Court of Appeal
Supreme Court

New South Wales

Case Name:	Aircraft Support Industries Pty Ltd v William Hare UAE LLC
Medium Neutral Citation:	[2015] NSWCA 229
Hearing Date(s):	4 May 2015
Date of Orders:	11 August 2015
Decision Date:	11 August 2015
Before:	Bathurst CJ at [1]; Beazley P at [64]; Sackville AJA at [65]
Decision:	Appeal dismissed. The appellant pay the respondent's costs of the appeal.
Catchwords:	ARBITRATION – international commercial arbitration – enforcement of foreign award under the International Arbitration Act 1974 (Cth) s 8 – breach of rules of natural justice – severance – partial enforcement of award – whether part of the award was incapable of severance such that no part should be enforced
Legislation Cited:	Arbitration Act 1996 (UK) International Arbitration Act 1974 (Cth) International Arbitration Amendment Bill 2010 (Cth)
Cases Cited:	ACN 006 397 413 Pty Ltd v International Movie Group (Canada) Inc [1997] 2 VR 31 Bremer Handelsgesellschaft mbH v Westzucker GmbH (No 2) (1981) 2 Lloyd's LR 130 Dranichnikov v Minister for Immigration & Multicultural Affairs [2003] HCA 26; 177 ALR 389 Evans v National Pool Equipment (1972) 2 NSWLR 410 Gordian Runoff Ltd v Westport Insurance Corporation [2010] NSWCA 57; 267 ALR 74 J.J. Agro Industries (P) Ltd (a firm) v Texuna

	International Ltd [1992] 2 HKLR 391 Nigerian National Petroleum Corporation v IPCO (Nigeria) Ltd (No 2) (2009) 1 Lloyd's Rep 89 Rodger v De Gelder [2015] NSWCA 211 TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd [2014] FCAFC 83; 311 ALR 307 Westport Insurance Corporation v Gordian Runoff Ltd [2011] HCA 37; 244 CLR 239 William Hare UAE LLC v Aircraft Support Industries Pty Ltd [2014] NSWSC 1403
Texts Cited:	Francis Russell, Edward Pollock and Herbert Russell, A Treatise on the Power and Duty of an Arbitrator: and The Law of Submissions and Awards (8th ed 1900, Stevens)
Category:	Principal judgment
Parties:	Aircraft Support Industries Pty Limited (Appellant) William Hare UAE LLC (Respondent)
Representation:	Counsel: BW Rayment QC / DT Kell (Appellant) JA Hogan-Doran / Q Rares (Respondent) Solicitors: Tomaras Lawyers (Appellant) Minter Ellison (Respondent)
File Number(s):	2014/332648
Decision under appeal:	
Court or Tribunal:	Supreme Court of New South Wales
Jurisdiction:	Equity Division – Commercial List
Citation:	2014/170094
Date of Decision:	14 October 2014
Before:	Darke J
File Number(s):	2014/170094

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

HEADNOTE

[This headnote is not to be read as part of the judgment]

On 18 December 2009, Aircraft Support Industries Pty Ltd (Aircraft Support) entered into a subcontract with William Hare UAE LLC (Hare) for Hare to perform construction work at Abu Dhabi airport. A dispute arose as to the final amount due and the payment of retention monies. On 10 May 2011, an officer of Aircraft Support executed a letter which was provided to Hare. It was accepted that this letter was a corrected version of a letter executed on behalf of both parties. The letter confirmed a final account sum in respect of full and final settlement of the construction works. The letter stated the amount that had been paid to date and confirmed an amount to be released for payment. The letter also stated that it was agreed that two releases of retention monies would be made, one of USD 797,500 within 30 days of the agreement, and another of USD 797,500 in January 2012. The first retention amount was paid in May 2012 but the second amount was not paid.

On 24 October 2012, Hare referred the matter to arbitration, claiming the second retention amount of USD 797,500 together with a further $50,000 said to be in respect of a discount granted by it in its final account. On 1 May 2014, an arbitral tribunal awarded a final award in respect of each of these amounts to Hare, together with interest and costs. Hare applied to the Supreme Court for an order enforcing the award pursuant to s 8(2) of the *International Arbitration Act 1974* (Cth) (the Act).

The trial judge ordered that the award be enforced to the extent that it related to the retention monies and interest payable thereon. However, he declined to enforce the award so far as it related to the discount of $50,000 as he held that the award of this amount constituted a failure to provide natural justice to Aircraft Support.

