether as part of an express term or as an implied term, carries with it the usual inference of the same choice for the arbitration agreement.

189 It is therefore unnecessary to consider the submission of the amicus curiae that the subsequent agreement of the parties before the Court of Appeal that South Australian substantive law was the applicable proper law of the main Contract (due to the connections with South Australia and absence of connections with any other legal system)<sup>181</sup> meant that the parties had chosen the substantive rules of law of South Australia as applicable to the substance of the dispute.

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**180** *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* (2022) 140 SASR 395 at 414 [58].

**181** *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* (2022) 140 SASR 395 at 414 [58].

*(ii) An express or implied choice of South Australian substantive law as the proper law for the main Contract*

190 The main Contract concerned design and construction work for a building in South Australia. The main Contract was in a form created by the "Master Builders Association of South Australia Incorporated". A form attached to the main Contract providing for statutory declarations for payments expressed the declarations as made in the "State of South Australia" and identified persons authorised to witness the declarations as those authorised in accordance with s 2 of the *Evidence (Affidavits) Act 1928* (SA). Whether or not that was the correct provision of South Australian law,<sup>182</sup> and whether or not it remains extant,<sup>183</sup> the point is that it supports the inference that the parties intended South Australian law to govern the main Contract. Further, the days of work under the main Contract excluded "public holidays in South Australia". And, most fundamentally, cl 19.2 provided that:

"If any part of this Contract contravenes any law of the Commonwealth of Australia or the State of South Australia that part will be invalid and be removed from the Contract. In all other ways this Contract will stay in force."

As a matter of interpretation of the express terms of cl 19.2 in the context of the main Contract as a whole (such that the contract will "stay in force" under the South Australian law described), whether by implicature in, or explicature from, the words of cl 19.2, the parties plainly chose rules of law applicable in the State of South Australia (including the applicable law in South Australia of the Commonwealth of Australia) to govern the main Contract.

*(iii) The express or implied choice of substantive law in the main contract generally carries over to the arbitration agreement*

191 No *express* provision was made in the arbitration agreement for any of the four aspects of party autonomy concerning a dispute between the Builder and the Consultant that arises in connection with the main Contract. In other words, no express provision was made for: (i) the place or seat of the arbitration; (ii) the curial or supervisory law of the arbitration; (iii) the procedure that governs the arbitration and the powers of the tribunal; or (iv) the substantive rules of law of the arbitration.

192 Nevertheless, as explained above, silence in expression of the parties' choice in an arbitration agreement cannot be equated with an absence of any

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**182** See *Oaths Act 1936* (SA), s 25.

**183** See *Oaths (Miscellaneous) Amendment Act 2021* (SA), Sch 1, item 1, repealing *Evidence (Affidavits) Act 1928* (SA) from 1 December 2021.

choice. The choice of the parties can be inferred from the circumstances of the case.<sup>184</sup> One particularly significant circumstance will be any express or implied choice of law to govern the operation of the main contract, in which the arbitration agreement is contained.<sup>185</sup>

193 The express or, at least, plainly implied choice of South Australian law for the substantive law of the main Contract, coupled with the absence of any other factor connecting the arbitration agreement to any other system of law, makes the conclusion almost inevitable that the parties impliedly chose the law of South Australia generally to be the substantive rules of law of the arbitration agreement. The arbitration agreement is closely connected to the main Contract. The arbitration agreement applies when "a dispute between the Builder and Consultant arises in connection with this Contract". Clause 21.1 provides that if such a "dispute is not resolved by dispute conciliation either party may refer the dispute to arbitration by notifying in writing the other party". The arbitration agreement thus applies to any dispute "in connection with" the main Contract. As Lord Burrows said (consistently with the majority on this point) in *Enka Insaat ve Sanayi AS v OOO "Insurance Company Chubb"*,<sup>186</sup> where there is an implied choice of the proper law in the main contract it is "natural, rational and realistic to regard that choice for the main contract as encompassing, or carrying across to, the arbitration agreement".

194 The inference that the arbitration agreement generally contains the same implied choice of the rules of substantive law as the express or implied choice in the main Contract is further reinforced by: (i) the requirement in cl 21.2 that a copy of any notice of dispute be sent to the Master Builders Association of South Australia; and (ii) the provision in cl 21.4 that the appointment of an arbitrator is to be made by the Chief Executive Officer of the Master Builders Association of South Australia.

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**184** *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418 at 438, quoting *Akai Pty Ltd v People's Insurance Co Ltd* (1995) 126 FLR 204 at 225. See also *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418 at 441, referring to *Cie d'Armement Maritime SA v Cie Tunisienne de Navigation SA* [1971] AC 572 at 595.

**185** *Enka Insaat ve Sanayi AS v OOO "Insurance Company Chubb"* [2020] 1 WLR 4117 at 4167 [170(iv)]; [2021] 2 All ER 1 at 50.

**186** [2020] 1 WLR 4117 at 4188 [228]; [2021] 2 All ER 1 at 71.

### **VIII. The rules of law impliedly chosen by the parties do not include proportionate liability**

#### *(i) The substantive effects of proportionate liability laws*

195 Consider a simplified and adapted example developed from the facts of this case. Suppose that a property owner (P) enters contracts for building work that is performed defectively. The defect would not have occurred but for the carelessness of, and breach of separate contracts by, either the builder (D1) or a consultant to the owner (D2). Both have committed a wrong to the owner. Both have caused the owner's loss. The owner has claims against them both. The owner can bring an action against either D1 or D2 or against both. As the Law Commission of New Zealand explained, "[a]s between P and D1, it is simply irrelevant that P also has a claim against D2, or that D1 may be entitled to claim contribution from D2".<sup>187</sup> This is the principle of solidary liability.

196 The principle of solidary liability is not merely a common law principle. It is a basic principle of causation and responsibility that a person whose wrongful acts were necessary for another's loss is responsible to that other for the loss. For instance, s 830 of the *Bürgerliches Gesetzbuch* (the German Civil Code) relevantly provides that if more than one person has caused damage by a jointly committed wrong, then each of them is responsible for the damage. Section 840(3) provides that, in specific circumstances where a third party is also responsible for damage, in the "internal relationship" between the defendant and the third party the third party is responsible alone.

197 Proportionate liability alters these basic principles of causation and responsibility by treating multiple wrongs to a plaintiff as though they were part of a single, divisible wrong, with the wrongdoers only responsible to the extent of their contribution to that notional single wrong. A dispute between P and D1 becomes a dispute between P and D1 and D2. As explained below, it is this effect that is antithetical to one of the paramount objects of arbitration and one reason for the widespread opposition within the arbitration industry to reform to proportionate liability schemes that would extend those schemes to arbitration.

#### *(ii) The proportionate liability laws applicable in South Australian courts and their consistent treatment as inapplicable to arbitration*

198 The background to the introduction of proportionate liability in Australia is explained in the reasons of Steward J and the relevant provisions are set out in the

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<sup>187</sup> Law Commission of New Zealand, *Apportionment of Civil Liability*, Report No 47 (1998) at 4 [6].

reasons of Gordon and Gleeson JJ.<sup>188</sup> When proportionate liability for economic loss was introduced in Australia, the "princip[al] objective" for its introduction in the CCA was expressed in the Explanatory Memorandum for the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003* (Cth) as being "to place downward pressure on professional indemnity insurance premiums".<sup>189</sup> It was said that the introduction of proportionate liability would achieve this goal by distributing the "full responsibility" of one party so that "liability rests with all defendants in proportion to their contribution to the plaintiff's loss".<sup>190</sup>

199 The proportionate liability provisions in the CCA commenced on 26 July 2004.<sup>191</sup> The Law Reform Act, including the original proportionate liability provision in s 7, originally came into effect on 16 August 2001, but significant amendments, including the introduction of Pt 3 concerning apportionable liability, commenced on 1 October 2005.<sup>192</sup>

200 The proportionate liability schemes in the Law Reform Act and the CCA follow the typical pattern of operating not merely to limit the liability of wrongdoers, but also to distribute the liability of wrongdoers. In other words, if A is the subject of wrongdoing by B, C and D, all of which causes A's loss, then the Law Reform Act and the CCA do not merely limit A's recovery against each of B, C and D, but distribute the liability across those parties. The proportionate liability as expressed in s 11 of the Law Reform Act is the clearest in this effect. It requires, in the example of A, B, C and D, that "the judgment first given (or that judgment as varied on appeal) determines for the purpose of all other actions": the notional damages of A that are recoverable from B, C and D (combined); the proportion of liability of B, C and D; and the extent of any contributory negligence by A (in relation to B, C and D). The dispute being determined by the court is not a dispute

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188 See also *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613 at 624-627 [10]-[17].

189 Australia, House of Representatives, *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003*, Explanatory Memorandum at 28 [4.110].

190 Australia, House of Representatives, *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003*, Explanatory Memorandum at 28 [4.111].

191 *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (Cth), s 2.

192 *Law Reform (Contributory Negligence and Apportionment of Liability) (Proportionate Liability) Amendment Act 2005* (SA), s 2.

between A and B but a dispute between A (on the one hand) and B, C and D (on the other).

201 The relevant proportionate liability provisions in South Australia, contained in the schemes of the Law Reform Act and the CCA with the effect described above, are partly expressed as directions to a court and as concerned with the powers of a court. But their "main focus is the ascertainment of the rights and liabilities of the parties rather than the mode, conduct, or regulation of court proceedings".<sup>193</sup> In that sense, they are generally substantive law provisions rather than provisions directed to curial powers that govern or regulate proceedings.

202 Nevertheless, the substantive operation of the proportionate liability schemes of the Law Reform Act and the CCA is inseparable from the operation of procedural provisions in the schemes, none of which are concerned with the "procedure to be followed by the arbitral tribunal in conducting the proceedings" within s 19 of the Arbitration Act, although in some circumstances the arbitral tribunal might attempt to adopt rules to similar effect. For instance, s 10(1) of the Law Reform Act, entitled "Procedural provision", is concerned to ensure that where a defendant is aware of a third party who may be liable on the plaintiff's claim, the defendant provides the plaintiff with any information that the defendant has about the identity and whereabouts of the third party and the circumstances giving rise to the third party's liability. The obvious purpose of this provision, like that of ss 87CE and 87CH of the CCA, is to provide the opportunity for a third party to be joined to the litigation in circumstances where there are also requirements for consistency in subsequent litigation against the third party.

203 There are further provisions which are neither: (i) rules of law concerned with the substance of the dispute between the parties within s 28 of the Arbitration Act, nor (ii) provisions which can be approximated by the "procedure to be followed by the arbitral tribunal in conducting the proceedings" within s 19 of the Arbitration Act. Those provisions are s 11 of the Law Reform Act and s 87CG of the CCA. Those provisions are concerned to ensure consistency in findings where the distributed liability of multiple wrongdoers is adjudicated over multiple court actions. Section 11 of the Law Reform Act, in particular, requires consistency in findings by a later court of (i) the amount of the plaintiff's notional damages, (ii) the proportion of liability of each wrongdoer, and (iii) the extent of any contributory negligence of the plaintiff.

204 At the time of their introduction in 2001 (and amendment in 2005) and 2004 respectively, the proportionate liability schemes in the Law Reform Act and the CCA were expressed not to extend to arbitration. Both schemes were expressed as

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193 Garnett, *Substance and Procedure in Private International Law* (2012) at 128 [5.21].



concerned with the imposition of proportionate liability by a court.<sup>194</sup> They have remained so limited ever since. Nothing in the terms of those schemes would impose proportionate liability upon the parties to an arbitration as part of the mandatory rules of a chosen curial or supervisory legal system. Indeed, important parts of the procedure that they require cannot be replicated by orders or directions of an arbitral tribunal. For instance, none of the consistency requirements in s 11 of the Law Reform Act could be the subject of orders or directions by an arbitral tribunal.

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In 2007, Mr Horan produced a report commissioned by the National Justice Chief Executive Officers Group, a group consisting of the Chief Executive Officers of the Departments of Attorney-General and Justice in all nine Australian jurisdictions. Four primary topics arose from the terms of reference provided to Mr Horan, including the issue of the intended scope of the legislation. In summarising his findings on this topic, Mr Horan noted the topic of alleged concern that proportionate liability schemes not only limited the liability of professionals in multi-party actions but "allow[ed] others to elude their contractual responsibilities".<sup>195</sup> The report by Mr Horan suggested, with great ambition, that the definition of "Court" in some proportionate liability schemes to include "tribunal" might extend the schemes to arbitrations.<sup>196</sup> But, for schemes such as those involved in this case, Mr Horan noted that if courts determine (as they did<sup>197</sup>) that arbitrations are not subject to proportionate liability "then parties will use arbitration agreements under the relevant state or territory law effectively to contract out of [proportionate liability]".<sup>198</sup> That echoed the view of earlier commentary that a "way of avoiding the operation of [proportionate liability] legislation was to ensure that all relevant disputes were dealt with by an arbitrator rather than a court".<sup>199</sup> In other words, Mr Horan considered that the legislation should be amended to restrict party autonomy in arbitration by requiring parties to adopt proportionate liability in arbitrations, however unsuited that scheme might

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**194** *Competition and Consumer Act 2010* (Cth), s 87CD; *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA), s 8(4).

**195** Horan, *Proportionate Liability: Towards National Consistency* (2007) at 5.

**196** Horan, *Proportionate Liability: Towards National Consistency* (2007) at 120 [442.2].

**197** See above at [142], fn 124.

**198** Horan, *Proportionate Liability: Towards National Consistency* (2007) at 121 [446].

**199** Stephenson, "Proportional Liability in Australia—the Death of Certainty in Risk Allocation in Contract" (2005) 22 *International Construction Law Review* 64 at 66.

be for arbitration and however much the parties might not wish such a scheme to apply.

206 In 2008, Professor Davis produced a further report concerning proposals to achieve national uniformity in proportionate liability, again commissioned by the National Justice Chief Executive Officers Group.<sup>200</sup> Professor Davis observed that there was "considerable doubt" whether State and Territory proportionate liability schemes applied to arbitration, referring to Mr Horan's observations to this effect in his report.<sup>201</sup> The only argument to which Professor Davis referred as capable of overcoming the considerable doubt as to application of those State and Territory regimes to arbitration was Mr Horan's ambitious claim that a "tribunal" might include arbitrations for those schemes which defined a court to include a tribunal.<sup>202</sup> That argument can be put to one side in this case because the schemes applicable in South Australia, relevant to the present case, do not contain such a definition. So too, it is unnecessary to address Professor Davis' views about the effect on Commonwealth proportionate liability schemes of the decision in *Government Insurance Office of New South Wales v Atkinson-Leighton Joint Venture*,<sup>203</sup> which is addressed above.<sup>204</sup>

207 In his 2008 report, Professor Davis proposed that State and Territory legislation be amended to extend proportionate liability schemes to arbitrations so "that parties are not able to use an arbitration clause ... as a covert means of contracting out of the [proportionate liability] regime".<sup>205</sup> In 2011, the Parliamentary Counsel's Committee produced a consultation draft of "Proportionate Liability Model Provisions" for the Standing Committee of Attorneys-General. The model, which was designed only "for the purposes of further consultation",<sup>206</sup> followed the approach of Mr Horan and Professor Davis

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**200** Davis, *Proportionate Liability: Proposals to Achieve National Uniformity* (2008).

**201** Davis, *Proportionate Liability: Proposals to Achieve National Uniformity* (2008) at 31 [12.1].

**202** Davis, *Proportionate Liability: Proposals to Achieve National Uniformity* (2008) at 31 [12.3].

**203** (1981) 146 CLR 206.

**204** See Davis, *Proportionate Liability: Proposals to Achieve National Uniformity* (2008) at 32 [12.4].

**205** Davis, *Proportionate Liability: Proposals to Achieve National Uniformity* (2008) at 31 [12.2].

**206** Australia, Standing Committee of Attorneys-General, *Proportionate Liability Regulation Impact Statement* (2011) at 7.

in eroding party autonomy in arbitration by prohibiting contracting out of proportionate liability, at least for contracts with a total consideration less than \$5 million or possibly \$10 million.<sup>207</sup> Consistently with the approach of Mr Horan and Professor Davis, the model provisions also extended the proportionate liability scheme to arbitration by a definition of "court" that "includes a tribunal, arbitrator and another entity able to make a binding determination about liability".<sup>208</sup>

208 The proposed "radical"<sup>209</sup> extension of proportionate liability schemes to arbitration provoked near-immediate outrage. As explained at the outset of these reasons, a leading arbitrator, Mr Monichino KC, described the proposal as a threat to "[t]he future of domestic arbitration in Australia" and said that the proposal had been opposed by the leading arbitral institutions in Australia: it was opposed by the Australian Centre for International Commercial Arbitration; it was opposed by the Chartered Institute of Arbitrators (Australia); it was opposed by the Institute of Arbitrators and Mediators Australia. Mr Monichino KC warned that if the proposal were adopted "the future of arbitration in Australia [would be] imperilled".<sup>210</sup>

209 Not only was the proposed radical extension abandoned but, as Steward J rightly observes,<sup>211</sup> the model provisions that were ultimately proposed in 2013 by the Parliamentary Counsel's Committee for the Standing Council on Law and Justice<sup>212</sup> were designed to remove any of the doubt that might have clouded the widespread view that proportionate liability schemes did not apply to arbitration. That doubt was removed by a proposal that repudiated the argument that the inclusion of "tribunal" in the definition of "court" in some proportionate liability schemes (not relevant to this appeal) could extend proportionate liability to arbitration in those jurisdictions. The proposed model provisions expressly spelled

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207 Parliamentary Counsel's Committee for the Standing Committee of Attorneys-General, *Consultation Draft: Proportionate Liability Model Provisions* (2011), cl 11(2).

208 Parliamentary Counsel's Committee for the Standing Committee of Attorneys-General, *Consultation Draft: Proportionate Liability Model Provisions* (2011), cl 1.

209 Monichino, "Arbitration Law in Victoria Comes of Age" (2012) 31(1) *The Arbitrator & Mediator* 41 at 49, citing *Lesotho Highlands Development Authority v Impregilo SpA* [2006] 1 AC 221 at 230 [17].

210 Monichino, "Arbitration Law in Victoria Comes of Age" (2012) 31(1) *The Arbitrator & Mediator* 41 at 60, 62.

211 At [246], referring to Parliamentary Counsel's Committee for the Standing Council on Law and Justice, *Proportionate Liability Model Provisions* (2013), cl 3.