Aircraft Support appealed against the orders of the primary judge, raising two issues. The first was whether there was a denial of natural justice in the making of the award of the retention monies, such that even if severance was possible, that part of the award should not have been enforced. Aircraft Support submitted that its principal defence was that the 2011 letter had to be a variation to the subcontract, or it had no legal effect, and that it was not a variation because of its terms and manner of execution. It submitted that the arbitrators did not deal with this issue.

The second issue was whether, even assuming that there was no denial of natural justice in respect of making the award for the retention monies, this part of the award was incapable of severance, with the consequence that no part of it should be enforced because of the denial of natural justice in respect of the $50,000 claim. Aircraft Support submitted that as s 8(6) of the Act dealt with the circumstances in which an award could be severed, this impliedly precluded severance in other circumstances. It submitted that s 8(7) made no provision for partial enforcement, demonstrating that partial severance was unavailable. It also submitted that s 8(7A) contained a legislative declaration that where a denial of natural justice occurs in connection with the making of an award, the enforcement of the award is contrary to public policy.

The Court (Bathurst CJ, Beazley P and Sackville AJA agreeing) held, dismissing the appeal:

Issue 1: Whether there was a denial of natural justice in the making of the award in respect of the retention monies

(i) In the context of international arbitration, it is necessary to show real practical unfairness and real practical injustice to the party resisting enforcement in order to decline to enforce an award under s 8(7A) of the Act or article 36 of the UNCITRAL Model Law by reason of a breach of the rules of natural justice. In this area, the concern of the law is to avoid practical injustice. ([42]-[43] (Bathurst CJ); [64] (Beazley P); [65] (Sackville AJA))

TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd [2014] FCAFC 83; 311 ALR 307, *Rodger v De Gelder* [2015] NSWCA 211, applied.

(ii) There was no denial of natural justice in the making of the award in respect of the retention monies as no attempt was made to demonstrate practical unfairness or injustice. Further, there was no failure by the arbitrators to respond to a clearly articulated argument as neither the pleadings nor the opening or closing submissions provided any argument in support of the issue raised. The obligation to give reasons did not extend to require arbitrators to deal with mere assertions which were unsupported by argument and apparently abandoned at the close of the case. ([44]-[46] (Bathurst CJ); [64] (Beazley P); [65] (Sackville AJA))

(iii) There was no denial of natural justice by the arbitrators failing to give adequate reasons for their award as the arbitrators set out the competing contentions, dealt with the oral evidence, gave reasons why an agreement was reached on 11 May 2011 and how subsequent conduct supported that conclusion. ([50] (Bathurst CJ); [64] (Beazley P); [65] (Sackville AJA))

Bremer Handelsgesellschaft mbH v Westzucker GmbH (No 2) (1981) 2 Lloyd's LR 130, *Gordian Runoff Ltd v Westport Insurance Corporation* [2010] NSWCA 57; 267 ALR 74, applied.

Westport Insurance Corporation v Gordian Runoff Ltd [2011] HCA 37; 244 CLR 239, considered.

Issue 2: Whether the award in respect of the retention monies was capable of severance

(i) In general, an arbitral award which is void in part is not void altogether if the void portion is clearly separate and divisible. In such a case, the residue can be enforced. Section 8(7A) of the Act did not impose any restriction on the circumstances in which an award could be severed. Accordingly, the Court had power to partially enforce the award. ([57], [60] (Bathurst CJ); [64] (Beazley P); [65] (Sackville AJA))

Evans v National Pool Equipment (1972) 2 NSWLR 410, *ACN 006 397 413 Pty Ltd v International Movie Group (Canada) Inc* [1997] 2 VR 31, *J.J. Agro Industries (P) Ltd (a firm) v Texuna International Ltd* [1992] 2 HKLR 391,

Nigerian National Petroleum Corporation v IPCO (Nigeria) Ltd (No 2) (2009) 1 Lloyd's Rep 89, applied.

JUDGMENT

1 **BATHURST CJ:** This is an appeal from orders made by a judge of the Equity Division of the Court enforcing in part an arbitral award made against the appellant, Aircraft Support Industries Pty Ltd (Aircraft Support), an Australian corporation, in favour of the respondent, William Hare UAE LLC (Hare), a company incorporated under the laws of Abu Dhabi in the United Arab Emirates. The primary judge ordered that judgment be entered in favour of Hare in the sum of US $1,481,678.42, with interest payable at 9% per annum on so much of the judgment as from time to time remained unpaid.

Background

2 On 18 December 2009, Aircraft Support entered into a subcontract with Hare for Hare to perform certain construction work at Abu Dhabi International Airport (the subcontract). The subcontract was stated to be governed by the laws of the United Arab Emirates.

3 A dispute arose between the parties as to the final amount due and the payment of retention monies. Ultimately, on 10 May 2011, an officer of Aircraft Support executed a letter which was provided to Hare (the 2011 letter). The primary judge found, and it was not disputed that, the 2011 letter was a corrected version of a letter of the same date executed on behalf of both parties. The 2011 letter was in the following terms:

> "RE: ADAT Hanger 6 - Final Account
>
> We write to confirm agreement to the Final Account Sum of USD 15,950,000 in respect of full and final settlement of all subcontract works undertaken by William Hare on the above project, including all variations claimed 1-105 and labour and plant provision to ASI for the roof lifting works.
>
> Total payment made to date is in the sum of USD 13,702,814.41 (incl. USD 3,274,876.94 paid direct by ADAT), and confirm a payment in the sum of USD 652,185.59 for the balance of the measured works has been released for payment with immediate effect.
>
> Retention monies will be released as agreed:
>
> ½ retention release within 30 days of this agreement (on or before 7th June 2011) in the sum of USD 797,500.00

> final release of retention on completion of the defects liability period scheduled for 31st January 2012 in the sum of USD 797,500.00
>
> We trust the above to be satisfactory in regards of the agreements made."

4 The first retention amount of $797,500 was in fact paid on 29 May 2012. The second amount of $797,500 was not paid.

5 On 24 October 2012, Hare referred the matter to arbitration, claiming the second retention release of $797,500 together with a further $50,000 said to be in respect of a discount granted by it in its final account. On 1 May 2014, an arbitral tribunal awarded a final arbitration award in respect of each of these amounts to Hare, together with interest and costs.

6 Hare applied to the Supreme Court for an order enforcing the award pursuant to s 8(2) of the *International Arbitration Act 1974* (Cth) (the Act).

7 The primary judge, in *William Hare UAE LLC v Aircraft Support Industries Pty Ltd* [2014] NSWSC 1403 (Trial Judgment), ordered that the award be enforced to the extent that it related to the retention monies and interest payable thereon. However, he declined to enforce the award so far as it related to the discount of $50,000. The trial judge, referring to the pleadings, said that the claim for this amount ought reasonably to have been treated as no longer pressed and that if the Tribunal proposed to make an order for payment of that amount, it should have given notice to the parties and invited them to address the issue. He held that a failure to do so constituted a failure to provide natural justice to Aircraft Support. However, he held that the balance of the award could be severed and enforced.

8 Aircraft Support appealed against the orders made by the primary judge, raising two issues. The first was whether there was a denial of natural justice in the making of the award of the retention monies, such that even if severance was possible, that part of the award should not have been enforced. This issue was the subject of the following grounds of appeal:

> "3 His Honour erred in failing to find that the tribunal failed to deal with the appellant's contention that unless the letter of 10 May 2011 which comprised the alleged agreement the subject of the arbitration dispute (Letter Agreement), was a formally executed variation of the Subcontract Agreement entered between the parties on 18 December 2009 (Subcontract), it was of no legal effect, as there could not be two separate and inconsistent contracts in

existence, merely accepting the respondent's submission that the Letter Agreement constituted a binding standalone agreement.

4 His Honour erred in finding that there has been no breach of the rules of natural justice in respect of the tribunal's decision that the Letter Agreement was a binding standalone agreement, without determining the appellant's contention that there had been no valid variation of the Subcontract between the parties.

5 His Honour erred in failing to find that the tribunal gave no reasons for the rejection of the defence that the Letter Agreement did not, and could not, vary the Subcontract, and that the tribunal's failure to give any such reasons resulted in a breach of the rules of natural justice.

6 His Honour erred in failing to find that the tribunal failed to give reasons for its decision that the Letter Agreement constituted a binding agreement, and that such agreement and the Subcontract were part of the same process, and that the tribunal's failure to give any such reasons resulted in a breach of the rules of natural justice.

7 His Honour erred in concluding that there no unfairness or practical injustice to the appellant in the manner in which the tribunal dealt with the Letter Agreement aspect of the case."