212 See Parliamentary Counsel's Committee for the Standing Council on Law and Justice, *Proportionate Liability Model Provisions* (2013).

out what had otherwise been assumed: proportionate liability schemes did not apply to arbitration.

210           Against this background, and in light of the principles concerning implied choice of procedure for an arbitration and implied choice of the substantive rules of an arbitration, the natural inference is that the procedure and substance of proportionate liability did not fall within the scope of the parties' choice of substantive rules of law in the arbitration agreement, contained in the main Contract and executed in 2015. For the reasons below, that natural inference should be drawn.

*(iii) The implied choice in the arbitration agreement did not extend to the procedure or substance of proportionate liability laws*

211           The next question is therefore whether the proportionate liability schemes in the Law Reform Act and the CCA fell within the scope of the implied choice of the parties to apply the substantive law of South Australia to the arbitration. The question requires consideration of the scope of the substantive laws that the parties impliedly chose and the relevance of their failure, expressly or impliedly, to choose any procedure for the arbitration.

212           A paramount object of arbitration, described in the Arbitration Act as "[t]he paramount object of this Act" and against which the Act must be interpreted,<sup>213</sup> "is to facilitate the fair and *final* resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense".<sup>214</sup> The Arbitration Act provides that this paramount object is to be achieved by "enabling parties to agree about how their commercial disputes are to be resolved", subject to public interest safeguards and this paramount object itself.<sup>215</sup>

213           The aspect of this paramount object concerning final resolution of disputes between parties to an arbitration agreement is reflected in the approach to interpretation of the terms of arbitration agreements. In *Fiona Trust & Holding Corporation v Privalov*,<sup>216</sup> giving the reasons with which the other judges agreed, Lord Hoffmann said that the interpretation of an arbitration agreement "must be influenced by whether the parties ... were likely to have intended that only some of the questions arising out of their relationship were to be submitted to arbitration and others were to be decided by national courts". In concluding that there was no rational basis upon which the parties would wish to divide questions of validity or

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213 *Commercial Arbitration Act 2011* (SA), s 1C(3).

214 *Commercial Arbitration Act 2011* (SA), s 1C(1) (emphasis added).

215 *Commercial Arbitration Act 2011* (SA), s 1C(2)(a).

216 [2007] 4 All ER 951 at 957 [7].

enforceability of the contract from questions about its performance, Lord Hoffmann said that "one would need to find very clear language before deciding that they must have had such an intention".<sup>217</sup>

214 In circumstances in which proportionate liability provisions have been described as laws that "appear procedural in effect",<sup>218</sup> and as they are laws which, as explained above, incorporate procedural rules as part of their schemes, it is also noteworthy that the same interpretative principle has been applied to the choice of procedural rules for an arbitration. As Born has said:<sup>219</sup>

"[P]arties can be assumed to desire a single, centralized forum (a 'one-stop shop') for resolution of their disputes, particularly those disputes regarding the procedural aspects of their dispute resolution mechanism. Fragmenting resolution of procedural issues between national courts and the arbitral tribunal produces the risk of multiple proceedings, delays and expense, inconsistent decisions, judicial interference in the arbitral process and the like. The more objective, efficient and fair result, which the parties should be regarded as having presumptively intended, is for a single, neutral arbitral tribunal to resolve all questions regarding the procedural requirements and conduct of the parties' dispute resolution mechanism." (footnotes omitted)

215 There is equally no rational basis to conclude that the parties would wish to incorporate substantive and procedural rules of law that would transform a dispute between themselves into a wider dispute with third parties which would require litigation for full resolution of the dispute.

216 The *Fiona Trust* approach to interpretation of arbitration agreements is not an English "parochial approach".<sup>220</sup> It is one that has been recognised in Singapore, Hong Kong, Germany, and the United States and has been said to be "now firmly embedded as part of the law of international commerce".<sup>221</sup> In the Full Court of the

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217 *Fiona Trust & Holding Corporation v Privalov* [2007] 4 All ER 951 at 957 [7].

218 Davies et al, *Nygh's Conflict of Laws in Australia*, 10th ed (2020) at 527 [20.32].

219 Born, *International Commercial Arbitration*, 3rd ed (2021), vol I at 1000. See *C v D* (2023) 26 HKCFAR 216 at 243 [49].

220 *Enka Insaat ve Sanayi AS v OOO "Insurance Company Chubb"* [2020] 1 WLR 4117 at 4150 [107]; [2021] 2 All ER 1 at 34.

221 *Enka Insaat ve Sanayi AS v OOO "Insurance Company Chubb"* [2020] 1 WLR 4117 at 4150 [107]; [2021] 2 All ER 1 at 34. See also *Larsen Oil and Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory*

Federal Court of Australia, Allsop J described this approach as a "sensible commercial presumption that the parties did not intend the inconvenience of having possible disputes from their transaction being heard in two places".<sup>222</sup> His Honour explained that it was a "common-sense approach to commercial agreements" and that "it provides appropriate respect for party autonomy".<sup>223</sup>

217 The *Fiona Trust* interpretation approach was applied in that case in the context of adopting a single approach to the meaning of clauses concerned with disputes "arising under" an agreement and disputes "arising out of" the agreement. In supplementary submissions in this appeal, the parties and the amicus curiae correctly observed that the *Fiona Trust* interpretation approach has not yet been applied to such clauses in Australia.<sup>224</sup> It is doubtful that Australian law, perhaps uniquely now of any jurisdiction in the world, will adopt or maintain an approach that adopts distinctions that have been said to "reflect no credit upon English [or any other] commercial law" and which have been described as operating in many cases to defeat the "reasonable commercial expectations of the parties".<sup>225</sup> But whether or not Australian law adopts such an approach, the rationale underpinning the general interpretative principle set out by Lord Hoffmann is independent of the arid linguistic debate about the function of prepositions in particular clauses. It is a rationale that applies generally to inform the interpretation of clauses in arbitration agreements.

218 The rationale supporting this general interpretative principle might be thought to be blindingly obvious: parties to an arbitration agreement intend that their disputes be finally resolved by arbitration, not by a combination of arbitration and litigation. All context, no less that which is blindingly obvious, should inform the interpretation of an express or implied choice of the parties in their arbitration agreement. Indeed, Art 28(4) of the UNCITRAL Model Law and s 28(5) of the Arbitration Act require the arbitral tribunal to determine the rules applicable to the

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*liquidation in Singapore*) [2011] 3 SLR 414 at 421 [13]; *Bunge SA v Shrikant Bhasi* [2020] 2 SLR 1223 at 1239 [37]; *Allianz Capital Partners GmbH, Singapore Branch v Goh Andress* [2023] 1 SLR 1618 at 1630-1631 [35]-[37]; *C v D* (2023) 26 HKCFAR 216 at 227 [9], 242-243 [48], 257 [98], 261-262 [117]-[118].

222 *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 at 87 [165].

223 *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 at 87-88 [165]. See also *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160 at 165.

224 See *Rinehart v Hancock Prospecting Pty Ltd* (2019) 267 CLR 514 at 529 [25].

225 *Fiona Trust & Holding Corporation v Privalov* [2007] 4 All ER 951 at 958 [12].

dispute "in accordance with the terms of the contract" and "take into account the usages of the trade applicable to the transaction".

219 The interpretative principle is also supported by Art 5 of the UNCITRAL Model Law and s 5 of the Arbitration Act, which reflect the general understanding in arbitration that judicial intervention is minimal. The interpretative principle thus gives effect to the paramount object described in the Arbitration Act and the contextual, and international, approach to interpretation that is mandated by Art 28(4) of the UNCITRAL Model Law and s 28(5) of the Arbitration Act. It would, frankly, be absurd to suggest that consideration of whether to draw an inference concerning the scope of the substantive rules of law that are expressly or impliedly chosen by the parties must exclude from the context in which the inference would be drawn one of the most basic objects of parties in their choice that their disputes should be resolved by arbitration.

220 The paramount object in the Arbitration Act of facilitating final resolution of disputes between parties to an arbitration and the associated strong interpretative principle giving effect to that paramount object are wholly consistent with the traditional rule, adopted in both the common law and civil law traditions, that a wrongdoer's liability is solidary (indivisible and undistributed). In an arbitration between an applicant and a respondent, solidary liability ensures that the dispute will be fully resolved because the liability of the respondent is undistributed. As explained above, there is no distribution of the recoverable loss to a third person who is not party to the arbitration agreement, even if the third person was also a cause of, or a contributor to, the applicant's loss. If the respondent is found to be a wrongdoer, the respondent might seek contribution in litigation against that third party in "a separate and independent action".<sup>226</sup> But from the applicant's perspective the dispute between the applicant and the respondent is at an end. From the respondent's perspective the dispute between *the applicant and the respondent* is also at an end.

221 By contrast with solidary liability, the paramount object of facilitating final resolution of disputes between parties to an arbitration and the associated strong interpretative principle are not wholly consistent with proportionate liability laws. To reiterate, the nature of proportionate liability laws is not merely to *limit* the extent or enforceability of liability in the manner of, for example, statutory caps on personal injury damages or statutory limitation laws. The nature of proportionate liability laws is typically also to *distribute* a respondent's liability across multiple wrongdoers. In doing so, the laws have the effect of enlarging a dispute from being a dispute between two parties (A, and wrongdoer B) to being a dispute between multiple parties (A, and wrongdoers B and C). The dispute is no

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**226** *Miller v Taylor* [1951] VLR 421 at 422. See also *National and General Insurance Co Ltd v State Government Insurance Office (Queensland)* (1972) 46 ALJR 375 at 376.

longer merely between A and B. From the perspective of *both* the applicant and the respondent the dispute is now between A, B and C. This difference between a proportionate liability scheme and a solidary liability scheme may be subtle but it is important: "[i]n effect, instead of having separate contribution proceedings, [a proportionate liability] regime requires the court to decide on each party's share of the responsibility in the principal proceedings".<sup>227</sup> An arbitration between A and B could only partly resolve that dispute.

222 The distributive operation of proportionate liability laws upon a dispute detracts from that aspect of the paramount object of arbitration that requires disputes between parties to an arbitration agreement to be finally resolved without the need for further litigation in court. The strong interpretative principle that gives effect to this aspect of the paramount object of arbitration must apply with at least the same force to the substantive rules of law impliedly chosen by the parties to an arbitration agreement as it does to the substantive rules of law expressly chosen by the parties to an arbitration agreement.

223 The application of the strong interpretative principle to the question of whether proportionate liability laws are impliedly chosen by the parties in an arbitration agreement is not simple. On the one hand, an express or implied choice of the substantive law of a State in a single law area to govern the main contract supports an inference that all of the same rules of law of that law area have been chosen for the arbitration agreement. On the other hand, when A and B enter an arbitration agreement, their reasonable expectation is that the entirety of their dispute that falls within the subject matter of the arbitration will be resolved in the arbitration rather than being enlarged into a dispute with C that can only be resolved in part by the arbitration. That reasonable expectation is reinforced by the widespread consensus prior to 2015 that proportionate liability laws do not apply to arbitration. Further, the lack of any choice by the parties of the inextricable procedural rules of the proportionate liability schemes further militates against any implied choice being made by the parties of the substantive laws of those same schemes. Ultimately, the scope of the parties' implied choice of the substantive rules of law that govern their arbitration agreement cannot extend in this case to a choice of the proportionate liability schemes in South Australia.

## IX. Conclusion

224 The appeal should be dismissed with costs.

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227 South Australia, Legislative Council, *Parliamentary Debates* (Hansard), 3 May 2005 at 1720.



## X. Postscript

225 In contrast with the conclusion reached in these reasons, a majority of this Court would allow the appeal. There is no doubt that the legal questions addressed in the various reasons are not simple. And the consequences of the decision on this appeal also may not be simple. The conclusion of the majority in this appeal does not necessarily apply to every arbitration agreement which provides for an arbitration to be governed by the substantive law of an Australian State. The interpretation of the arbitration agreement in this case might be relevant to, but cannot dictate, the interpretation of any other arbitration agreement. A sufficiently clear context, or sufficiently clear terms, might be sufficient in some arbitration agreements to exclude proportionate liability schemes from the rules of law chosen by the parties as applicable to the substance of their dispute.

226 One certain consequence of this decision, however, is that the widespread consensus concerning proportionate liability schemes in arbitration, described in the opening paragraph of these reasons, can no longer inform the interpretation of arbitration agreements. The widespread consensus was that, absent a clearly expressed or implied choice to the contrary, proportionate liability laws would not apply to arbitrations governed by the substantive law of an Australian State. Of course, it was not uncommon for a contract that contains an arbitration agreement to include provisions that limit the liability, by timing of action or quantum of damages, of one or more parties to the contract. But the widespread consensus was based upon the notion that it was quite another thing for an arbitration agreement to include proportionate liability laws that both limit liability and distribute (and therefore widen) a dispute beyond the parties, and therefore beyond an arbitration, to require curial involvement. For that reason, the widespread consensus reflected an underlying interpretative approach to arbitration clauses based on a policy of minimal curial intervention or involvement that "is commonly accepted in international practice".<sup>228</sup>

227 Unless legislation alters the law in some or all Australian States, the result of this appeal is that drafters of arbitration agreements must now be aware that the widespread consensus over the last decade no longer applies in Australia. Proportionate liability laws will usually (but not necessarily always) apply as part of the substantive law in Australian arbitrations.

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228 *CBX v CBZ* [2022] 1 SLR 47 at 56 [12].

228 STEWARD J. In this appeal, the Court is faced with an invidious choice: does the law of proportionate liability apply in the proposed arbitration between the parties to this dispute? If South Australia's law concerning proportionate liability<sup>229</sup> applies in the proposed arbitration – and only part of that law can ever so apply – the claimant, Pascale Construction Pty Ltd ("the claimant"), may be disadvantaged. That is because if, in the proposed arbitration, it can only recover part of its claimed loss or damage against the respondent, Tesseract International Pty Ltd ("the respondent"), the claimant will then have to institute separate proceedings to try to recover the balance of its loss against the alleged concurrent wrongdoer, Mr Penhall, as identified by the respondent. Mr Penhall is a third party; he is not a party to the proposed arbitration.<sup>230</sup> Nor can Mr Penhall be joined to the proposed arbitration without his consent. In contrast, if South Australia's law concerning proportionate liability does not apply in the proposed arbitration – as found by the Court of Appeal of the Supreme Court of South Australia – then the respondent may instead be disadvantaged. That is because the claimant may be able to recover all of its loss or damage in the arbitration, leaving the respondent in separate proceedings to recover contribution – if it can – from Mr Penhall. In either case, the risk of multiple proceedings and inconsistent findings as to the extent of liability is real.

229 The very same problem arises in relation to the application in the proposed arbitration of the proportionate liability provisions contained in Pt VIA of the *Competition and Consumer Act 2010* (Cth) ("the CC Act"). That is because the claimant alleges that the respondent has also engaged in misleading or deceptive conduct and the respondent has again identified Mr Penhall to be a concurrent wrongdoer.

230 The answer to this problem, with respect, does not lie in the act of submission of the parties to the arbitration, together with the recognition by South Australia of the autonomy of the parties by s 28 of the *Commercial Arbitration Act 2011* (SA) ("the Arbitration Act").<sup>231</sup> The act of submission simply exposes both the claimant and the respondent to the risk of being respectively disadvantaged, in the ways described above. Nor did the parties really suggest that the contract entered into by the parties shed any light on the dilemma this Court faces, one way or the other. That agreement provided for the supply by the respondent of engineering consultancy services to the claimant, a builder, in relation to the design

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229 *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA).

230 It is alleged that Mr Penhall assisted the claimant in preparing a tender for the design and construction of a building to be built by the claimant.

231 *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 at 549 [16] per French CJ and Gageler J.

and construction of a warehouse. Clause 20.1 of that agreement provides for compulsory conciliation in relation to a dispute between the parties which "arises in connection with" the contract. Where such a dispute is not resolved by conciliation, cl 21.1 provides that "either party may refer the dispute to arbitration by notifying in writing the other party". This clause says nothing expressly about the application of South Australia's or the CC Act's proportionate liability laws.

231 Nonetheless, both parties agreed at the hearing of the appeal that the arbitrator would need to apply the substantive law, or the "law of the land", of South Australia in accordance with s 28(3) of the Arbitration Act, which provides:

"Failing any designation by the parties, the arbitral tribunal must apply the law determined by the conflict of laws rules which it considers applicable."

232 Following the hearing of the appeal, the parties were invited to file written submissions concerning whether, amongst other things, s 28(1), instead of s 28(3) of the Arbitration Act, was applicable. Section 28(1) provides:

"The arbitral tribunal must decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute."

233 The respondent submitted that the contract it had entered into with the claimant "favours" an application of s 28(3) but also considered that it made no difference whether s 28(1) or s 28(3) applied. It submitted that there was no sign that the parties had adopted any "customised approach" as to what laws might be applied in the arbitration. The claimant, "[o]n balance", agreed that it was necessary to "approach the matter in accordance with s 28(3)".

234 In Australian jurisprudence, the phrase "law of the land" has its origin in the reasons of this Court in *Government Insurance Office of New South Wales v Atkinson-Leighton Joint Venture*.<sup>232</sup> There, Stephen J observed that "arbitrators must determine disputes according to the law of the land".<sup>233</sup> Such an obligation arose from an implication, arising from the submission by the parties to arbitration, that in such an arbitral proceeding "a claimant should be able to obtain from arbitrators just such rights and remedies as would have been available to him were he to sue in a court of law of appropriate jurisdiction".<sup>234</sup> Mason J agreed with

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**232** (1981) 146 CLR 206 at 222, 224 per Barwick CJ, 235 per Stephen J, 246 per Mason J. See also *Chandris v Isbrandtsen-Moller Co Inc* [1951] 1 KB 240 at 259 per Tucker LJ.

**233** *Government Insurance Office* (1981) 146 CLR 206 at 235.

**234** *Government Insurance Office* (1981) 146 CLR 206 at 235 per Stephen J.

Stephen J.<sup>235</sup> But Stephen J also observed that the obligation to apply the law in an arbitration was:<sup>236</sup>

"subject to such qualifications as relevant statute law may require".