9 The second issue was whether, even assuming that there was no denial of natural justice in the making of the award for the retention monies, this part of the award was incapable of severance, with the consequence that no part of it should be enforced because of the denial of natural justice in respect of the $50,000 claim. This issue was the subject of the following grounds of appeal:

"17 His Honour erred in concluding that the analogous United Kingdom legislation under consideration in the Court of Appeal's decision in *Nigerian National Petroleum Corporation v IPCO (Nigeria) Ltd (No. 2)* [2008] EWCA Civ 1157; (2009) 1 Lloyds Rep 89, and the provisions of the Hong Kong legislation under consideration in the *J J Agro Industries (P) Ltd v Texuna International Ltd* [1992] 2 HKLR 391, closely resemble the provisions of s 8 of the Act, and in failing to distinguish those cases on the basis that neither the United Kingdom legislation nor the Hong Kong legislation contained like provisions to those in s 8(7A) the Act.

18 His Honour erred in failing to hold that as a matter of statutory construction the references to 'award' in s 8 of the Act did not extend to part of an award.

19 His Honour erred in holding that s 8 should be construed so as to allow enforcement (pursuant to s 8(2) and s 8(3)) of a part of an award, where severance of the award is possible.

20 His Honour erred in failing to find that severance should not be allowed because the arbitral proceedings were fundamentally flawed in that the appellant was denied a fair hearing, and the opportunity to present its case in respect of an important matter which, on the respondent's case as determined by the tribunal, was a key element to the alleged agreement comprised in the Letter Agreement, which flaw affects the entire Award which derived from the process."

10 To understand the reasoning of the primary judge and the submissions of the parties, it is necessary to consider the course of the arbitration and the award in more detail.

The arbitration

(i) The subcontract and the terms of reference to the arbitration

11 Clause 19.1 of the subcontract provided for disputes to be settled by arbitration. It was in the following terms:

> "19.1 Amicable Settlement and Arbitration
>
> The Parties shall endeavour to settle by good faith negotiation any dispute, difference, controversy or claim of any kind arising between them out of or in connection with this Agreement.
>
> In case of failure to settle the dispute, difference, controversy or claim by such negotiation within thirty (30) days or such other period as the Parties may agree, the claimant may notify the other Party of its intention to submit the dispute to arbitration. The arbitration shall be heard before three arbitrators. Each of the parties hereto shall appoint one arbitrator with the remaining third arbitrator to be chosen by agreement of the two arbitrators previously chosen. If either party fails to appoint its arbitrator or the two arbitrators are not able to agree on the person of the third arbitrator within 30 days from the date the last of the two was appointed, then either parry may approach the Abu Dhabi Chamber of Commerce and Industry (ADCCI) and request that the other party's arbitrator or the third arbitrator, as the case may be shall be appointed by the Chairman of the ADCCI. All aspects of such arbitration shall be governed by the regulations of ADCCI in force at such time. All arbitration proceedings are to take place in Abu Dhabi in the English language. The decision of such arbitration shall be final and binding upon the parties hereto without appeal to any court or other party. Pending the decision or award, the parties shall continue to perform their obligations under this Agreement. The provisions of this Agreement relating to arbitration shall continue in force notwithstanding the termination of this Agreement."

12 On 8 May 2013, the parties agreed, pursuant to article 36 of the Charter and Regulation of Abu Dhabi Commercial Conciliation and Arbitration Centre, to the Terms of Reference and Arbitration Agreement for the arbitration (terms of reference). Relevantly, cl 4.20.3 of the terms of reference provided for the arbitral tribunal to state the facts, legal grounds and the evidence upon which any award made by it was based.

13 Schedule 4 of the terms of reference contained a summary of the claim made by Hare. Relevantly, it was in the following terms:

> "1.2.5 In early 2011, the Parties entered negotiations concerning the value of the final account in relation to the Works. As a result of these discussions, the Parties reached an agreement as to the final account sum (USD 15,950,000)

and the specific dates the retention was to be repaid. The Claimant agreed to discount the final account sum by appropriately USD 50,000."

14 Schedule 5 of the terms of reference contained a summary of Aircraft Support's defence. In relation to the 2011 letter, it stated as follows:

> "1 The parties are still bound by the terms and conditions of the formal agreement entered into on 18 December 2009."
>
> "8 The alleged 2011 agreement was at best an expression of a negotiating position taken at that time as part of an ongoing negotiation dynamic between the parties and they had not at that time finished their negotiations toward an agreement about the final payment due under the formal contract."