235 However, the need for an implication of the kind considered in *Government Insurance Office* has not survived the enactment of the Arbitration Act, which is explicitly based upon the UNCITRAL Model Law on International Commercial Arbitration.<sup>237</sup> It also cannot coexist with the application here of s 28(3) of the Arbitration Act. That provision makes no reference to any implication arising from the choice of the parties to include in their agreement an arbitration clause. Rather, resolution of the issue before the Court turns upon whether the claim in proportionate liability, by reason of its essential nature, is picked up as part of the content of the relevant substantive law of South Australia.<sup>238</sup>

236 In that respect, no party has contended that the proposed arbitration would be "null and void, inoperative or incapable of being performed" for the purposes of s 8(1) of the Arbitration Act. Nor has any party contended that the continuation of the proposed arbitration would "for any other reason become unnecessary or impossible" for the purposes of s 32(2)(c) of the Arbitration Act. Instead, pursuant to s 27J of that Act, the Supreme Court of South Australia was asked to answer the following question of law:

"Does Part 3 of the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) and/or Part VIA of the [CC Act] apply to this commercial arbitration proceeding conducted pursuant to the legislation and the [Arbitration Act]?"

237 For the reasons set out below, that question should be answered "No".

### **Proportionate liability in Australia**

238 The introduction of proportionate liability in Australia, as distinct from traditional forms of solidary liability, arose from the increasing number of actions in negligence against well-insured professionals who might not in fact have been

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235 *Government Insurance Office* (1981) 146 CLR 206 at 246-247.

236 *Government Insurance Office* (1981) 146 CLR 206 at 235.

237 See s 2A of the Arbitration Act.

238 cf *Allergan Pharmaceuticals Inc v Bausch & Lomb Inc* (1985) ATPR ¶40-636; *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160.

very culpable. As Finkelstein J observed in *BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd [No 2]*:<sup>239</sup>

"Proportionate liability was introduced into state and federal legislation following an inquiry into the law of joint and several liability established by the Commonwealth and the New South Wales Attorneys-General in 1994. The impetus for the inquiry was the growing number of actions against professionals, particularly auditors, who were being singled out as targets for negligence actions not because of their culpability (which might be small) but because they were insured and had the capacity to pay large damages awards. One consequence was a sharp rise in insurance premiums payable by professionals."

239 The inquiry referred to by Finkelstein J was undertaken by Professor Davis of the Australian National University and led to the production of two reports, in 1994 and 1995 respectively. In the second, which largely subsumed the first, Professor Davis described proportionate liability in the following terms:<sup>240</sup>

"If parties are regarded as proportionately liable, the liability of each is in all circumstances limited to the extent to which that party is considered to be responsible for the loss. There is no right of contribution between various defendants, since none of them would, as a general rule, be liable to pay to the plaintiff any more than the proper share owing by each defendant.

Proportionate liability also allows for the sharing of liability among a number of persons. The major difference from joint and several liability is that proportionate liability puts the risk of the insolvency or untraceability of a defendant on to the plaintiff. For the latter to recover the whole of his or her loss, each person responsible for that loss must be sued to judgment, and execution thereon satisfied. A further difference from joint and several liability is that whereas that form of liability assumes that each of those found liable is an effective cause of the whole of the loss suffered by the injured party, proportionate liability apportions causal effectiveness according to the degree of fault of each wrongdoer."

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239 [2008] FCA 1656 at [4]. See also *Aquagenics Pty Ltd v Break O'Day Council* (2010) 20 Tas R 239 at 247 [10] per Evans J (Wood J agreeing); *Bennett v Elysium Noosa Pty Ltd (in liq)* (2012) 202 FCR 72 at 145-146 [272] per Reeves J; *Curtin University of Technology v Woods Bagot Pty Ltd* [2012] WASC 449 at [57] per Beech J.

240 Commonwealth of Australia, *Inquiry into the Law of Joint and Several Liability: Report of Stage Two* (1995) at 9.

240 Two critical and obvious observations must be made. First, a key feature of the scheme is that the risk of recovery against an insolvent defendant has been moved to the plaintiff. Secondly, to recover its loss in full, the plaintiff must now sue all concurrent wrongdoers; each wrongdoer "must be sued to judgment". The second report noted that there would be two consequences for defendants: first, that concurrent wrongdoers would only be responsible for their "proper proportion of the loss", and no more; and secondly, that "the existing complicated rules as to contribution between various defendants would no longer be necessary".<sup>241</sup> Neither report suggested that proportionate liability could apply in an arbitration.

241 The foregoing reports led to the production by the Standing Committee of Attorneys-General in 1996 of "Draft Model Provisions to Implement the Recommendations of the Inquiry into the Law of Joint and Several Liability". The model was produced to enable and facilitate the enactment of proportionate liability laws in existing Commonwealth and State laws. Again, the model does not refer to arbitration. The introductory text to the model notes that it provides for a court to have regard to the liability of an "absent" concurrent wrongdoer "and for the Plaintiff to bring a subsequent action against that wrongdoer".<sup>242</sup> But it goes on to state that the aim nonetheless is for all possible parties to be joined in one set of proceedings. It thus records the following:<sup>243</sup>

"The draft also provides for a Defendant to join other concurrent wrongdoers to the proceedings. In this way it is aimed to allow for all possible parties to be brought into one set of proceedings."

242 The model defines an "apportionable claim" in cl 1 as a claim for economic loss or property damage arising from a failure of two or more concurrent wrongdoers to exercise reasonable care; as a claim for damages under s 42 of the *Fair Trading Act 1987* (Cth) or s 52 of the *Trade Practices Act 1974* (Cth) arising from the acts or omissions of two or more concurrent wrongdoers; or as a claim for damages under s 995 of the *Corporations Law* arising from the acts or omissions of two or more concurrent wrongdoers. Claims arising under a contract are not included.

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241 Commonwealth of Australia, *Inquiry into the Law of Joint and Several Liability: Report of Stage Two* (1995) at 35.

242 *Draft Model Provisions to Implement the Recommendations of the Inquiry into the Law of Joint and Several Liability* (1996) at 2.

243 *Draft Model Provisions to Implement the Recommendations of the Inquiry into the Law of Joint and Several Liability* (1996) at 2.

243 After defining what is an "apportionable claim" the model provides for proportionate liability in cl 2(1) as follows:

"In any proceedings involving an apportionable claim:

- (a) the liability of each defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the damage or loss claimed that the court considers just having regard to the extent of the defendant's responsibility for the damage or loss; and
- (b) the court may give judgment against each defendant for not more than that amount."

244 The model then eliminates any right of contribution from a defendant against whom judgment is given under cl 2(1),<sup>244</sup> and further provides for the possibility of additional proceedings against any other concurrent wrongdoer who had not been a party to any earlier proceedings.<sup>245</sup> However, in those further proceedings the plaintiff would be prevented from receiving compensation for damage or loss that was greater than the damage or loss actually sustained.<sup>246</sup>

245 Clause 5(1) of the model provides for the joinder of defendants as follows:

"The court may give leave for any one or more persons to be joined as defendants in proceedings involving an apportionable claim."

246 By 2005, the Commonwealth and all the States and Territories had legislated the model provisions in differing ways.<sup>247</sup> In 2013, in response to

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244 *Draft Model Provisions to Implement the Recommendations of the Inquiry into the Law of Joint and Several Liability* (1996), cl 3.

245 *Draft Model Provisions to Implement the Recommendations of the Inquiry into the Law of Joint and Several Liability* (1996), cl 4(1).

246 *Draft Model Provisions to Implement the Recommendations of the Inquiry into the Law of Joint and Several Liability* (1996), cl 4(2).

247 *Civil Liability Amendment (Personal Responsibility) Act 2002* (NSW); *Civil Liability Act 2003* (Qld); *Civil Liability Amendment Act 2003* (WA); *Wrongs and Limitation of Actions Acts (Insurance Reform) Act 2003* (Vic); *Civil Law (Wrongs) (Proportionate Liability and Professional Standards) Amendment Act 2004* (ACT); *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (Cth); *Civil Liability Amendment (Proportionate Liability) Act 2005* (Tas); *Law Reform (Contributory Negligence and Apportionment of Liability)*

concerns about differences between the proportionate liability legislation in the various jurisdictions and the potentially uncertain operation of particular provisions, the Parliamentary Counsel's Committee prepared a further model set of legislative provisions dealing with proportionate liability.<sup>248</sup> The "Proportionate Liability Model Provisions" included a new clause not found in the 1996 model, dealing specifically with proportionate liability and arbitrations. That clause, cl 3, provides for the non-application of proportionate liability in an arbitration. It is in the following form (emphasis added):

**"Non-application to arbitration etc**

*To remove any doubt*, an entity (other than a court) that is able to make a binding determination about liability in relation to an apportionable claim is not required to apply this part in making the determination.

**Drafting note**

**Jurisdictions may choose whether or not to include this provision."**

247 The Decision Regulation Impact Statement which accompanied the 2013 model explains that cl 3 is needed because concurrent wrongdoers cannot be joined in an arbitration. It states as follows:<sup>249</sup>

"In light of issues raised in consultation on the consultation draft model provisions have been revised to provide that proportionate liability does not apply to arbitral tribunals or [external dispute resolution]. Central to this approach is that one of the assumptions *underpinning* proportionate liability is the ability to join concurrent wrongdoers to proceedings. This is not necessarily possible when a dispute is being determined by an arbitral tribunal or by [external dispute resolution]."

**The scheme of the South Australian law**

248 Most of the elements of proportionate liability reflected in the 1996 draft model are featured in the South Australian law, which was enacted in 2005 as an amendment to the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) ("the Law Reform Act"). The Second Reading Speech for

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*(Proportionate Liability) Amendment Act 2005* (SA); *Proportionate Liability Act 2005* (NT).

248 Standing Council on Law and Justice, *Proportionate liability model provisions: Decision regulation impact statement* (2013) at 4.

249 Standing Council on Law and Justice, *Proportionate liability model provisions: Decision regulation impact statement* (2013) at 21 (emphasis added).



the Bill<sup>250</sup> which introduced that reform records that "instead of having separate contribution proceedings, this regime requires the court to decide on each party's share of the responsibility in the principal proceedings".<sup>251</sup> There was thus an expectation that "plaintiffs will usually seek to join all potentially liable parties in the first proceedings",<sup>252</sup> although there was also a recognition that this would not always be so. To encourage this, the South Australian law added another feature to the 1996 model, which is described in the Second Reading Speech as follows:<sup>253</sup>

"Further, to encourage joinder of all the parties in one action, the Bill requires a defendant to pass on to the plaintiff any information he or she may have about the identity and whereabouts of any other potential defendant and the circumstances giving rise to his or her liability. Failure to do so puts the defendant at risk of an order for the costs of any subsequent proceedings that could have been thereby avoided."

249 The foregoing is reflected in s 10 of the Law Reform Act, which is in the following terms:

- "(1) If a defendant entitled to a limitation of liability under this Part has reasonable grounds to believe that a person who is not a party to the action may be liable on the plaintiff's claim, the defendant must, as soon as practicable, provide the plaintiff with information that is in the defendant's possession, or reasonably available to the defendant (and not equally available to the plaintiff), about –
- (a) the other person's identity and whereabouts; and
  - (b) the circumstances giving rise to the other person's liability.
- (2) If a defendant fails to comply with its obligation under this section, a court may order the defendant to pay costs incurred in proceedings that could have been avoided if the obligation had been carried out.

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**250** *Law Reform (Contributory Negligence and Apportionment of Liability) (Proportionate Liability) Amendment Bill 2005 (SA).*

**251** South Australia, Legislative Council, *Parliamentary Debates* (Hansard), 3 May 2005 at 1720.

**252** South Australia, Legislative Council, *Parliamentary Debates* (Hansard), 3 May 2005 at 1720.

**253** South Australia, Legislative Council, *Parliamentary Debates* (Hansard), 3 May 2005 at 1720.

- (3) A court may order that costs payable under this section be assessed on the basis of an indemnity."

250 Section 8 of the Law Reform Act provides for a limitation on the liability of a defendant where the claim for damages is "apportionable" (a term defined by s 3(2)). Section 8 relevantly provides:

- "(1) If a defendant's liability on a claim for damages is apportionable, the liability is limited under this section.
- (2) If the limitation applies, the defendant's liability is limited to a percentage of the plaintiff's notional damages that is fair and equitable having regard to –
  - (a) the extent of the defendant's responsibility for the harm; and
  - (b) the extent of the responsibility of other wrongdoers (including wrongdoers who are not party to the proceedings) whose acts or omissions caused or contributed to the harm."

251 Section 3(2) defines an "apportionable liability" as economic loss, or loss of, or damage to, property, where there were two or more wrongdoers who had caused the harm and a wrongdoer was negligent or innocent.

252 In a proceeding where a claim is made for apportionable damages, s 8(4) requires the court to determine: first, the plaintiff's "notional damages" (a term defined by s 3(1)); secondly, the liability of any defendant against whom an apportionable claim has not been made; and thirdly, in relation to each defendant who is a party against whom an apportionable claim has been made, that proportion of the notional damages which represents the percentage of each such defendant's liability. Pursuant to s 9, in a case in which the liability of one or more wrongdoers has been limited under Pt 3 of the Law Reform Act (which includes s 8), no order for contribution between those wrongdoers may be made save in exceptional defined cases.

253 Section 11 addresses the possibility of additional proceedings for the same harm against wrongdoers who are entitled to apportionable liability. Where this occurs, the "judgment first given" determines: the amount of notional damages; the proportionate liability of each wrongdoer but only if they had been a party to that first proceeding; and the extent of any contributory negligence on the part of the plaintiff.

254 The foregoing scheme thus exhibits the following relevant elements:

- (a) It imposes a potential limitation on the liability of a defendant where an apportionable claim is made having regard to the defendant's responsibility for the harm suffered.

- (b) It obliges a defendant to give information to a plaintiff about other wrongdoers and empowers a court to order costs where the defendant fails to comply with this obligation in order to encourage and facilitate joinder of all concurrent wrongdoers in one set of proceedings. Unlike the 1996 model, there is no express power in the Law Reform Act to join such wrongdoers; but such joinder would be possible pursuant to the *Uniform Civil Rules 2020* (SA).<sup>254</sup>
- (c) It generally denies claims of contribution against concurrent wrongdoers found to be proportionately liable.
- (d) It contemplates the potential need for further proceedings arising out of the same harm to a plaintiff in respect of concurrent wrongdoers who had not been parties to an earlier trial, but limits the issues in that further proceeding in the way described above.

255 Below, the Court of Appeal decided that it would be artificial and inappropriate to characterise any part of the foregoing proportionate liability regime as procedural in nature.<sup>255</sup> Before this Court, no party challenged that conclusion and the appeal proceeded on the basis that the entire regime was substantive in nature. With respect, that approach was plainly correct.<sup>256</sup>

### **Proportionate liability under the CC Act**

256 Generally, Pt VIA of the CC Act provides for proportionate liability where an apportionable claim is made for damages pursuant to s 236 of the *Australian Consumer Law*.<sup>257</sup> The legislative scheme is relevantly, and in substance, the same as that for South Australia, save that:

- (a) Pursuant to s 87CD(4), the limitation on the liability of a defendant expressly applies whether or not all concurrent wrongdoers are parties to the proceedings.
- (b) There is an express power to join one or more persons as defendants. Section 87CH thus provides:

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<sup>254</sup> See *Uniform Civil Rules 2020* (SA), r 22.1.

<sup>255</sup> See *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* (2022) 140 SASR 395 at 415 [63] per Doyle JA (Livesey P and Bleby JA agreeing).

<sup>256</sup> In that respect, I agree with [104] of the reasons of Gordon and Gleeson JJ. The same conclusion also applies to Pt VIA of the CC Act.

<sup>257</sup> Contained in Sch 2 to the CC Act. See CC Act, s 87CB(1).

- "(1) The court may give leave for any one or more persons to be joined as defendants in proceedings involving an apportionable claim.
- (2) The court is not to give leave for the joinder of any person who was a party to any previously concluded proceedings in respect of the apportionable claim."

257 Section 87CG should also be mentioned. It is the provision which governs "subsequent actions". In substance it is very similar to s 11 of the Law Reform Act, but its application is confined to preventing a plaintiff from recovering a greater amount than the damage or loss actually sustained.

258 Part VIA of the CC Act was inserted into that Act by the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (Cth). The Explanatory Memorandum which accompanied the introduction of the Bill that became that Act is instructive. It records that proportionate liability:<sup>258</sup>

"means that liability rests with all defendants in proportion to their contribution to the plaintiff's loss. This is contrasted against joint and several liability where a defendant can be held liable for the total loss sustained, even if they contributed to the loss in a small way."

259 The Explanatory Memorandum notes that proportionate liability "places an onerous burden on plaintiffs to join all defendants" to recover "full compensation" but said that this would be "countered" with the following two benefits:<sup>259</sup>

- (a) proportionate liability would create downward pressure on professional indemnity premiums, which had become extremely high; and
- (b) there would be procedural rules designed "to provide the appropriate balance between the interests of plaintiffs and defendants".<sup>260</sup> The

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258 Australia, House of Representatives, *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003*, Explanatory Memorandum at 28 [4.111].

259 Australia, House of Representatives, *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003*, Explanatory Memorandum at 32 [4.130].

260 Australia, House of Representatives, *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003*, Explanatory Memorandum at 32 [4.130].

Explanatory Memorandum then records how that balance might be achieved as follows:<sup>261</sup>

"[The law] operates so that, in applying proportionate liability to a claim, a court should have regard to the responsibility of any potential defendant who is not a party to the proceedings. Further, [the law] requires defendants to notify a plaintiff in writing of the identity and alleged role of any other potential defendants of whom they are aware would also provide protection to plaintiffs. Defendants who fail to co-operate would risk being ordered to pay costs."

260 The Explanatory Memorandum then observes that, given "these procedural protections, it is highly unlikely that consumers will be materially disadvantaged by these reforms".<sup>262</sup> That document then sets out what the Commonwealth, State and Territory Governments considered to be the "key features" of a model of proportionate liability as follows:<sup>263</sup>

"The Commonwealth, State and Territory Governments have endorsed the following key features of a model of proportionate liability:

- in applying proportionate liability to a claim, a Court will be able to have regard to the comparative responsibility of any wrongdoer who is not a party to the proceedings;
- a defendant to a claim to which proportionate liability can apply, will be obliged to notify the plaintiff in writing, at the earliest possible time, of the identity and alleged role of any other person(s) of whom the defendant is aware, who could be held liable for the plaintiff's loss or any part of it;
- where a defendant fails to discharge the disclosure obligation proposed, the Court will have a discretion to order that the defendant

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**261** Australia, House of Representatives, *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003*, Explanatory Memorandum at 32 [4.130].