(ii) The pleadings

15 The parties filed pleadings in the arbitration. Paragraphs 8.1 to 8.5 of the Statement of Claim filed by Hare pleaded an oral agreement reached at a meeting of 10 May 2011. Paragraphs 8.6 to 9.0 pleaded what was described as the letter agreements. These paragraphs were in the following terms:

> "8.1 On 10 May 2011, at approximately midday, Mr Moss, Mr Langbein and Mr Haslam attended a meeting at Mr Haslam's office to discuss William Hare's Final Account and the final amount of the retention sum that was due to be paid to William Hare.
>
> 8.2 The attendees did not review and discuss the Final Account in detail as this had already been done by the parties' respective project teams. The discussions centred on agreeing the Final Account.
>
> 8.3 Nigel Moss agreed to settle the Final Account at USD $15.95 million on the condition that:
>
> (a) the final outstanding payment for the measured works would be paid immediately;
>
> (b) the first half of the retention sum would be paid by 7 June 2011; and
>
> (c) the final half of the retention sum would be paid at the end of the defects liability period, 31 January 2012.
>
> 8.4 Mr Moss's offer was USD $50,000 less than the sum William Hare had previously indicated to ASI it would settle the Final Account at. However, Mr Moss was willing to offer this reduction on the basis that ASI would guarantee payment of the outstanding retention sum and fix specific dates for the release of the outstanding two retention payments.
>
> 8.5 William Hare's offer was agreed between the Parties and both Mr Moss and Mr Langbein, the two respective Managing Directors, shook hands on this agreement.
>
> <u>The Letter Agreements</u>
>
> 8.6 As a result of this agreement, Mr Haslam was instructed by Mr Langbein to type up a letter of agreement during the meeting. The letter sets out the agreement that had been made in the meeting. The letter confirmed:

‘*the Final Account Sum of USD 15,950,000 in respect of full and final settlement of all subcontract works undertaken by William Hare on the above project, including all variations claimed 1-105 and labour and plant provision to ASI for the roof lifting works…..*

Retention monies will be released as agreed:

> *½ retention release within 30 days of this agreement (on or before 7 June 2011) in the sum of USD 794,274.89*
>
> *Final release of retention on completion of the defects liability period scheduled for 31 January 2012 in the sum of USD 794,274.89.’*

8.7 The letter of agreement was signed by both Mr Rob Haslam of ASI and Mr Nigel Moss of William Hare in front of Mr Mark Langbein. Mr Moss confirms that he was not concerned that Mr Haslam was signing the letter as Mr Haslam had previously dealt with the monthly payments that had been paid to William Hare and the agreement was reached and signed in front of Mr Langbein himself. Mr Haslam is also listed in the Subcontract (section A7) as the ‘Commercial Manager’ for the Project and performed that role throughout the Project.

8.8 Following the meeting and on his return to William Hare’s office, Mr Moss received a phone call from Mr Haslam. Mr Haslam confirmed to Mr Moss that, when typing the letter of agreement in the meeting, he had made an arithmetical error. He confirmed to Mr Moss that he wished to send an amended letter of agreement which confirmed the correct payment sum of USD $652,185.50 to be released to William Hare (as opposed to USD $594,133.65 contained in the first letter of agreement) and correct retention payments of USD $797,500.

8.9 Mr Haslam sent Mr Moss an email later in the day, at 4.13pm, confirming ‘*…apologies for the confusion! See attached revised Final Account letter as agreed. The numbers should add up this time!’* As the email suggests, attached to the email was an amended letter of agreement from ASI to William Hare, dated 10 May 2011 and signed by Mr Haslam (the ‘Final Letter Agreement’) which confirmed the final account sum was agreed and fixed at USD $15.95 million in full and final settlement of all Subcontract work (including variations) and the retention sum was fixed at USD $1.595 million (i.e. 20% of the Final Account). Paragraph 3 of the Final Letter Agreement states that ‘*retention monies will be released as agreed:*

> *½ retention release within 30 days of this agreement (on or before 7 June 2011) in the sum of USD 797,500.00*
>
> *Final release of retention on completion of the defects liability period scheduled for 31 January 2012 in the sum of USD 797,500’.*

8.10 The Final Letter Agreement sets out the agreement that was finalised between Mr Moss and Mr Langbein during the 10 May meeting. In consideration for ASI agreeing specific dates for the release of the final payment and the retention sum, William Hare agreed the final account sum at USD $15.95 million.”