**262** Australia, House of Representatives, *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003*, Explanatory Memorandum at 32 [4.131].

**263** Australia, House of Representatives, *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003*, Explanatory Memorandum at 154-155 [5.352].

pay any or all of the plaintiff's costs, on an indemnity basis or otherwise".

261 Importantly for the purposes of this appeal, the key features include the obligation on a defendant to notify the plaintiff about other concurrent wrongdoers, and the power of the court to enforce that obligation with a costs order. Given that the very purpose of any such notification would be to secure the joinder of all concurrent wrongdoers, it must follow that the capacity to join must also be considered to be a "key feature". That is supported by the explanation in the 2013 Decision Regulation Impact Statement set out above that the ability to join concurrent wrongdoers is one of the assumptions underpinning proportionate liability.<sup>264</sup> Given the substantive similarities between the Law Reform Act and Pt VIA, and their respective basis in the 1996 model, it also must follow that the South Australian legislation also exhibits these two "key features".

262 Importantly, the "key features" are part of the way both legislatures have balanced the interests of a plaintiff against those of defendants. A plaintiff must now recover against all concurrent wrongdoers to be able to recover its loss or damage in full.<sup>265</sup> But this burden is lessened because of the obligation on a defendant to disclose the identity of potential concurrent wrongdoers, an obligation enforceable with an award of costs, and because of the capacity of a plaintiff to join those third parties in one proceeding. Naturally, the utility or worth of that capacity will vary from case to case and from wrongdoer to wrongdoer. But the existence of that capacity is nonetheless a vital feature of each legislative regime. As Beech J correctly observed in *Curtin University of Technology v Woods Bagot Pty Ltd*:<sup>266</sup>

"It is one thing to decide to impose proportionate liability upon a plaintiff in the framework where the court has power to join other concurrent wrongdoers. To impose proportionate liability in the absence of such a power is a quite different thing. The absence of a power to join other wrongdoers has the prospect that a proportionate liability regime may cause injustice or hardship to a claimant."

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264 It is also notable that the 2013 model contains further provisions concerning notice directed at securing joinder: see cll 7(6), 10(3) and 10(4).

265 *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613 at 624 [10] per French CJ, Hayne and Kiefel JJ.

266 [2012] WASC 449 at [85].

**Missing "key features" in the proposed arbitration**

263 The foregoing two "key features" of the proportionate liability regimes found in South Australia and in Pt VIA of the CC Act are not capable of being easily or fully applied in the proposed arbitration. This is because:

- (a) there is no ready means of enforcing the obligation on a respondent to disclose the identity of other potential concurrent wrongdoers;
- (b) but, more importantly, even if a respondent were to identify a potential concurrent wrongdoer, the claimant would have no means of joining that person or entity to the arbitral proceedings. The notification – which is expressly designed for this purpose – might be pointless. Of course, a third-party concurrent wrongdoer might consent to become a party to an arbitration. But there would be no legal means of compelling this to occur.

264 Without both of these features, the carefully calibrated adjustment of rights and obligations found in each proportionate liability regime is distorted; what is left is a misshapen parody of what was intended. Those features also reflect an expectation, or an aim, in cases of apportionable liability: namely that all claims will be resolved in the one proceeding. The extrinsic materials referred to above make that legislative expectation clear.

265 And there is another problem. The provisions in the Law Reform Act and in Pt VIA dealing with future proceedings cannot be made to work with an arbitration. No court would be bound by findings made by an arbitral tribunal as to, for example, the total loss and damage suffered by a plaintiff. Take the South Australian provisions by way of example. The phrase "judgment first given" in s 11 might, for the purposes of an arbitration, be capable of being "moulded" to refer to a previous arbitral determination.<sup>267</sup> But the principle of "moulding" words of a statute to fit the needs of an arbitration has no place in a court of law. And notwithstanding certain obiter observations of the Court in *Bitumen and Oil Refineries (Australia) Ltd v Commissioner for Government Transport*,<sup>268</sup> there is just no prospect of construing the phrase "judgment first given" as referring to an arbitral award. The same conclusion applies to the use of the word "judgment" in s 87CG(1) of the CC Act.

266 If an arbitral tribunal were to make findings about proportionate liability, and a plaintiff were then obliged to sue a third-party concurrent wrongdoer, the

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**267** *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 369 per Mason J.

**268** (1955) 92 CLR 200 at 212.

risk of inconsistent findings arising from the same harm is thus real. As Beech J also observed in *Curtin University of Technology*:<sup>269</sup>

"Because an arbitrator has no power to join other concurrent wrongdoers, a claimant would be obliged to commence subsequent court proceedings against other concurrent wrongdoers on account of whose responsibility the claimant's loss and damage had been reduced in arbitration. Obviously, the court would not be bound by, or even influenced by, the arbitrator's findings on the conduct and responsibility of those other concurrent wrongdoers. Consequently, the claimant would face the risk of a conflicting judgment from a court in the subsequent proceedings."

267 It cannot now be doubted that each regime here for proportionate liability must have been drafted on the clear assumption that claims for proportionate liability would necessarily be addressed in a court. Such claims, by their very nature, assume the existence, or possible existence, of more than one wrongdoer for the purposes of a claim arising in tort or under the *Australian Consumer Law*. In other words, they relate to causes of action which may be "in connection with" a contract, but which are not claims *under* a contract; they are *not* claims which only arise between parties to a contract. That is why each regime relies upon an obligation on a defendant to disclose the identity of other possible wrongdoers, and upon an ability to join necessary parties; and each seeks a resolution of all matters in one proceeding and, if that is not possible, to confine certain issues before future court proceedings against other wrongdoers.

### **The substantive law of South Australia applicable to the arbitration**

268 The parties agreed that for the purposes of s 28 of the Arbitration Act the proposed arbitral tribunal will be obliged to apply the substantive law of South Australia. As already mentioned, no part of that conclusion was said by the parties to arise from any implied term arising from the submission of the parties to arbitration, or from an implied term in the arbitration agreement.<sup>270</sup> Rather, following the enactment of the Arbitration Act, it is a consequence arising from s 28(3) itself.

269 Whilst the reasons of the Court of Appeal below record the agreement of the parties that the law of South Australia was to apply to the proposed arbitration,

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269 [2012] WASC 449 at [86].

270 cf *Government Insurance Office* (1981) 146 CLR 206; *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337.



thus potentially engaging s 28(1) of the Arbitration Act, it was nonetheless accepted that this outcome was mandated by s 28(3).<sup>271</sup>

270 Four initial observations should be made about the applicable law of South Australia:

- (a) First, it was not in dispute that it includes applicable federal law in that State. It thus includes, to the extent necessary, the CC Act and the *Australian Consumer Law*.<sup>272</sup>
- (b) Secondly, it was not disputed that the applicable law is the substantive, as distinct from procedural, law of South Australia. In that respect, it was also not in dispute that both the Law Reform Act and Pt VIA of the CC Act are not procedural in nature.<sup>273</sup> Whether that characterisation of those laws is correct need not be decided.
- (c) Thirdly, it was accepted that the parties could, if they both so agreed, apply both the Law Reform Act and Pt VIA of the CC Act to the proposed arbitration.<sup>274</sup> They could by agreement apply a modified version of each regime for proportionate liability, if that is what they both wanted. They could, for example, apply the rule which reduces a defendant's liability proportionately without giving a claimant any ability to join concurrent wrongdoers. In such a case, the arbitral tribunal would be obliged pursuant to s 28(1) of the Arbitration Act to apply those laws as altered in accordance with the wishes of both parties. This admission is relied upon for the proposition that proportionate liability is possible in an arbitration. With great respect, that proposition is not correct; it is only a modified version of proportionate liability which can be applied, and then only by reason of a choice made by the parties pursuant to s 28(1).
- (d) Fourthly, it may presently be accepted that, for the purposes of an arbitration, references, for example in the Law Reform Act, to a "plaintiff" and a "defendant" could be read as references to a claimant and a

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271 *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* (2022) 140 SASR 395 at 414 [58] per Doyle JA (Livesey P and Bleby JA agreeing).

272 *IBM Australia Ltd v National Distribution Services Ltd* (1991) 22 NSWLR 466; *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160. No point was taken that South Australia had itself enacted the *Australian Consumer Law*: see s 14 in Pt 3 of the *Fair Trading Act 1987* (SA).

273 cf *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503.

274 See *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* (2022) 140 SASR 395 at 452 [205] per Doyle JA (Livesey P and Bleby JA agreeing).

respondent;<sup>275</sup> the reference to a "court" could be read as a reference to an "arbitral tribunal";<sup>276</sup> and a reference to an "action" could be read as a reference to an arbitration.<sup>277</sup> A similar approach could also be made with respect to equivalent terms in Pt VIA of the CC Act.

### **Subjects incapable of resolution by arbitration**

271 It is well accepted that some disputes, whether in whole or in part, are not capable of settlement by arbitration. Public policy considerations about when a particular class of dispute should be resolved only in a court of law may mandate this outcome. The applicable principles were summarised by Allsop J in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* as follows:<sup>278</sup>

"If there is an award in respect of a dispute that is not capable of settlement by arbitration the award may be set aside or will not be enforced: Art V, Subart 2(a) of the New York Convention and Arts 34(2)(b)(i) and 36(1)(b)(i) of the Model Law. The types of disputes which national laws may see as not arbitrable and which were the subject of discussion leading up to both the New York Convention and the Model Law are disputes such as those concerning intellectual property, anti-trust and competition disputes, securities transactions and insolvency. It is unnecessary to discuss the subject in detail. (See generally Redfern A and Hunter M, *Law and Practice of Commercial Arbitration* (Thomson/Sweet and Maxwell, 2004) at 138 et seq; Mustill M and Boyd S, *Commercial Arbitration 2001 Companion* at 70-76; Sutton D St J, and Gill J, *Russell on Arbitration* (Sweet and Maxwell, 2003) at 12-15.) It is sufficient to say three things at this point. First, the common element to the notion of non-arbitrability was that there was a sufficient element of legitimate public interest in these subject matters making the enforceable private resolution of disputes concerning them outside the national court system inappropriate. Secondly, the identification and control of these subjects was the legitimate domain of national legislatures and courts. Thirdly, in none of the *travaux préparatoires* was there discussion that the notion of a matter not being capable of settlement by arbitration was to be understood by reference to whether an otherwise arbitrable type of dispute or claim will be ventilated fully in the arbitral forum applying the laws chosen by the parties to govern

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275 See ss 3, 8, 10 and 11 of the Law Reform Act.

276 See ss 7, 8 and 10 of the Law Reform Act.

277 See ss 6, 10 and 11 of the Law Reform Act.

278 (2006) 157 FCR 45 at 98 [200] (Finkelstein J agreeing).

the dispute in the same way and to the same extent as it would be ventilated in a national court applying national laws."

272 Austin J in *ACD Tridon Inc v Tridon Australia Pty Ltd* also referred to public policy limitations on what disputes may or may not be privately arbitrated.<sup>279</sup> His Honour adopted the following from Mustill and Boyd's *Law and Practice of Commercial Arbitration in England*:<sup>280</sup>

"[T]he types of remedies which the arbitrator can award are limited by considerations of public policy and by the fact that he is appointed by the parties and not by the state. For example, he cannot impose a fine or a term of imprisonment, commit a person for contempt or issue a writ of subpoena; nor can he make an award which is binding on third parties or affects the public at large, such as a judgment in rem against a ship, an assessment of the rateable value of land, a divorce decree, a winding-up order or a decision that an agreement is exempt from the competition rules of the EEC under Article 85(3) of the Treaty of Rome."

273 The last observation made by Allsop J in the passage set out above – namely that the laws chosen by the parties to the arbitration need not be the same as, or operate to the same extent as they would, in a court of law – reflects the principle underlying the UNCITRAL Model Law concerning the autonomy of the parties. It gives primacy to the choice of laws which parties may make for the purposes of their arbitration. As Allsop J observed in *Comandate Marine Corp*:<sup>281</sup>

"The whole point of an arbitration agreement ... is to remove all relevant disputes to a defined legal regime for resolution: here, to London arbitration, under English law. To interpret legislation implementing the New York Convention to operate only to refer to arbitration such parts of the differences between the parties as are covered by the arbitration agreement that will be dealt with by the arbitrator in the same way that the staying court would deal with them, would be to undermine the New York Convention by infringing on the autonomy of the parties recognised by the New York Convention in the scope of the arbitration agreement. It would be to give a meaning to the domestic law implementing the New York Convention contrary to the New York Convention, in particular by

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279 [2002] NSWSC 896.

280 *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896 at [189], citing Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England*, 2nd ed (1989) at 149 (footnotes omitted). See also *A Best Floor Sanding Pty Ltd v Skyer Australia Pty Ltd* [1999] VSC 170; *Rinehart v Welker* (2012) 95 NSWLR 221.

281 (2006) 157 FCR 45 at 106-107 [237] (Finkelstein J agreeing).

ascribing to the phrase 'is capable of settlement by arbitration' a meaning in s 7(2)(b) different from that which it carries in the New York Convention."

274 But this is not a case where the parties have jointly chosen to apply a modified form of proportionate liability to the proposed arbitration. This is not a case about giving primacy to the autonomy of the parties; as set out above, they have simply made no choice about what particular law or laws to apply. Nor is this a case where the parties have contended that their dispute, whether in whole or part, is not capable of being arbitrated, whether on public policy grounds or otherwise. Rather, this is a case where, to use the language of s 28(3) of the Arbitration Act, there has been a failure of "any designation by the parties" of the applicable law. In such circumstances the arbitral tribunal must apply the "law" determined by the conflict of laws rules which it "considers applicable",<sup>282</sup> and which is here said to be the law of South Australia, without any elaboration of what that might be or at what level of generality it is to be ascertained. In that respect, the autonomy of the parties would appear to be largely irrelevant.

**Proportionate liability is otherwise incapable of resolution by arbitration without substantial changes to the legislation**

275 Allsop J's reference in *Comandate Marine Corp* to certain "subjects" that are only the "legitimate domain of ... courts" is dispositive here, where there has been a failure by the parties to designate what law is to apply. That is because it should be found that by reason of the design of the proportionate liability rules here, as described above, and because their effect has been to "transform fundamentally the relationship which exists between a plaintiff and a concurrent wrongdoer",<sup>283</sup> absent the consent of all parties for the purposes of s 28(1) of the Arbitration Act those rules can only legitimately be applied in a court of law. That conclusion is compelled because the arbitral tribunal simply cannot apply the applicable law relating to proportionate liability in full; that is something only a court can do. In other words, the arbitral tribunal cannot apply what is the law of South Australia as enacted by the Law Reform Act and the CC Act. That is a conclusion concerning the content of the law to be applied under s 28(3); it is not a conclusion that the issue of proportionate liability can never be the subject of an arbitration. As mentioned above, the parties are always able to choose a version of an applicable law mandating proportionate liability in an arbitration pursuant to s 28(1) of the Arbitration Act.

276 That a dramatically abridged version of the law of proportionate liability cannot form part of the law of South Australia for the purposes of s 28(3) was essentially the same conclusion reached by the unanimous Court of Appeal below,

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**282** Section 28(3) of the Arbitration Act.

**283** *Gunston v Lawley* (2008) 20 VR 33 at 49 [60] per Byrne J.

by Beech J in the Supreme Court of Western Australia in *Curtin University of Technology*,<sup>284</sup> by Evans and Wood JJ in the Full Court of the Supreme Court of Tasmania in *Aquagenics Pty Ltd v Break O'Day Council*,<sup>285</sup> by a former Justice of the Supreme Court of Victoria, David Byrne KC writing extrajudicially,<sup>286</sup> and by Cavanough J in the Supreme Court of Victoria in *Wealthcare Financial Planning Pty Ltd v Financial Industry Complaints Service Ltd*.<sup>287</sup>

277 The last case is instructive. A complaint had been made about a financial planner to a dispute resolution service called the Financial Industry Complaints Service Ltd ("FICS"). It was required to resolve the dispute having regard to "any applicable legal rule or judicial authority". A panel appointed by FICS upheld the complaint and found that all of the loss suffered by the complainant had been caused by the conduct of the planner. The financial planner sought declarations in the Supreme Court of Victoria that the determination by FICS had breached its constitution and rules and that the determination was of no force or effect. In essence it claimed that FICS had failed to apply principles of proportionate liability; there were other persons or entities, it was said, who were responsible for the loss that had been suffered. Cavanough J refused the relief sought. His Honour did so because of the nature and structure of Victoria's equivalent law concerning proportionate liability, found in Pt IVAA of the *Wrongs Act 1958* (Vic). Cavanough J found that "the whole tenor of Pt IVAA suggests confinement to proceedings in court and closely comparable proceedings" and that its provisions make "manifest the general undesirability of split proceedings in relation to apportionable claims".<sup>288</sup> Amongst other things, his Honour reasoned:<sup>289</sup>

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284 [2012] WASC 449 at [85]-[90].

285 (2010) 20 Tas R 239 at 253-255 [26]-[33], 276 [111] (albeit in obiter).

286 Byrne, "Proportionate Liability: Some Creaking in the SuperStructure", paper delivered at the Judicial College of Victoria, 19 May 2006 at 6-7 [20]. See also Levin, "Proportionate Liability in Arbitrations in Australia?" (2009) 25 *Building and Construction Law Journal* 298; Monichino, "Arbitration Law in Victoria Comes of Age" (2012) 31(1) *The Arbitrator & Mediator* 41; Levin, "Proportionate Liability in Arbitrations in Australia: Resolution of Some Uncertainties" (2013) 29 *Building and Construction Law Journal* 230.

287 (2009) 69 ACSR 418.

288 *Wealthcare Financial Planning Pty Ltd v Financial Industry Complaints Service Ltd* (2009) 69 ASCR 418 at 430-431 [37]-[38].

289 *Wealthcare Financial Planning Pty Ltd v Financial Industry Complaints Service Ltd* (2009) 69 ASCR 418 at 430 [38] (footnotes omitted).

"Another feature of Pt IVAA tends strongly in the same direction. Unsurprisingly, Pt IVAA seems to proceed on the basis that, at least in the usual case, if possible, all putative 'concurrent wrongdoers' should be before the court (or tribunal) in the one proceeding. That principle can only happily operate in a forum which has jurisdiction over all potential defendants. Needless to say, FICS can only deal with its members and has no jurisdiction or power over anyone else."

278 The same conclusion was reached below. Doyle JA, with whom Livesey P and Bleby JA agreed, found that in the case of the South Australian and CC Act proportionate liability laws:<sup>290</sup>

"[I]t seems to me that there are aspects of those legislative regimes that are intended to be integral to their overall operation and yet which are inapposite for (if not incapable of) application in arbitration proceedings. Any attempt to apply those provisions to arbitration proceedings would result in a materially different proportionate liability regime from the one intended by the relevant Parliament."

279 Doyle JA's reasons for the foregoing conclusion focus rightly on the arbitral tribunal's inability to force concurrent wrongdoers to participate in the one settled outcome. Those reasons also invoke the additional time and expense that would be imposed upon a claimant, who might otherwise be obliged to recover the balance of any loss or damage in separate proceedings in circumstances where there would be some risk of inconsistent findings. Doyle JA was also influenced by the fact that the regimes for proportionate liability are designed for the resolution of disputes involving multiple wrongdoers, as distinct from a singular bipartite dispute between parties to a contract. Doyle JA concluded:<sup>291</sup>

"In my view, these difficulties and differences in the operation of the relevant proportionate liability provisions in the context of an arbitration, as opposed to court proceedings, are not mere matters of detail that can simply be ignored. They are not merely 'rough edges' in the application of those regimes to arbitration proceedings that can be ignored, or worked through in some satisfactory manner. To the contrary, I regard them as an important part of the balance struck by the relevant legislatures when reallocating the risk and burden in certain types of multi-party litigation from a defendant to a plaintiff. They are an integral aspect of the mechanisms enacted by the South Australian and Commonwealth

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290 *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* (2022) 140 SASR 395 at 449 [189].

291 *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* (2022) 140 SASR 395 at 451 [201].

Parliaments to achieve this balance that is not able to be given effect in the same way in the context of arbitration proceedings. To apply either of those proportionate liability regimes in arbitration proceedings would be to apply a regime that differed materially in its operation from the regime that the relevant legislature intended to enact."

280 With great respect, both Doyle JA and Cavanough J were plainly correct in deciding that proportionate liability can only legitimately and properly be addressed in a court of law, save in those cases where the parties have consented to apply a truncated version of that law. In simple terms, the proportionate liability provisions of the Law Reform Act and the CC Act cannot be applied to the proposed arbitration precisely because what would then be applied would be a dramatically different regime for proportionate liability, authorised neither by the Parliament of South Australia nor by the Parliament of the Commonwealth. The arbitral tribunal, in such a case, would not be applying the substantive law of South Australia but something else entirely.

281 The foregoing conclusion leaves a respondent (defendant) exposed to the risk of being found wholly liable in arbitration. Such a respondent (defendant) would then be put to the additional time and expense of attempting to obtain contribution from other wrongdoers with the same risk of possible inconsistent outcomes. That is obviously unsatisfactory. For one thing, as Gordon and Gleeson JJ observe, it results in rendering the respondent (defendant) subject to solidary liability when that is also not part of the law of South Australia. In that sense, it must be accepted that this will result in the arbitral tribunal applying something that is no longer the law in that State. But that is because of the impossibility of applying principles of proportionate liability in an arbitration for the reasons set out above. In such circumstances, all the arbitral tribunal can do is to apply what is left of the law of South Australia, and that, in a bilateral arbitration, necessarily exposes the respondent to liability for the claimant's full loss. And that is so precisely because the respondent cannot join any concurrent wrongdoer that might also be responsible for that loss. Confined in this way, the arbitral tribunal has no one else to which it can attribute the loss or damage alleged to have been suffered by the claimant.

282 The foregoing also suggests that, the respondent here having raised the issue of proportionate liability, the preferred position should have been reached that the entire arbitration was either inoperative or incapable of being performed for the purposes of s 8(1) of the Arbitration Act, or that the continuation of the proceedings had become unnecessary or impossible for the purposes of s 32(2)(c) of that Act. But, as already mentioned, these points were not pursued by any party. And it does not answer the question of law posed for determination by the Supreme Court of South Australia. It is, of course, also still open to the South Australian Parliament, and the Commonwealth and each State and Territory Parliament, to implement cl 3 of the 2013 Proportionate Liability Model Provisions set out above.

283           The result in this appeal highlights the limitations of arbitration. The  
fashionable trumpeting of the arbitral resolution of disputes may have overstated  
its virtues. Some disputes are better resolved in a court of law.

284           The appeal should be dismissed with costs.



JAGOT AND BEECH-JONES JJ.

**Background to the appeal**

285 Pascale and Tesseract contracted for Tesseract to provide Pascale with engineering consultancy services in respect of Pascale's proposed construction of a Bunnings Warehouse building in South Australia. The contract provided for any dispute between them which arose in connection with the contract and which was not resolved by conciliation to be referred to arbitration.

286 Pascale commenced arbitration proceedings claiming that, in providing the engineering consultancy services to Pascale, Tesseract was negligent and engaged in misleading or deceptive conduct in trade or commerce in contravention of provisions of the legislation proscribing such conduct,<sup>292</sup> causing Pascale economic loss for which Pascale sought damages. Tesseract denied these allegations and claimed, alternatively, that if it is liable to Pascale, a third party, Mr Penhall, who assisted Pascale in preparing the tender for the design and construction of the warehouse, is another wrongdoer who shares responsibility for the harm that caused Pascale's alleged loss, with the consequence that any liability of Tesseract to Pascale must be reduced under the relevant legislation to reflect the proportionate liability of Tesseract and Mr Penhall.<sup>293</sup> As a non-party to the contract, Mr Penhall is not and cannot be required to be a party to the arbitration between Tesseract and Pascale.

287 Although it was common ground between the parties that the substantive law applying to the arbitration is the law of South Australia (which includes the law of the Commonwealth), the parties were given an opportunity to file further submissions addressing whether this common ground resulted from the application of s 28(1) or s 28(3) of the *Commercial Arbitration Act 2011* (SA) ("the Domestic Arbitration Act").<sup>294</sup> Section 28(1) provides for the arbitral tribunal to "decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute". Section 28(3) provides for the arbitral tribunal to "apply the law determined by the conflict of laws rules which it considers applicable". As will be explained, on our reasoning, whether the source

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**292** *Australian Consumer Law* (Sch 2 to the *Competition and Consumer Act 2010* (Cth)), s 18.

**293** By operation of Pt VIA of the *Competition and Consumer Act 2010* (Cth) and the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA).

**294** *Commercial Arbitration Act 2011* (SA), s 28(1) or (3) (see further below).

of the applicable substantive law is s 28(1) or s 28(3) does not affect the outcome of the appeal.

288 The place of the arbitration is South Australia. In the arbitration, Pascale correctly accepted that there was but one dispute which encompassed the whole of Tesseract's defence,<sup>295</sup> but also contended that the proportionate liability provisions could not be applied by the arbitrator in determining the dispute. Tesseract referred an agreed question of law to the Supreme Court of South Australia,<sup>296</sup> asking if the proportionate liability regimes that would apply in any court proceeding in respect of the claims between Tesseract and Pascale – Pt VIA of the *Competition and Consumer Act 2010* (Cth) ("the CCA") and the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) ("the Law Reform Act") (collectively, "the proportionate liability regimes") – apply in the arbitration.

289 The Court of Appeal of the Supreme Court of South Australia answered "no" to the agreed question of law. The Court of Appeal's reasoning was that attempting to apply the proportionate liability regimes "would result in difficulties and differences not contemplated by the relevant legislatures in enacting those regimes".<sup>297</sup> According to the Court of Appeal, as "essential features of both of the regimes ... are not amenable to application in arbitration proceedings",<sup>298</sup> it would not be "appropriate to conclude that the parties intended to confer the Arbitrator with authority to apply these provisions in this changed way; or indeed that the relevant legislatures intended that the regimes they enacted might be 'picked up' and applied, in a materially changed way, by an implied term of an arbitration agreement".<sup>299</sup>

290 As explained below, the Court of Appeal erred, and the appeal must be allowed. The only limits on the substantive law of South Australia (which includes the law of the Commonwealth) applying in the arbitration are those which result from party choice or from the conflict of laws rules and, because South Australia is the place of the arbitration, from the arbitrability of the dispute and the public

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**295** cf the cases cited in fn 373.

**296** *Commercial Arbitration Act 2011* (SA), s 27J.

**297** *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* (2022) 140 SASR 395 at 451 [200].

**298** *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* (2022) 140 SASR 395 at 452 [206].

**299** *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* (2022) 140 SASR 395 at 451-452 [202].

policy of South Australia. Further, South Australia being the place of the arbitration, the arbitrability of the dispute and the public policy of South Australia necessarily trump the choice of the parties as to the substantive rules to be applied in the arbitration. Separately from this, as explained below, the doctrines of arbitrable subject-matter and the public policy of the jurisdiction in which recognition or enforcement of the award is sought also apply to an application for recognition or enforcement of an award in that jurisdiction.

291 In this case, as will be explained, the substantive provisions of the proportionate liability regimes are not excluded by the doctrines of arbitrability or public policy as applicable in South Australia. Further, the parties did not choose to exclude those regimes from applying in the arbitration. Accordingly, the arbitral tribunal must decide the dispute in accordance with the substantive law of South Australia, including the substantive provisions of the proportionate liability regimes.

#### **The applicable substantive law – s 28(1) or (3)?**

292 The parties did not expressly identify in their contract the rules of law that would apply to the substance of the dispute in any arbitration between them. According to the parties, either they subsequently agreed to apply to the substance of the dispute in the arbitration the law of South Australia or they agreed that the relevant law, as determined by the applicable conflict of laws rules, was the law of South Australia. From the reasons of the Court of Appeal it is unclear which of these choices was made,<sup>300</sup> but, on our reasoning, nothing turns on the difference. If the parties agreed to apply the law of South Australia to the substance of their dispute, either in their contract or subsequently, that would constitute an express choice of law for the purposes of s 28(1) of the Domestic Arbitration Act. Alternatively, if no such express choice was made, South Australian law would apply by reason of the applicable conflict of laws rules under s 28(3) of the Domestic Arbitration Act, given that the contract "has its closest and most real connexion" with South Australia.<sup>301</sup>

293 More importantly, on our reasoning, it must also be taken from their choice (whatever its legal character, engaging either s 28(1) or (3) of the Domestic Arbitration Act) and the other circumstances of the matter that the parties intended South Australia to be the place of arbitration. This follows from the common

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**300** Compare *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* (2022) 140 SASR 395 at 411 [43], 414 [58].

**301** *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 217, quoting *Bonython v The Commonwealth* (1950) 81 CLR 486 at 498; [1951] AC 201 at 219. See also the reasons of Gordon and Gleeson JJ at [88]-[90].

position of the parties that the Domestic Arbitration Act applies to their arbitration and from the fact that s 1(2) of that Act provides that, subject to certain exceptions, the Act applies only if the place of arbitration is in South Australia. It is this choice, as to the place of arbitration, which means that the law of South Australia as to the arbitrability of the dispute applies and that the conduct of the arbitration is subject to the public policy of South Australia. On that basis, the substantive provisions of the proportionate liability regimes would not apply in the arbitration only if their application rendered the dispute non-arbitrable (which they do not) or their application would be contrary to the public policy of South Australia (which it is not). Further, because we conclude that the parties also did not choose to exclude the proportionate liability regimes from applying in the arbitration, those regimes are not excluded by party choice if s 28(1) is engaged.

### **The statutory provisions**

#### *Domestic Arbitration Act*

294 According to the Second Reading Speech, the Domestic Arbitration Act was enacted as a "new framework for the conduct of domestic commercial arbitrations".<sup>302</sup> The existing legislation had to be updated to "match the United Nations Commission on International Trade Law [UNCITRAL] Model Law on International Commercial Arbitration" ("the Model Law").<sup>303</sup> There were, it was said, "good reasons for adopting the amended UNCITRAL Model Law as the basis for the domestic law", including that: (a) "the UNCITRAL model has legitimacy and familiarity worldwide"; (b) it would create "national consistency in the regulation and conduct of international and domestic commercial arbitration"; and (c) "practitioners and courts will be able to draw on case law and practice in the Commonwealth and overseas to inform the interpretation and application of its provisions".<sup>304</sup>

295 The Second Reading Speech said that cl 28 (now s 28 of the Domestic Arbitration Act, set out below) "enables the parties to choose the substantive law to be applied to the particular facts of the matter in dispute (as opposed to determining the arbitral law under which the dispute is resolved). It makes it clear

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**302** South Australia, Legislative Council, *Parliamentary Debates* (Hansard), 7 July 2011 at 3436.

**303** South Australia, Legislative Council, *Parliamentary Debates* (Hansard), 7 July 2011 at 3436.

**304** South Australia, Legislative Council, *Parliamentary Debates* (Hansard), 7 July 2011 at 3436.

that an arbitral tribunal is to make a determination in accordance with the terms of the contract, taking into account the usages of the trade applicable to it."<sup>305</sup>

296 Section 1C(1) of the Domestic Arbitration Act provides that the "paramount object of this Act is to facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense". According to s 1C(2)(a) and (b) respectively, the Act achieves its paramount object by "enabling parties to agree about how their commercial disputes are to be resolved (subject to subsection (3) and such safeguards as are necessary in the public interest)" and "providing arbitration procedures that enable commercial disputes to be resolved in a cost effective manner, informally and quickly". Section 1C(3) provides that the Act "must be interpreted, and the functions of an arbitral tribunal must be exercised, so that (as far as practicable) the paramount object of this Act is achieved".

297 Section 1(1) provides that the Domestic Arbitration Act applies to "domestic commercial arbitrations". As indicated above, s 1(2) provides that the provisions of the Domestic Arbitration Act, except ss 8, 9, 17H, 17I, 17J, 35 and 36, apply only if the place of arbitration is in South Australia. By s 1(3), an arbitration is "domestic" if: (a) "the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in Australia"; (b) "the parties have (whether in the arbitration agreement or in any other document in writing) agreed that any dispute that has arisen or may arise between them is to be settled by arbitration"; and (c) "it is not an arbitration to which the Model Law (as given effect by the *International Arbitration Act 1974* of the Commonwealth) applies".<sup>306</sup> Section 1(5) provides that the Act does not affect any other Act by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of the Domestic Arbitration Act.

298 Section 2A(1) of the Domestic Arbitration Act provides that, in the interpretation of that Act, regard is to be had to the need to promote so far as practicable uniformity between the application of the Act to domestic commercial arbitrations and of the Model Law (given effect by the *International Arbitration*

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305 South Australia, Legislative Council, *Parliamentary Debates* (Hansard), 7 July 2011 at 3441.

306 Section 21(1) of the *International Arbitration Act 1974* (Cth) provides that if the Model Law (see Sch 2 to that Act) applies to an arbitration, the law of a State or Territory relating to arbitration does not apply to that arbitration. Article 1(1) of the Model Law provides that it "applies to international commercial arbitration", with Art 1(3) specifying when an arbitration is international.

*Act 1974 (Cth)* ("the International Arbitration Act")) to international commercial arbitrations and the "observance of good faith".

299 Section 5 of the Domestic Arbitration Act provides that "[i]n matters governed by this Act, no court must intervene except where so provided by this Act".

300 Section 6(1) of the Domestic Arbitration Act provides that the Supreme Court of South Australia has specified functions under the Act, including the determination of any question of law arising in the course of the arbitration under s 27J of the Act.

301 By s 7(1) of the Domestic Arbitration Act, an "arbitration agreement" is "an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not".

302 By s 16(1) of the Domestic Arbitration Act, "[t]he arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement". Section 16(9), however, subjects a decision of an arbitral tribunal that it has jurisdiction to the supervision of the Supreme Court of South Australia.

303 Section 19(1) of the Domestic Arbitration Act provides that, subject to the provisions of the Act, "the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings". By s 19(2), "[f]ailing such agreement, the arbitral tribunal may, subject to the provisions of this Act, conduct the arbitration in such manner as it considers appropriate".

304 Section 20(1) of the Domestic Arbitration Act provides that the parties are free to agree on the place of arbitration. By s 20(2), failing such agreement, the place of arbitration is to be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties. By s 20(3), the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place (whether or not in South Australia) it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

305 Section 27C(1) of the Domestic Arbitration Act enables the consolidation of arbitral proceedings on application by a party on the ground that: a common question of law or fact arises in those proceedings; the rights to relief claimed in all those proceedings are in respect of, or arise out of, the same transaction or series of transactions; or it is desirable that such an order be made.

306 Section 27J of the Domestic Arbitration Act provides that "[u]nless otherwise agreed by the parties, on an application to the Court made by any of the

parties to an arbitration agreement the Court has jurisdiction to determine any question of law arising in the course of the arbitration", "the Court" meaning the Supreme Court of South Australia.<sup>307</sup>

307 Section 28 of the Domestic Arbitration Act is in these terms:

**"Rules applicable to substance of dispute**

- (1) The arbitral tribunal must decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute.
- (2) Any designation of the law or legal system of a given State or Territory must be construed, unless otherwise expressed, as directly referring to the substantive law of that State or Territory and not to its conflict of laws rules.
- (3) Failing any designation by the parties, the arbitral tribunal must apply the law determined by the conflict of laws rules which it considers applicable.
- (4) The arbitral tribunal must decide the dispute, if the parties so agree, in accordance with such other considerations as are agreed to by the parties.
- (5) In all cases, the arbitral tribunal must decide in accordance with the terms of the contract and must take into account the usages of the trade applicable to the transaction."

308 Section 31(4) and (5) of the Domestic Arbitration Act provide, respectively, that the arbitral "award must state its date and the place of arbitration as determined in accordance with section 20" and that the "award is taken to have been made at the place stated in the award in accordance with subsection (4)".

309 Section 34 of the Domestic Arbitration Act confines the grounds on which an arbitral award may be set aside. The grounds include, by s 34(2)(b)(i) and (ii) respectively, that "the subject matter of the dispute is not capable of settlement by arbitration under the law of this State" or "the award is in conflict with the public policy of this State".