[internal citations omitted]

16 In its defence, Aircraft Support effectively pleaded that what took place could not amount to an agreement varying the subcontract. This appears from par 15 of the Defence, which relevantly pleaded as follows:

> "15.1 The contractual structure set out above is detailed and complex. It was entered into after due deliberation by the principal officers of the two companies involved. At no time has there been any formal agreement to vary or modify the contractual terms set out above, or any of them.
>
> …
>
> 15.5 The suggestion of such a modification of the formal agreement are [sic] set out in clause 7 of the Statement of Claim flies in the face of the evidence of ASI as to resolve and outstanding issues between the parties.
>
> …
>
> 15.6.1 *clause 7.3:* the subcontract did not provide for William here [sic] to submit a final account valuation. There was no agreement between the parties to vary the conditions of clause 16.5, which require the contractor (ASI) to prepare the 'final account' valuation. Therefore, the documents submitted or allegedly submitted by William Hare is irrelevant. Likewise, whatever review undertaken by ASI as alleged concerning this document cannot be relevant. These documents may have been part of an informal negotiation process, undertaken prior to the triggering of clause 16.5 but their content cannot bind either party.
>
> …
>
> 15.7 *Clause 8.1:* The meeting referred to in relation to clause 8 should be viewed in the context of what has been stated in clause 15.6 above, that these discussions were a preliminary to the formal preparation by ASI of the valuation contemplated by clause 16.5. William Hare has misrepresented the nature of the document which they prepared at the meeting of 10 May, 2011. It did not and could not amount to an agreement under the provisions of the subcontract in relation to the payment of the final subcontract price. Mark Langbein was not attending the meeting. He was present only for a short period at the commencement of the meeting and did not take part in any of its discussions. His evidence is that, had he known that William Hare thought that it was a meeting to sign off on a valuation as contemplated by the contract, he would have adjourned the meeting until all of the issues which ASI raised in the past had been properly set out and ventilated."

17 The reference to cl 16.5 was a reference to cl 16.5 of the subcontract, which provided for the payment of the subcontract price. It was in the following terms:

> "16.5 <u>Payment of Subcontract Price and Other Sums Due</u>
>
> Payment will be made based on the valuation mutually agreed & prepared by the Contractor."

18 The proposition thus seems to be that it was a precondition to payment that Aircraft Support prepare a valuation of the work which was to be mutually agreed upon. It is by no means clear from the Defence why Aircraft Support

asserted that this prevented the parties from separately agreeing to settle their outstanding claims.

19 In par 2 of the Statement of Reply filed by Hare, Hare emphasised that it was relying on a standalone agreement, rather than a variation to the subcontract. Relevantly, this paragraph was as follows:

> "2.1 The Respondent appears to have misunderstood the Claimant's claim. The Respondent incorrectly summarises the Claimant's claim as being that the Parties '*entered into a variation of the Subcontract Agreement under which* [the Respondent] *became liable to pay* [the Claimant] *the sum of US dollar 797,500.'* The Respondent also states that the Claimant '*has not established under law that the* [provisions of the Subcontract Agreement] *have been varied or modified.'*
>
> 2.2 For the avoidance of doubt, and to clarify the Respondent's misunderstanding of this claim, the Claimant does not seek to argue that the terms of the Subcontract Agreement have been varied or modified. Rather, the Claimant submits that the Parties entered into a settlement agreement on 10 May 2011 (the 'Final Letter Agreement') in which the Respondent agreed to pay the Claimant, in full and final settlement of works carried out by the Claimant:
>
> (a) USD 652,185.59 immediately ('Final Payment');
>
> (b) half of the retention release within 30 days of the agreement (i.e. by 7 June 2011) in the sum of USD 797,500.00 ('First Retention Payment');
>
> (c) the final release of the retention on 31 January 2012 in the sum of USD 797,500.00 ('Second Retention Payment').
>
> 2.3 It is the Claimant's case that the Final Letter Agreement is a standalone agreement, separate from the Subcontract Agreement, and is enforceable in its own right. The terms of the Final Letter Agreement are clear, unambiguous and enforceable. This arbitration relates to the terms of the Final Letter Agreement and not to the terms of the Subcontract Agreement."