310 Sections 35 and 36 of the Domestic Arbitration Act are also relevant. Section 35(1) provides that an "arbitral award, irrespective of the State or Territory

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307 *Commercial Arbitration Act 2011 (SA)*, s 2(1).

in which it was made, is to be recognised in this State as binding and, on application in writing to the Court, is to be enforced subject to the provisions of this section and section 36". Section 36 confines the grounds on which the Supreme Court of South Australia may refuse recognition or enforcement of an arbitral award. The grounds include, by s 36(1)(b)(i) and (ii) respectively, that "the subject matter of the dispute is not capable of settlement by arbitration under the law of this State" or "the recognition or enforcement of the award would be contrary to the public policy of this State".

311 We agree with Gageler CJ<sup>308</sup> that, under the Domestic Arbitration Act, parties who have agreed to submit a dispute to arbitration have a choice as to: (a) the place of arbitration (or choice of seat), which is a "legal concept" that dictates the "curial law"<sup>309</sup> that applies to the arbitration, meaning the jurisdiction of the designated courts of that place to supervise the arbitration and to deal with applications in accordance with ss 16(9) and 34 of the Domestic Arbitration Act; (b) the rules of law applicable to the substance of the dispute in accordance with s 28(1) of the Domestic Arbitration Act; and (c) the procedure to be followed by the arbitral tribunal in conducting the proceedings in accordance with s 19(1) of the Domestic Arbitration Act.

*Commonwealth proportionate liability regime*

312 As noted, Pascale's claims against Tesseract include a claim for damages for alleged misleading or deceptive conduct in contravention of s 18 of the *Australian Consumer Law* ("the ACL"). Section 236 of the ACL provides that a person who suffers loss or damage because of the conduct of another person where the conduct contravened a provision of Ch 2 or 3 of the ACL (which includes s 18 in Ch 2) "may recover the amount of the loss or damage by action against that other person". Part VIA of the CCA concerns proportionate liability for misleading or deceptive conduct. Part VIA commenced on 26 July 2004.<sup>310</sup>

313 The Explanatory Memorandum for the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003* (Cth), which proposed the insertion of Pt VIA in the (now) CCA, explained that "[i]nsurance plays an important role in the Australian economy" and "provides a mechanism for transferring and pooling the risk of financial loss to entities with the expertise to

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308 Reasons of Gageler CJ at [28].

309 *Enka Insaat ve Sanayi AS v OOO "Insurance Company Chubb"* [2020] 1 WLR 4117 at 4139 [68]; [2021] 2 All ER 1 at 23.

310 *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (Cth), s 2(1), item 3.



manage the risks involved".<sup>311</sup> According to the Explanatory Memorandum, Australia was experiencing a "hard insurance market"<sup>312</sup> which had "broad economic ramifications".<sup>313</sup> The proportionate liability provisions were intended to ensure, amongst other things, that insurers could be "more confident in insuring risk", as the insured risk would be confined to the loss for which the insured was responsible.<sup>314</sup> The associated procedural rules were "designed to provide the appropriate balance between the interests of plaintiffs and defendants".<sup>315</sup> The Explanatory Memorandum said that "the national model for proportionate liability when implemented in all jurisdictions, will contribute to an improvement in the professional indemnity insurance market across Australia".<sup>316</sup> This reflected the fact that State and Territory legislatures had implemented or were also implementing proportionate liability regimes.

314 Section 87CB(1) of the CCA provides that Pt VIA applies to a claim for damages made under s 236 of the ACL for economic loss or damage to property caused by conduct that was done in contravention of s 18 of the ACL.

315 Under s 87CD(1) of the CCA, in any proceedings involving an apportionable claim, "the liability of a defendant who is a concurrent

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311 Australia, House of Representatives, *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003*, Explanatory Memorandum at 24 [4.84].

312 Australia, House of Representatives, *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003*, Explanatory Memorandum at 24 [4.86].

313 Australia, House of Representatives, *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003*, Explanatory Memorandum at 25 [4.91].

314 Australia, House of Representatives, *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003*, Explanatory Memorandum at 31 [4.128].

315 Australia, House of Representatives, *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003*, Explanatory Memorandum at 32 [4.130].

316 Australia, House of Representatives, *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003*, Explanatory Memorandum at 33 [4.139].

wrongdoer<sup>317</sup> in relation to that claim is limited to an amount reflecting that proportion of the damage or loss claimed that the court considers just having regard to the extent of the defendant's responsibility for the damage or loss" and "the court may give judgment against the defendant for not more than that amount". Section 87CD(4) provides that s 87CD "applies in proceedings involving an apportionable claim whether or not all concurrent wrongdoers are parties to the proceedings".

316 Section 87CE(1) of the CCA is a procedural provision for a defendant to notify a plaintiff of any other person who the defendant has reasonable grounds to believe may be a concurrent wrongdoer in relation to the claim, failing which "the court hearing the proceedings may order that the defendant pay all or any of those costs of the plaintiff".

317 Section 87CF of the CCA protects a defendant "against whom judgment is given" under Pt VIA from being required to contribute to any damages or contribution recovered from another concurrent wrongdoer and from being required to indemnify any such wrongdoer.

318 Section 87CH(1) of the CCA provides that "[t]he court may give leave for any one or more persons to be joined as defendants in proceedings involving an apportionable claim".

319 The proportionate liability regime in the CCA does not expressly prohibit contracting out of its terms. For present purposes it is sufficient to observe that other proportionate liability legislation in Australia either expressly permits contracting out of some provisions of the applicable proportionate liability legislation,<sup>318</sup> expressly prohibits contracting out of some provisions of the applicable proportionate liability legislation,<sup>319</sup> or (like Pt VIA of the CCA and the Law Reform Act) includes no express provision one way or the other.<sup>320</sup>

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317 Section 87CB(3) provides that, for the purposes of Pt VIA, a "**concurrent wrongdoer**, in relation to a claim, is a person who is one of 2 or more persons whose acts or omissions (or act or omission) caused, independently of each other or jointly, the damage or loss that is the subject of the claim".

318 *Civil Liability Act 2002* (NSW), s 3A(2); *Civil Liability Act 2002* (Tas), s 3A(3); *Civil Liability Act 2002* (WA), s 4A.

319 *Civil Liability Act 2003* (Qld), s 7(3).

320 See also *Wrongs Act 1958* (Vic).

*South Australian proportionate liability regime*

320 The Second Reading Speech relating to the amendments in 2005 to the Law Reform Act introducing the proportionate liability regime explained that "under a system of joint and several liability, the one who is able to pay is made to pay in full even though only partly responsible for the damage".<sup>321</sup> The 2005 amendments, in contrast, created a "regime of proportionate liability so that in cases of property damage and financial loss, each wrongdoer is legally liable to pay only for his or her share of the damage".<sup>322</sup> The intention of changing the law in this way was to "help ensure that insurance remains available and affordable ... consistent with measures taken in other States".<sup>323</sup>

321 The Law Reform Act, by s 4(1), applies to tortious, contractual, and statutory liabilities in damages. A wrongdoer's right to contribution from another wrongdoer who is liable for the same harm is contained in s 6(1). Section 8 applies to "apportionable liability". "Apportionable liability" is defined in s 3(2) as follows:

"A liability is an **apportionable liability** if the following conditions are satisfied:

- (a) the liability is a liability for harm (but not derivative harm<sup>[324]</sup>) consisting of—
  - (i) economic loss (but not economic loss consequent on personal injury); or
  - (ii) loss of, or damage to, property;
- (b) 2 or more wrongdoers (who were not acting jointly) committed wrongdoing from which the harm arose;

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321 South Australia, Legislative Council, *Parliamentary Debates* (Hansard), 3 May 2005 at 1720.

322 South Australia, Legislative Council, *Parliamentary Debates* (Hansard), 3 May 2005 at 1720.

323 South Australia, Legislative Council, *Parliamentary Debates* (Hansard), 3 May 2005 at 1720.

324 Defined in s 3(1) to mean "harm suffered as a result of injury to, or death of, another (but does not include nervous shock arising from injury to, or death of, another)".

- (c) the liability is the liability of a wrongdoer whose wrongdoing was negligent or innocent.

..."

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Where s 8 applies, a defendant's liability is limited in accordance with that provision. In effect, the defendant's liability is limited to a percentage of the plaintiff's "notional damages" that is fair and equitable having regard to the extent of the defendant's responsibility for the harm and the extent of the responsibility of other wrongdoers (including wrongdoers who are not party to the proceedings) whose acts or omissions caused or contributed to the harm. The plaintiff's "notional damages", in substance, is 100 percent of the plaintiff's loss from the harm.<sup>325</sup> Section 8(4) is in these terms:

"In a case involving apportionable liability, the court must proceed as follows:

- (a) the court first determines the plaintiff's notional damages;
- (b) the court gives judgment against any defendant whose liability is not subject to limitation under this section for damages calculated without regard to this Part;
- (c) the court determines, in relation to each defendant whose liability is limited under this section, a proportion of the plaintiff's notional damages equivalent to the percentage representing the extent of that defendant's liability;
- (d) the court then gives judgment against each such defendant based on the assessment made under paragraph (c) (but in doing so must give effect to any special limitation of liability to which any of them may be entitled).

..."

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Section 10(1) is to the effect that a defendant entitled to a limitation of liability who has reasonable grounds to believe that a person who is not a party to the action may be liable on the plaintiff's claim must, as soon as practicable, provide the plaintiff with information that is in the defendant's possession, or reasonably available to the defendant (and not equally available to the plaintiff), about the other person's identity and whereabouts and the circumstances giving

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**325** *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA), s 3(1).

rise to the other person's liability. The sanction for a defendant not complying with this obligation prescribed in s 10(2) is that a court may order the non-complying defendant to pay costs incurred in proceedings that could have been avoided if that obligation had been carried out.

324 Section 11 is in these terms:

**"Separate proceedings**

If a plaintiff brings separate actions for the same harm against wrongdoers who are entitled to a limitation of liability under this Part, the judgment first given (or that judgment as varied on appeal) determines for the purpose of all other actions—

- (a) the amount of the plaintiff's notional damages; and
- (b) the proportionate liability of each wrongdoer who was a party to the action in which the judgment was given; and
- (c) whether the plaintiff was guilty of contributory negligence and, if so, the extent of that negligence."

325 As noted, the Law Reform Act does not expressly prohibit contracting out of its terms.

**The contract**

326 The contract between Pascale and Tesseract is identified on its front page as a "Consultant – Design & Construct Plain English Contract" between Pascale as "The Builder" and Tesseract as "The Consultant". The front page identifies the contract as one issued in December 2011 by the Master Builders Association of South Australia Inc. The contract is a standard form contract between a builder and a professional consultant for use in the construction industry. The second page of the contract, for example, recites that the contract "is made available to *all* members of the building and construction industry".<sup>326</sup>

327 The contract records that the Builder (Pascale) "is engaged to design and construct" a "multi level Bunnings store including basement carpark with ground level and mezzanine shop floors, office area and associated works" (defined as "the Works") on identified land in South Australia, and that "[t]he Builder wishes to engage the services of the Consultant to assist the Builder in performing the Works". To that end the Builder (Pascale) and the Consultant (Tesseract) agree

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326 Emphasis in original.

that "[f]or the money stated in clause 2 the Consultant must, according to the terms and conditions of this Contract, provide the Consulting Work". The money payable by the Builder (Pascale) to the Consultant (Tesseract) for the Consulting Work stated in cl 2 of the contract is a lump-sum fee of \$203,995.00.

328 The "Consulting Work" means "that consulting work the Consultant is engaged to perform under this Contract as described in the Contract Documents". The "Contract Documents" include the Principal's Project Requirements for the construction of the Bunnings Warehouse including numerous plans, reports and documents not prepared by the Consultant (Tesseract) but by third parties and by the Builder (Pascale) (such as a document called "Pascale Construction – Construction Methodology"), and the Builder's (Pascale's) tender documents.

329 The main obligations under the contract require the Consultant (Tesseract), amongst other things, to "[w]ork cooperatively with the Builder and any other consultants or other persons nominated by the Builder to perform the Consulting Work and enable the Works to be completed", and to "[p]rovide the Consulting Work to a standard of a competent professional consultant in the Consultant's field of expertise in accordance with the Contract, the Builder's requirements, the Principal's Project Requirements, the Contract Documents, and any other documents provided by the Builder to the Principal". The "Principal" means "the person for whom the Builder is performing the Works".

330 Clause 19.2 provides that "[i]f any part of this Contract contravenes any law of the Commonwealth of Australia or the State of South Australia that part will be invalid and be removed from the Contract. In all other ways this Contract will stay in force."

331 Clause 20.1 ("Dispute Conciliation") provides that "[i]f a dispute between the Builder and Consultant arises in connection with this Contract, then either party must deliver to the other a notice of dispute identifying and providing details of the dispute". Clause 21 ("Arbitration") contains the arbitration agreement. Clause 21.1 provides that "[i]f the dispute is not resolved by dispute conciliation either party may refer the dispute to arbitration by notifying in writing the other party". By cl 21.4, the "Chief Executive Officer of the Master Builders Association of South Australia will appoint an Arbitrator".

332 Attachment 5 to the contract is a pro-forma statutory declaration for payments which refers to the required witness as "a person authorised to witness a

statutory declaration in accordance with Section 2 of the Evidence (Affidavits) Act 1928 South Australia".<sup>327</sup>

### **The limits on applicable laws**

#### *General*

333 Arbitration legislation throughout Australia is based on the UNCITRAL Model Law on International Commercial Arbitration as amended and given effect in Sch 2 to the International Arbitration Act.<sup>328</sup> According to the Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration, the Model Law was developed to address disparities in national laws about arbitration, many of which were unsuited to international commercial disputes.<sup>329</sup> The intention of Art 5 of the Model Law ("[i]n matters governed by this Law, no court shall intervene except where so provided in this Law"), which is given effect in arbitration legislation throughout Australia,<sup>330</sup> is to protect "the arbitral process from unpredictable or disruptive court interference [which] is essential to parties who choose arbitration (in particular foreign parties)".<sup>331</sup> In respect of Art 28 of the Model Law, which is also given effect in

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**327** An Act repealed on 1 December 2021 by the *Oaths (Miscellaneous) Amendment Act 2021* (SA), Sch 1, item 1.

**328** *Commercial Arbitration Act 2010* (NSW); *Commercial Arbitration Act 2011* (SA); *Commercial Arbitration Act 2011* (Tas); *Commercial Arbitration Act 2011* (Vic); *Commercial Arbitration Act 2012* (WA); *Commercial Arbitration Act 2013* (Qld); *Commercial Arbitration Act 2017* (ACT); *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT).

**329** *UNCITRAL Model Law on International Commercial Arbitration 1985, With amendments as adopted in 2006* (2008) at 24 [5].

**330** *International Arbitration Act 1974* (Cth), ss 15, 16, Sch 2 Art 5; *Commercial Arbitration Act 2010* (NSW), s 5; *Commercial Arbitration Act 2011* (SA), s 5; *Commercial Arbitration Act 2011* (Tas), s 5; *Commercial Arbitration Act 2011* (Vic), s 5; *Commercial Arbitration Act 2012* (WA), s 5; *Commercial Arbitration Act 2013* (Qld), s 5; *Commercial Arbitration Act 2017* (ACT), s 5; *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT), s 5.

**331** *UNCITRAL Model Law on International Commercial Arbitration 1985, With amendments as adopted in 2006* (2008) at 27 [17].

arbitration legislation throughout Australia,<sup>332</sup> the UNCITRAL Explanatory Note said that:<sup>333</sup>

"This provision is significant in two respects. It grants the parties the freedom to choose the applicable substantive law, which is important where the national law does not clearly or fully recognize that right. In addition, by referring to the choice of 'rules of law' instead of 'law', the Model Law broadens the range of options available to the parties as regards the designation of the law applicable to the substance of the dispute."

334 In accordance with this intention, the Supreme Court of the United States in *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc* said that:<sup>334</sup>

"[T]he international arbitral tribunal owes no prior allegiance to the legal norms of particular states; hence, it has no direct obligation to vindicate their statutory dictates. The tribunal, however, is bound to effectuate the intentions of the parties."

*The place of arbitration as distinct from the jurisdiction in which recognition or enforcement is sought*

335 Article 31(3) of the Model Law provides that "[t]he award shall state its date and the place of arbitration as determined in accordance with article 20(1)" and that "[t]he award shall be deemed to have been made at that place". Article 20(1) provides that "[t]he parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the

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332 *International Arbitration Act 1974* (Cth), ss 15, 16, Sch 2 Art 28; *Commercial Arbitration Act 2010* (NSW), s 28; *Commercial Arbitration Act 2011* (SA), s 28; *Commercial Arbitration Act 2011* (Tas), s 28; *Commercial Arbitration Act 2011* (Vic), s 28; *Commercial Arbitration Act 2012* (WA), s 28; *Commercial Arbitration Act 2013* (Qld), s 28; *Commercial Arbitration Act 2017* (ACT), s 28; *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT), s 28.

333 *UNCITRAL Model Law on International Commercial Arbitration 1985, With amendments as adopted in 2006* (2008) at 33 [39]. See also *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 at 548 [13].

334 (1985) 473 US 614 at 636.



convenience of the parties." These provisions are also reflected in arbitration legislation throughout Australia,<sup>335</sup> including in the Domestic Arbitration Act.

336 Further reflecting Arts 34 and 36 of the Model Law as given effect in Sch 2 to the International Arbitration Act, statutory provisions are in force in every jurisdiction in Australia to the effect that a court may: set aside an arbitral award if "the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State" or "the award is in conflict with the public policy of this State"; or refuse to enforce an arbitral award if "the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State" or "the recognition or enforcement of the award would be contrary to the public policy of this State".<sup>336</sup> In respect of an arbitration under the International Arbitration Act or the Domestic Arbitration Act (and in arbitration legislation throughout Australia), the legislation identifies the relevant State – "this State" – as, respectively, Australia and each State or Territory which has enacted arbitration legislation. Accordingly, in a South Australian proceeding, the reference to "this State" in the Domestic Arbitration Act means in each case the State of South Australia.

337 The separate operation of ss 34 (setting aside an award) and 36 (refusing to recognise or enforce an award) of the Domestic Arbitration Act, reflecting Arts 34 and 36 of the Model Law, means that the laws relating to arbitrable subject-matter and the public policy of the *place of arbitration* apply to the conduct of an arbitration. In contrast, the laws relating to arbitrable subject-matter and the public policy of the *jurisdiction in which recognition or enforcement of the award is sought* apply to an application for recognition or enforcement of an award. Importantly, however, s 36(1)(a)(v) of the Domestic Arbitration Act, reflecting Art 36(1)(a)(v) of the Model Law, provides that recognition or enforcement of an

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335 *International Arbitration Act 1974* (Cth), ss 15, 16, Sch 2 Art 31(3); *Commercial Arbitration Act 2010* (NSW), s 31(4), (5); *Commercial Arbitration Act 2011* (SA), s 31(4), (5); *Commercial Arbitration Act 2011* (Tas), s 31(4), (5); *Commercial Arbitration Act 2011* (Vic), s 31(4), (5); *Commercial Arbitration Act 2012* (WA), s 31(4), (5); *Commercial Arbitration Act 2013* (Qld), s 31(4), (5); *Commercial Arbitration Act 2017* (ACT), s 31(4), (5); *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT), s 31(4), (5).

336 *Commercial Arbitration Act 2010* (NSW), ss 34(2)(b), 36(1)(b); *Commercial Arbitration Act 2011* (SA), ss 34(2)(b), 36(1)(b); *Commercial Arbitration Act 2011* (Tas), ss 34(2)(b), 36(1)(b); *Commercial Arbitration Act 2011* (Vic), ss 34(2)(b), 36(1)(b); *Commercial Arbitration Act 2012* (WA), ss 34(2)(b), 36(1)(b); *Commercial Arbitration Act 2013* (Qld), ss 34(2)(b), 36(1)(b); *Commercial Arbitration Act 2017* (ACT), ss 34(2)(b), 36(1)(b); *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT), ss 34(2)(b), 36(1)(b).

arbitral award may be refused by a court if proof is furnished to the court that "the award has not yet become binding on the parties or has been set aside or suspended by a court of the State or Territory in which, or under the law of which, that award was made". By this means, the laws relating to arbitrable subject-matter and the public policy of the *place of arbitration* may determine the recognition or enforcement of an award in a jurisdiction other than that of the place in which the award was made.

338 These conclusions are also relevant to the operation of s 8(1) of the Domestic Arbitration Act, which reflects Art 8(1) of the Model Law. By s 8(1) (and Art 8(1)), the court's duty, on request by a party where the action before it is subject to an arbitration agreement, is to "refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed". An agreement to arbitrate a non-arbitrable subject-matter or to conduct an arbitration which, by reason of substance or procedure, is contrary to the public policy of the place of arbitration will be one which is, at the least, "incapable of being performed" in that place within the meaning of s 8(1) of the Domestic Arbitration Act (and Art 8(1) of the Model Law). Further, by s 16(9) of the Domestic Arbitration Act (and Art 16(3) of the Model Law), it is "the Court" which, if requested to do so by a party, finally determines if an arbitral tribunal has jurisdiction. Within the meaning of s 16(9) (and Arts 6 and 16(3)), "the Court" is the court identified by the legislature as the court with jurisdiction in the jurisdiction where the arbitration takes place – in this case, the Supreme Court of South Australia.<sup>337</sup>

339 In the present case, the place of the arbitration being South Australia, it is the non-arbitrability of the subject-matter under the law of South Australia and the public policy of South Australia which are relevant. Accordingly, any arbitral award may be set aside by the Supreme Court of South Australia if the subject-matter of the dispute is not arbitrable or the award is in conflict with the public policy of South Australia. Similarly, that Court could also refuse to recognise or enforce any arbitral award if recognition or enforcement were to be sought in South Australia and the Court finds that the subject-matter of the dispute is not arbitrable or the recognition or enforcement of the award would be contrary to the public policy of South Australia. This means that an arbitrator, cognisant of the duty of an arbitrator to make an enforceable award,<sup>338</sup> should also have the public policy of South Australia in mind when conducting the arbitration.

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337 *Commercial Arbitration Act 2011* (SA), ss 2, 6.

338 eg, Horvath, "The Duty of the Tribunal to Render an Enforceable Award" (2001) 18 *Journal of International Arbitration* 135.

*Non-arbitrable subject-matter and conflict with or contrary to public policy*

340 The concepts of "conflict with" or being "contrary to" the public policy of South Australia are to be understood as repugnancy to the fundamental values underlying the legal system and laws of South Australia (in the sense described above as including the applicable laws of the Commonwealth, and the unified common law of Australia). Deane and Gaudron JJ described arbitrable subject-matter as, perhaps, involving "rights which are not required to be determined exclusively by the exercise of judicial power".<sup>339</sup> Martin CJ referred to the doctrine of non-arbitrable subject-matter as "resting on the notion"<sup>340</sup> that "some matters so pervasively involve public rights, or interests of third parties, which are the subjects of the uniquely governmental authority, that agreements to resolve such disputes by 'private' arbitration should not be given effect",<sup>341</sup> those matters being within an "exceptional category".<sup>342</sup>

341 The types of disputes which fall into the exceptional category of non-arbitrable subject-matter have been identified as including, for example, disputes involving: criminal offences; employment grievances; property settlement; divorce; the custody of children; bankruptcy and insolvency; and certain intellectual property disputes.<sup>343</sup> There may well be overlap between the circumstances in which a court might find that the subject-matter of a dispute is not capable of settlement by arbitration and that the recognition of an award concerning that dispute would be contrary to public policy. In this case, however, the subject-matter of the dispute – a commercial contract for the provision of engineering consultancy services – is not within the "extremely limited circumstances" which involve non-arbitrability.<sup>344</sup> The relevant issue, therefore, is one of public policy alone.

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339 *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 at 351.

340 *Pipeline Services WA Pty Ltd v ATCO Gas Australia Pty Ltd* [2014] WASC 10 at [80].

341 *Pipeline Services WA Pty Ltd v ATCO Gas Australia Pty Ltd* [2014] WASC 10 at [80], quoting Born, *International Commercial Arbitration* (2009), vol 1 at 768.

342 *Pipeline Services WA Pty Ltd v ATCO Gas Australia Pty Ltd* [2014] WASC 10 at [81].

343 *WDR Delaware Corporation v Hydrox Holdings Pty Ltd* (2016) 245 FCR 452 at 474 [128]; *Rinehart v Welker* (2012) 95 NSWLR 221 at 257 [165]. See also Born, *International Commercial Arbitration* (2009), vol 1 at 768.

344 *Rinehart v Welker* (2012) 95 NSWLR 221 at 258 [167].

342 Conflict with public policy does not arise from mere inconsistency of the award with so-called "mandatory laws" (also referred to as "mandatory rules") of the place in which the arbitration is being conducted (relevant to an application to set aside an award) or the place in which recognition and enforcement of the award may be sought. "Mandatory laws", being "laws that purport to apply [in arbitration] irrespective of a contract's proper law or the procedural regime selected by the parties",<sup>345</sup> may or may not embody fundamental precepts of public policy of the place in which the arbitration is being conducted or the place in which an award is sought to be recognised and enforced.<sup>346</sup>

343 Similarly, principles applying to the severability of an invalid statutory provision do not answer the question of repugnancy to public policy. The limit on the availability of severance of an invalid from a valid statutory provision, that the remaining valid law is not substantially different from the law as enacted,<sup>347</sup> does not determine repugnancy to public policy. Courts, not contracting parties, are subject to the doctrine of statutory severance because of the separation of powers, one manifestation of which is that courts are not free to rewrite legislation so that it has a materially different effect under the guise of severing invalid from valid parts of legislation. Separation of legislative power from judicial power has nothing to do with the position of contracting parties agreeing to refer disputes between them to, and agreeing the rules of law to apply in, an arbitration. This explains why the kind of legislative intention that would suffice to prevent a court from severing one (invalid) provision from another (valid) provision does not satisfy the test of conflict with (or repugnancy to) the public policy of South Australia (or of any other State or Territory in or the Commonwealth of Australia). To the extent Pascale – and the Court of Appeal – conceived of the relevant issue in terms of this kind of legislative intention, they were in error.

344 It follows from this that the Court of Appeal's statement that there was "unlikely to be any significant practical difference between" determining the applicable rules of law by reference to "the parties' implied (objective) intention under their arbitration agreement" or "some overriding (objective) intention on the

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345 Barraclough and Waincymer, "Mandatory Rules of Law in International Commercial Arbitration" (2005) 6 *Melbourne Journal of International Law* 205 at 206.

346 eg, *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 at 622 [59].

347 *Harrington v Lowe* (1996) 190 CLR 311 at 328.

part of the relevant legislature"<sup>348</sup> cannot be accepted. It conflates inapposite notions of statutory intention relevant to the doctrine of statutory severance with contractual intention.

### *Conclusions*

345 For these reasons, in the circumstances of this case, where the arbitration has commenced but has not been completed (and there is as yet no award sought to be recognised or enforced in some other jurisdiction), the only limit in the present case on the parties' choice of the rules of law applicable to the substance of the dispute (being the laws of South Australia) is a choice which would lead to an award in conflict with or contrary to the public policy of South Australia (in the narrow sense described of repugnancy to the fundamental values underlying the laws of South Australia), South Australia being the place of the arbitration. While statutory intention will be relevant to the ascertainment of conflict with public policy, as discussed, the mere fact that a court would characterise one or more provisions of a statute as non-severable is not a test for conflict with public policy in its relevant sense of repugnancy to that policy.

346 This means that, in the present case, if there is no conflict with (in the sense of repugnancy to) the public policy of South Australia in the proportionate liability regimes applying to the extent they are able to do so in the arbitration, those regimes, to that extent, were able to be chosen by the parties to apply. It is not necessary to go further to resolve the present appeal. The remaining issues, accordingly, are those of statutory and contractual intention.

### **Statutory intention**

#### *Background to potential reform of proportionate liability regimes*

347 Aspects of the background to the reform of proportionate liability regimes in Australia are instructive and support the conclusions in these reasons.<sup>349</sup>

348 In 2011, the Standing Committee of Attorneys-General ("the SCAG") released a consultation draft of "Proportionate Liability Model Provisions".<sup>350</sup> These draft Model Provisions included in s 1 a definition of "court" as including "a tribunal, arbitrator and another entity able to make a binding determination

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348 *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* (2022) 140 SASR 395 at 445 [179].

349 And the reasons of Gageler CJ and of Gordon and Gleeson JJ.

350 Australia, Standing Committee of Attorneys-General, Consultation Draft 7 [PCC-386] Proportionate Liability Model Provisions, 15 September 2011.

about liability". The SCAG also released an accompanying "Proportionate Liability Regulation Impact Statement" (said to be "for consultation purposes" and not as necessarily reflecting "the views of [the] SCAG, or of any jurisdiction or Government Department"<sup>351</sup>). The Proportionate Liability Regulation Impact Statement recorded that the issue of whether the then existing proportionate liability regimes applied to arbitrations "is not specifically dealt with in the current legislation and views on this differ".<sup>352</sup> The Proportionate Liability Regulation Impact Statement included consideration of the arguments that had been made for and against the draft Model Provisions applying in arbitration.<sup>353</sup> The Proportionate Liability Regulation Impact Statement concluded that there "are strong policy arguments that proportionate liability legislation should apply to arbitrations and external dispute resolution schemes and all submissions on the consultation drafting instructions that addressed this issue supported this".<sup>354</sup> It was for this reason that "court" was defined in the draft Model Provisions to include a "tribunal, arbitrator and another entity able to make a binding determination about liability".<sup>355</sup>

349 Bodies representing arbitrators and some arbitrators objected to this proposal during the consultation. For example, an article by Albert Monichino (a barrister, arbitrator, and mediator) recorded that the "future of domestic arbitration in Australia is threatened by proportionate liability reforms which are presently under consideration".<sup>356</sup> Monichino expressed his view that the then existing proportionate liability regimes did not apply in arbitration<sup>357</sup> but, more to the point for present purposes, said that the "leading arbitral institutions in Australia

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351 Australia, Standing Committee of Attorneys-General, Proportionate Liability Regulation Impact Statement, September 2011 at 1.

352 Australia, Standing Committee of Attorneys-General, Proportionate Liability Regulation Impact Statement, September 2011 at 32.

353 Australia, Standing Committee of Attorneys-General, Proportionate Liability Regulation Impact Statement, September 2011 at 32-33.

354 Australia, Standing Committee of Attorneys-General, Proportionate Liability Regulation Impact Statement, September 2011 at 33.

355 Australia, Standing Committee of Attorneys-General, Proportionate Liability Regulation Impact Statement, September 2011 at 33.

356 Monichino, "Arbitration Law in Victoria Comes of Age" (2012) 31(1) *The Arbitrator & Mediator* 41 at 60.

357 Monichino, "Arbitration Law in Victoria Comes of Age" (2012) 31(1) *The Arbitrator & Mediator* 41 at 61.

(ACICA, CIArb and IAMA)<sup>358</sup> opposed the proposal to make proportionate liability legislation expressly referable to arbitrations seated in Australia".<sup>359</sup>

350 In 2013, the Standing Council on Law and Justice ("the SCLJ") (formerly the SCAG) released revised draft Proportionate Liability Model Provisions.<sup>360</sup> In the revised draft, "court" is defined (in s 1) to include "a tribunal". This section then appears:

**"3 Non-application to arbitration etc**

To remove any doubt, an entity (other than a court) that is able to make a binding determination about liability in relation to an apportionable claim is not required to apply this part in making the determination.

**Drafting note**

**Jurisdictions may choose whether or not to include this provision."**

351 The arbitration bodies, or at least CIArb and the IAMA, considered this a victory. The former, in a submission supported by the IAMA, told the New South Wales Department of Attorney General and Justice that it was "self-evident that the SCLJ was persuaded by the submissions made by various stakeholders that applying PL [proportionate liability] to arbitrations would undermine the inter-governmental efforts to promote domestic and international arbitration in Australia" and argued that New South Wales should adopt the Model Provisions, including s 3, which, by the drafting note to the section, had been left to each jurisdiction to decide for itself.

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358 The Australian Centre for International Commercial Arbitration, the Chartered Institute of Arbitrators (Australia), and the Institute of Arbitrators and Mediators Australia respectively.

359 Monichino, "Arbitration Law in Victoria Comes of Age" (2012) 31(1) *The Arbitrator & Mediator* 41 at 62.

360 Australia, Standing Council on Law and Justice, Proportionate Liability Model Provisions [PCC-386], 26 September 2013.

352 No jurisdiction in Australia has incorporated s 3 into its proportionate liability regime.<sup>361</sup> Whatever the views expressed by the arbitration bodies (and some arbitrators) to the contrary, the legislatures did not accept that application of the proportionate liability regimes in arbitrations would be inappropriate.

*The correct approach*

353 Neither Pt VIA of the CCA nor the Law Reform Act expressly states that it does or does not apply in an arbitration. The legislation imposes duties on "the court".<sup>362</sup> The other language in the statutes also contemplates orders by and judgments of a court.<sup>363</sup> This does not mean, however, that the proportionate liability regimes do not apply in arbitration.

354 As Finkelstein J has explained:<sup>364</sup>

"Proportionate liability was introduced into state and federal legislation following an inquiry into the law of joint and several liability established by the Commonwealth and the New South Wales Attorneys-General in 1994. The impetus for the inquiry was the growing number of actions against professionals, particularly auditors, who were being singled out as targets for negligence actions not because of their culpability (which might be small) but because they were insured and had the capacity to pay large damages awards. One consequence was a sharp rise in insurance premiums payable by professionals."

355 If the substantive provisions of the proportionate liability regimes did not apply in an arbitration, the common objective of both the Commonwealth and

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**361** *Wrongs Act 1958* (Vic); *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA); *Civil Liability Act 2002* (NSW); *Civil Liability Act 2002* (Tas); *Civil Liability Act 2002* (WA); *Civil Liability Act 2003* (Qld); *Civil Law (Wrongs) Act 2002* (ACT); *Proportionate Liability Act 2005* (NT). See also *Competition and Consumer Act 2010* (Cth), Pt VIA; *Corporations Act 2001* (Cth), Pt 7.10 Div 2A; *Australian Securities and Investments Commission Act 2001* (Cth), Pt 2 Div 2 Subdiv GA.

**362** eg, *Competition and Consumer Act 2010* (Cth), s 87CD; *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA), s 8(4).

**363** eg, *Competition and Consumer Act 2010* (Cth), ss 87CE(1), 87CE(2), 87CF, 87CG(1); *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA), ss 7(2), 9, 11.

**364** *BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd [No 2]* [2008] FCA 1656 at [4].



South Australian Parliaments to ensure the viability of Australia's insurance market for professional services would conflict with their common object of ensuring effective arbitration systems for commercial disputes to facilitate trade and commerce. The legislative intention to be inferred is that both objects should be achieved. Effect must be given to that legislative intention.

*The incorrect approach*

356 Pascale's approach to the ascertainment of statutory intention involves the wrong focus. Statutory intention is relevant only to the extent it can inform the question whether an award resulting from the arbitration will be liable to be set aside or not recognised or enforced as being in conflict with or contrary to the public policy of South Australia.

357 Pascale's premise is that it is unable to require all potential concurrent wrongdoers (including Mr Penhall) to be joined as a party to the arbitration, with the consequence being that the proportionate liability regimes are not "expressed in terms appropriate to, and capable of being exercised in, an arbitration".<sup>365</sup> The consequence does not follow from the premise. At the same time, moreover, Pascale accepted that if all potential wrongdoers in respect of a claim could be joined to an arbitration, then the proportionate liability regimes are "expressed in terms appropriate to, and capable of being exercised in, an arbitration".<sup>366</sup> Both propositions cannot be right.

358 Pascale's submissions also wrongly assume that the Commonwealth and South Australian Parliaments gave greater weight to the protection of a party from the risk of not being able to recover a part of its loss from the other party in an arbitration than to the confining of a party's recoverable loss from another party to the loss for which the other party was responsible in order to ensure the continuing viability in Australia of professional indemnity insurance against economic loss and loss from property damage. That assumption is irreconcilable with the context in which the proportionate liability regimes were enacted.

359 That assumption is also inconsistent with the substance of the proportionate liability regimes. Neither Pt VIA of the CCA nor the Law Reform Act ensures (or could ensure) that a plaintiff in a court proceeding is able to join all potential concurrent wrongdoers in the proceeding in order to maximise the plaintiff's chance of recovering 100 percent of its loss. There are many reasons why a

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365 *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 369.