20 Aircraft Support filed a Statement of Rejoinder which made the following assertions:

> "4. As to paragraph 2.2, the respondent says that the only means whereby any purported agreement between the parties could have been entered into, or could be construed to have been entered into, from the event on or about 10 May 2011, is a matter of Law.
>
> 5. The Arbitration can determine that the initial agreement between the parties has been subject to a formal variation.
>
> …
>
> 9. As to paragraph 2.3, it is something not possible as a matter of law to vary a formal written contract by use of a letter between an authorised representative of the parties in the manner outlined by the applicant.

> 10. On the best construction of the contract that could possibly be given to the terms of this letter, it cannot operate except as an expression of the party's intentions at a stage in the negotiation process."
>
> [internal citations omitted]

21 The position of the parties as it emerged from the pleadings thus seem to be that Hare asserted that liability arose as a result of an agreement reached on 11 May 2011, while Aircraft Support asserted that any subsequent agreement could only arise as a result of a formal variation of cl 16.5 of the subcontract.

(iii) The submissions at the arbitration

22 In its opening submissions, Hare again expressly relied on the 2011 letter as a standalone agreement. Paragraphs 11-13 of these submissions were as follows:

> "11. Article 125 of the UAE Civil Code states:
>
> *'A contract is the coming together of an offer made by one of the contracting parties with the acceptance of the other, together with the agreement of them both in such a manner as to establish the effect thereof on the thing contracted for, and from which results an obligation upon each of them with regard to that which each is bound to do for the other.'*
>
> 12. The Final Letter Agreement was the culmination of lengthy negotiations between the Parties. During the negotiations, which led to the signing of the Final Letter Agreement, both Parties had compromised their respective valuations of the Final Account: the Respondent had increased its valuation from USD 15,885,497.48, and the Claimant reduced its valuation from USD 16,317,054.26, to USD 16,000,000. During the 10 May 2011 negotiations, the Claimant offered to accept a further USD 50,000 reduction (USD 15,950,000), in full and final settlement of the account, provided that the Respondent would pay:
>
> (a) the Final Payment immediately;
>
> (b) the First Retention Payment by June 2011; and
>
> (c) the Final Retention Payment by 31 January 2012.
>
> 13. This offer was accepted by the Respondent and, in accordance with Article 125, formed a binding contract. To avoid confusion about the deal struck, the Parties, at the suggestion of Mr Langbein, recorded the agreement in writing in the Final Letter Agreement."
>
> [internal citations omitted]

23 In its opening submissions to the arbitration, Aircraft Support raised the following issues:

> "7. The respondent asserts that the parties are yet to comply with the process to which the parties have agreed in solemn contract pursuant to clause 16.5.
>
> …

> 12 The respondent says that the only means whereby any purported agreement between the parties could have been entered into, or could be construed to have been entered into, from the events on or surrounding 11 May, 2011 is if the initial agreement between the parties has been subject to a formal variation.
>
> 13 The respondent asserts that none of the formalities which the parties could reasonably have anticipated were required to be complied with to achieve such an end were carried out and no such variation of the original agreement was effected.
>
> …
>
> 15 At no time had Mr Langbein, the principal of the respondent, given approval for any formal variation or are there documents evidencing that formal variation of the contract executed by the appropriate representatives of the parties.
>
> 16 The only means whereby the subcontract then could possibly be varied was if the relevant principals who had negotiated an [sic] executed that subcontract entered in a formal manner, whether by way of the variation, or by way of a new contract, into a binding variation of the original agreement.
>
> 17 It is not possible as a matter of law to vary a formal written contract by use of a letter between representatives of the parties not of the same status as those who executed the original agreement. The best construction that could possibly be given to the terms of this letter of 11 May 2011 is that it is an expression of the party's intentions at a stage in the negotiation process.
>
> 18 The meeting of the 'parties' on 11 May 2011 was one of many in the course of meetings to discuss a means of resolving outstanding issues prior to the entry into the formal process under clause 16.5.
>
> …
>
> 33 Informality by way of a letter or a handshake even maybe [sic] appropriate in a simple commercial context, but not here."

24 In its closing submissions to the arbitration, filed on 9 January 2014, Aircraft Support challenged the 2011 letter on a number of grounds. First, it submitted that the person who signed the letter on its behalf, a Mr Robert Haslam, had no authority to do so. Second, it submitted that the 2011 letter was not binding due to the absence of writing. Of particular relevance were pars 110 to 115 of the submissions, which were in the following terms:

> "110. The alleged 'agreement' between the parties, in the form of a 3 paragraph letter from the Respondent's Commercial Manager dated 10 May 2011 may not meet the UAE law requirements for a Contract (and ergo for a Settlement Agreement or Contract Amendment). The letter is signed by only one (1) party (and the signatory does not have authority to contractually bind the Respondent); the subject matter of the letter is 'ADAT Hangar 6 – Final Account' (as opposed to 'Settlement Agreement' or 'Contract Amendment') and there is no reference to a 'claim' or 'dispute' or settlement thereof. The letter appears to be a 'garden variety' final account letter that is often issued by

an employer (or main contractor) at the end of a project – not a separate contract/agreement.