366 *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 369.

plaintiff may not be able to or may choose not to join all potential concurrent wrongdoers in a court proceeding. The potential concurrent wrongdoer may be dead, not identifiable, not locatable, bankrupt, insolvent, or uninsured. Yet the proportionate liability regimes apply nevertheless, and the plaintiff carries the risk of not being able to recover 100 percent of its loss. While the legislation facilitates the prospect of a joinder,<sup>367</sup> the legislation does not provide, for example, that the relevant proportionate liability regime does not apply if a plaintiff is unable to join all potential concurrent wrongdoers in the proceeding. Rather, the legislation expressly contemplates that a plaintiff may not be able to join all potential concurrent wrongdoers in the proceeding and, in that event, regulates the outcome of any future proceeding involving different parties.<sup>368</sup>

360 Accordingly, to characterise a plaintiff as having a "right" or "opportunity" to join all potential concurrent wrongdoers in a court proceeding – as Pascale does – is inaccurate. A plaintiff's "right" and "opportunity" to do so are constrained by many legal and practical contingencies over which the plaintiff has no control. The difference in an arbitration is not so fundamental or even so material that it can justify ascribing to the Commonwealth and South Australian Parliaments an intention that the proportionate liability regimes not apply if a party is unable to join all potential concurrent wrongdoers in the arbitration.

361 To the contrary, the manifest policy choice made by the Commonwealth and South Australian Parliaments in enacting their proportionate liability regimes was that the regimes would apply whether a plaintiff could join all potential wrongdoers as parties or not, irrespective of the forum for dispute resolution. The choice is unsurprising given that the public interest at stake – the ongoing viability of professional indemnity insurance for economic loss and property damage in Australia – had been assessed by all legislatures in Australia to require protection at the expense of the capacity for plaintiffs to recover 100 percent of their loss from a single defendant who could afford to pay.

362 Contrary also to Pascale's arguments, s 11 of the Law Reform Act does not present any intractable difficulty for an arbitration. The focus of s 11 is the effect of a "judgment first given". There is no reason to conclude that a "judgment first given" is not assimilable to an "arbitral award first given" if it is enforceable as a judgment. This is achieved by obtaining an order for recognition of the arbitral award in accordance with s 35 of the Domestic Arbitration Act. Once recognised, the arbitral award is binding and enforceable, as s 35(1) states. Further, once the

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367 *Competition and Consumer Act 2010* (Cth), ss 87CD(5), 87CH; *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA), s 10.

368 *Competition and Consumer Act 2010* (Cth), s 87CD(4); *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA), s 12.

first arbitral award is recognised in this way, there is no reason to suggest that an arbitrator should not be bound by s 11 of the Law Reform Act in any subsequent arbitration in precisely the same way in which a court would be so bound in any subsequent proceeding. This reasoning applies equally to s 87CF of the CCA.

363 The only aspect of the arbitration in the present case which is not assimilable to a court proceeding in respect of the same dispute is the inability of the parties or the arbitrator to require the joinder of a third party to the arbitration against their will. On analysis, however, this is a product of the terms of the arbitration agreement between Pascale and Tesseract, not the terms of the proportionate liability regimes. If, for example, Pascale had used a contract that included a further agreement by all its consultants to agree to arbitrate any dispute arising in connection with the contract in a joint or single arbitration with any other consultant who may be liable for loss caused by the same harm, Pascale could then have required Mr Penhall and Tesseract to arbitrate Pascale's claims in the one (or effectively the one) arbitration, if necessary, by an application for consolidation of the arbitral proceedings as contemplated by s 27C of the Domestic Arbitration Act (the substance of which is also in equivalent legislation throughout Australia).<sup>369</sup> In other words, the problem perceived by Pascale, that it cannot join Mr Penhall in its arbitration with Tesseract, is ultimately of Pascale's own contractual making.

364 Moreover, we agree with Gageler CJ<sup>370</sup> that some provisions of the proportionate liability regimes (ss 10 and 11 of the Law Reform Act and ss 87CE, 87CH and 87CG of the CCA) are not rules of law applicable to the substance of the dispute and, consequently, are not within s 28 of the Domestic Arbitration Act, but, in any event, as explained above, can be given effect in an arbitration. As a matter of legal characterisation, however, they are procedural rules subject to s 19(1) of the Domestic Arbitration Act. Even if these provisions were not assimilable to arbitration at all, that fact would not result in either the subject-matter of the dispute being non-arbitrable under, or the conduct of the arbitration or recognition or enforcement of any award made in the arbitration being in conflict with or contrary to, the law of South Australia.

365 It follows that the only available inference from the text, context, and purpose of the proportionate liability regimes is that the Commonwealth and South

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**369** See also *International Arbitration Act 1974* (Cth), s 24; *Commercial Arbitration Act 2010* (NSW), s 27C; *Commercial Arbitration Act 2011* (Tas), s 27C; *Commercial Arbitration Act 2011* (Vic), s 27C; *Commercial Arbitration Act 2012* (WA), s 27C; *Commercial Arbitration Act 2013* (Qld), s 27C; *Commercial Arbitration Act 2017* (ACT), s 27C; *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT), s 27C.

**370** Reasons of Gageler CJ at [61]-[62].

Australian Parliaments intended that their legislation would apply in arbitration subject only to the capacity of the parties to agree to the contrary.<sup>371</sup>

366 For these reasons, the appeal is not to be determined on the basis that either Pt VIA of the CCA or the Law Reform Act evinces a statutory intention that the legislation is not to apply in an arbitration if a party claiming damages is unable to join all potential concurrent wrongdoers in the arbitration. More relevantly, the application of that legislation in an arbitration insofar as it can apply does not give rise to any conflict with the public policy of South Australia.

### **Contractual intention**

367 Nothing in the text, context, or commercial purpose of the contract supports Pascale's argument that the objectively ascertainable intention of Pascale and Tesseract at the time of entry into the contract was that the arbitrator would determine a dispute between them arising in connection with the contract by applying, to the extent relevant, the law of the Commonwealth and the law of South Australia but, in both cases, excluding the proportionate liability regimes of the Commonwealth and of South Australia.

368 An agreement to arbitrate disputes should be liberally construed on the basis that parties who have agreed to arbitrate are "unlikely to have intended that different disputes should be resolved before different tribunals".<sup>372</sup> Avoiding fragmentation of an arbitrable dispute to the extent of the involvement in the dispute of a non-party does not provide a good reason to adopt a narrow construction of an otherwise amply expressed arbitration agreement.<sup>373</sup>

369 First, arbitration agreements are liberally construed to ensure that full effect is given to the contractual intention of the parties, who have entered into an arbitration agreement to resolve all disputes between them in arbitration. In the world of modern commerce, a dispute between the parties to an arbitration

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371 *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 at 549-550 [14]-[17].

372 *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160 at 165. See also *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 at 87-88 [164]-[165].

373 cf *Paharpur Cooling Towers Ltd v Paramount (WA) Ltd* [2008] WASCA 110 at [42]-[48]; *Aquagenics Pty Ltd v Break O'Day Council* (2010) 20 Tas R 239 at 253-255 [27]-[33], 272-273 [90]-[93]; *Curtin University of Technology v Woods Bagot Pty Ltd* [2012] WASC 449 at [62]. See also *John Holland Pty Ltd v Kellogg Brown & Root Pty Ltd* [2015] NSWSC 451 at [73]-[89].

agreement may well encompass disputes with non-parties. The appropriate liberal construction of the scope of an arbitration agreement is not to be abandoned merely by reason of a routine commercial likelihood of the dispute also extending to non-parties.

370 Second, and as observed by Hammerschlag J in *John Holland Pty Ltd v Kellogg Brown & Root Pty Ltd*,<sup>374</sup> the abandonment of the liberal construction of the scope of an arbitration agreement apparent in some cases<sup>375</sup> results from hindsight about the actual dispute which has arisen involving non-parties (that is, by reasoning backward), which is impermissible.<sup>376</sup>

371 Third, the involvement of a non-party in a dispute within the scope of an arbitration agreement between two or more parties merely gives those two or more parties another choice. Their choice is either to resolve all rights between them as parties to the arbitration agreement in accordance with the rules of law they are taken to have chosen to apply in the arbitration or, alternatively, to agree that the arbitration agreement should not apply to the dispute because of the inability to join the non-parties and their relevance to the dispute. Pascale, however, wants to have its cake and to eat it too. Pascale wants to have its dispute with Tesseract resolved in an arbitration in which, by reason of the mere agreement to arbitrate, the rules of law that would ordinarily apply to limit Pascale's "rights" as against Tesseract and Tesseract's "liability" to Pascale would not apply.

372 That Pascale and Tesseract are the parties to the contract, and, thereby, the arbitration agreement, does not mean that Pascale and Tesseract are to be taken to have agreed that any arbitration between them would exclude the otherwise applicable proportionate liability regimes. Pascale's contrary argument assumes that, in entering into an arbitration agreement confined to disputes between them, Pascale and Tesseract agreed further that the arbitration would determine their respective rights and liabilities as if the acts or omissions of any other person could not be relevant to those rights and liabilities. That assumption is untenable.

373 In the ordinary course, an agreement to arbitrate is taken only to "give the arbitrator authority to provide the claimant with the relief available to it in a court

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374 [2015] NSWSC 451.

375 See fn 373.

376 *John Holland Pty Ltd v Kellogg Brown & Root Pty Ltd* [2015] NSWSC 451 at [82]-[84].

of law of competent jurisdiction dealing with the dispute".<sup>377</sup> If Pascale's argument is correct, Pascale would be able to obtain from an arbitrator far more extensive relief than it would be able to obtain from a court of law of competent jurisdiction dealing with the dispute. An agreement between parties to give an arbitrator authority of that kind would not readily be inferred from a mere agreement to arbitrate given that it would be both contrary to the law of the land and significantly different from the relief available to a claimant in a court.

374 Pascale's argument also overlooks the fundamental difference between an arbitrator not being able to give a party all the relief that the party might obtain from a court and an arbitrator being able to give a party relief that it could never obtain in a court. The former involves nothing more than the law of the land not being amenable to application in an arbitration. The latter involves rewriting the law of the land. If parties wish to rewrite the law of the land for an arbitration in respect of arbitrable subject-matter then, subject to any conflict with applicable public policy, they may do so. In the ordinary course, however, Pascale's "rights" and Tesseract's "liabilities" do not stand free from the proportionate liability regimes forming part of the law of the land. It would not be inferred that parties intended to rewrite the law of the land and to create different "rights" and "liabilities" between themselves by doing nothing more than agreeing that a dispute between them arising from a contract was to be referred to arbitration. A reasonably clear expression of intention to modify the law of the land would be required.

375 Pascale's submission that the parties to an arbitration agreement are aware of the limits of arbitration works against it in this appeal. It would be odd to attribute to parties a knowledge of the law of the land sufficient to support the existence of an inferred objective intention between them that the proportionate liability regimes which would otherwise dictate their rights and liabilities against each other would not apply in an arbitration.<sup>378</sup> Rather, the limitation the parties would be taken to accept in the ordinary course is that, to the extent either or both of them have rights against non-parties, they will not be resolved in the arbitration between them, unless the non-party agrees to participate in the arbitration or an order for consolidation of arbitration proceedings involving the non-party can be and is made.

376 The proposed contractual intention becomes even more dubious in this case once it is acknowledged that, while the contract is between Pascale and Tesseract

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377 *IBM Australia Ltd v National Distribution Services Ltd* (1991) 22 NSWLR 466 at 481.

378 See, by analogy, *Mastrobuono v Shearson Lehman Hutton Inc* (1995) 514 US 52 at 63.

alone, the Works contemplated by the contract involved multiple parties with different but interacting responsibilities. In providing the Consulting Work, moreover, Tesseract was contractually bound to cooperate with all other personnel involved in the Works and to comply with numerous requirements defined by reference to the work of people other than Tesseract.

377 In these circumstances, it approaches commercial nonsense to infer that, merely by entering into an arbitration agreement in respect of disputes between them in connection with their contract, Pascale and Tesseract agreed that Tesseract would be liable for 100 percent of any loss of Pascale caused by harm for which Tesseract was only responsible in part. If Pascale and Tesseract had intended their dispute to be so determined in arbitration, considerably more than their mere agreement to arbitrate all disputes arising in connection with the contract would have been required to embody that intention.

378 Insofar as a statement of Lord Hoffmann in *Fiona Trust & Holding Corporation v Privalov*<sup>379</sup> was the subject of the further submissions the Court requested, the relevant issue in that case was whether the arbitration clause covered a dispute about the validity of one party's rescission of the contract on account of the contract having allegedly been procured through bribery.<sup>380</sup> In that context, Lord Hoffmann posed the question: "[c]ould [the parties] have intended that the question of whether the contract was repudiated should be decided by arbitration but the question of whether it was induced by misrepresentation should be decided by a court?"<sup>381</sup> It was that question Lord Hoffmann answered in the negative, saying that "the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. As Longmore LJ remarked [below in the Court of Appeal]: '[i]f any businessman did want to exclude disputes about the validity of a contract, it would be comparatively easy to say so.'"<sup>382</sup>

379 Section 28(1) of the Domestic Arbitration Act – in referring to "such rules of law as are chosen by the parties as applicable to the substance of the dispute" –

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379 [2007] 4 All ER 951.

380 [2007] 4 All ER 951 at 955 [2].

381 [2007] 4 All ER 951 at 957 [7].

382 [2007] 4 All ER 951 at 958 [13].

contemplates a capacity for parties to choose those applicable rules (albeit, as discussed, subject to any such choice rendering the dispute non-arbitrable or the award being in conflict with or contrary to applicable public policy). Given this, it cannot be assumed that a common contractual intention between parties that all disputes between them be resolved in arbitration carries with it a further common contractual intention between those parties that the substance of the dispute between them would not be resolved in arbitration in accordance with the substantive provisions of any otherwise applicable proportionate liability regimes.

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As a contract is an agreement between at least two parties, a common intention will only be common if it is properly attributable to all parties. The validity of the attribution of the further common intention identified above, by reason of nothing more than an agreement of parties to arbitrate their disputes and their assumed or inferred common intention to resolve all disputes between them in arbitration, can be tested in the following way. If party A suffers loss by the wrongs of two or more other parties (party B and party C) and party A has agreed with only, say, party B and not party C to submit disputes to arbitration, and the proportionate liability regimes do not apply in the arbitration, party A may obtain full recovery from party B in the arbitration. The burden then would be on party B to seek contribution from party C in a court proceeding. If, however, the proportionate liability regimes apply in the arbitration, the effect would be to place the burden of seeking recovery of the balance of the loss on party A rather than party B. From the perspective of party A, the effect of the proportionate liability regimes applying in an arbitration is that only its dispute with party B (with whom it has entered into an arbitration agreement) is able to be fully resolved in the arbitration in accordance with the law of the land, whereas its dispute with party C (with whom it has not entered into an arbitration agreement) may only be resolved in a court proceeding. However, from the perspective of party B, if the proportionate liability regimes do not apply in the arbitration, its rights against party A to have the dispute between them resolved in the arbitration in accordance with the law of the land are curtailed. And, either way, subject to subsequent agreement with party C, one or other party to the arbitration agreement is left to seek contribution or recovery in a court. In these circumstances, where there is nothing more than an agreement that disputes between party A and party B be subject to arbitration, there is no foundation for attributing to party A and party B a common intention that the arbitration between them exclude any otherwise applicable proportionate liability regimes, enabling party A to recover more from party B than party B would be liable for under the law of the land. That is, more than a mere agreement to arbitrate all disputes between the parties to an arbitration agreement is required to support an inference of a common intention that otherwise applicable proportionate liability regimes not apply in an arbitration.



381 Accordingly, even if the presumption which Lord Hoffmann identified in *Fiona Trust* were to be adopted in Australia,<sup>383</sup> it would not operate to support an inference of a mutual contractual intention to exclude the proportionate liability regimes from an arbitration to be conducted in accordance with the laws of South Australia.

### **The position of non-parties**

382 Section 87CD(1) of the CCA and s 11 of the Law Reform Act apply to any subsequent action (that is, subsequent to the giving of a first judgment or first arbitral award enforceable as a judgment) in accordance with their terms. Those provisions address, to the extent the Parliaments have considered necessary, the risk of conflicting determinations (in arbitration and in a court).<sup>384</sup>

383 Those provisions also address the risk to non-parties (be it in respect of a proceeding in a court or an arbitration) in the manner the Commonwealth and South Australian Parliaments considered appropriate. That apparent risk arises most acutely in the case of s 11 of the Law Reform Act. By s 11, the "judgment first given" (be it a judgment of a court or an arbitral award that has been recognised by a court) determines the plaintiff's notional damages, the proportionate liability of the parties to that judgment, and the plaintiff's contributory negligence. This means that a wrongdoer who was not a party to the earlier court proceeding or arbitration cannot challenge those matters in any subsequent court proceedings or arbitration. This incapacity, however, applies equally in a court or in an arbitral tribunal. The only difference from the perspective of a non-party is that a non-party aware of their status as a potential wrongdoer exposed to proportionate liability can apply to be joined to a court proceeding and the court can join that person without the existing parties' agreement. In contrast, if a non-party wishes to participate in an arbitration, an arbitral tribunal cannot join that non-party unless the existing parties agree. Throughout Australia a non-party who apprehends that an arbitral award has been procured by, say, fraud or collusion could apply to set aside the award under s 34(2)(b)(ii) of the Domestic Arbitration Act (or its equivalents) or for the court to refuse to recognise or enforce the award under s 36(1)(b)(ii) (or its equivalents). Unlike ss 34(2)(a) and 36(1)(a) (which depend on action by a party), those provisions operate by reference to the condition "if the Court finds". If such an

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383 Which it has not: see *Rinehart v Hancock Prospecting Pty Ltd* (2019) 267 CLR 514 at 527-529 [18]-[25]; *Inghams Enterprises Pty Ltd v Hannigan* (2020) 379 ALR 196 at 212-213 [64]-[66].

384 cf *Curtin University of Technology v Woods Bagot Pty Ltd* [2012] WASC 449 at [85]-[89].

application succeeded, then s 87CD(1) (and s 87CF) of the CCA and s 11 of the Law Reform Act would not be engaged.

### **Conclusion and orders**

384           The Court of Appeal erred in answering the agreed question of law as to whether the proportionate liability regimes apply in the arbitration in the negative. That agreed question of law should have been answered "yes".

385           Accordingly, the orders which should be made are:

- (1)    The appeal be allowed with costs.
- (2)    Set aside order 1 of the orders made by the Court of Appeal of the Supreme Court of South Australia on 21 October 2022 and, in lieu thereof, order that:

The question of law reserved, "[d]oes 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 Domestic Arbitration Act]?", be answered "yes".