111. The following provisions of the UAE Civil Code regarding contract formation and objectives may be relevant:

Article 129

The necessary elements for the formation of a contract are:

a. Meeting of minds of the contracting parties on the main elements.

b. The object of the contract must be something possible, specified or specifiable, and negotiable.

c. The obligations arising out of the contract must have a licit cause.

Article 199

Every contract must have an object to be added to it.

112. The Respondent submits that it is an implied term of the Subcontract that any variation of it, such as the variation that was purported to be made by the Alleged Agreement, must be in writing and executed by the parties to the Subcontract. The implied term is to be inferred from the following, amongst others:

i. the Subcontract was formally executed, and it expressly states to be executed, by the '*authorized representatives of the parties*' to the Subcontract who, on behalf of the Respondent, was Mr Mark Langbein, the Managing Director of the Respondent;

ii. clause 1.6 of the Conditions of the Subcontract provides that: 'All instructions are to be issued in writing through the Contractor…';

iii. clause 8.2 of the Conditions of the Subcontract provides that: 'All instructions are to be issued in writing through the Contractor…';

iv. clause 9.1 of the Conditions of the Subcontract provides that: 'there shall be no variation to the subcontract works… without the express written permission/Instruction of the Contractor';

v. additional clause A8 that '*The Subcontractor and a witness are required to sign in full on page 4 of this Agreement… and endorse all pages with the company stamp. Thereafter, both copies of [the documents comprising the Agreement] are to be returned to the Contractor who will likewise sign, initial and stamp this Agreement…';* and

vi. condition 1.6 of the Fidic Conditions which are incorporated in the Subcontract provides [sic] that: '*Instruction given by the Contractor shall be in writing…*'.

113. This issue requires review of the facts surrounding the claimed amendment and whether such amendment has been, expressly of tacitly, approved by the principal. In the absence of any express provision that all amendments or modifications to the contract should be in writing, the general rule provided by Article 94 Federal Law No. 18 of 1993 on the Issuance of The Commercial Transactions Law for UAE, is that: '*Unless otherwise provided by law or stipulated in the agreement, commercial obligations of any amount whatsoever may be evidenced by all means of proof".*

114. Notwithstanding the general rule set out in Article 94, Article 2 of The Commercial Transactions Law for UAE states in relevant part:

Article 2

1. Whatever is agreed upon by the contracting parties shall apply to the traders and the commercial works unless such agreement contradicts with a commanding commercial text.

2. Should there be no special agreement available, the rules of commercial convention shall apply to whatever is not provided for in this law or in other laws dealing with commercial matters. Special or local conventions shall have priority over general conventions. If no commercial convention is available, the provisions governing civil matters shall be applied where there is no contradiction with the general principles of commercial activity.

3. Neither the said special agreements nor the rules of commercial convention may be applied if they contradict with public discipline or morals.

115. Thus, the industry custom in the UAE and prior dealings between the parties are important factors in determining whether a contract amendment must be in writing. Without question, the industry custom in the UAE is that significant amendments to a substantial construction contract must be in writing. Also, the parties understood the importance of memorializing their agreements on the project in writing and so any substantial amendments to the subcontract would have been identified as such and reduced to writing."

[internal citations omitted]

25 Thus, the closing submissions did not contend that a formal variation of cl 16.5 of the subcontract was necessary, but rather, that in the circumstances of the present case, it was necessary for the agreement to be in writing.

(iv) The award

26 The final arbitration award was in writing. It set out Hare's contentions in the following terms:

"25.1.9 The Letter Agreement is a Stand Alone Agreement

The Claimant does not argue that the Letter Agreement is a variation to the Contract and that it is simply a settlement agreement which is a standalone agreement and enforceable in its own right and that its terms are clear and unambiguous. The Claimant maintains that the arbitration is about this agreement and not the Subcontract.

25.1.10 Alternatively The Letter Agreement is made pursuant to or is covered by The Subcontract Agreement

The Claimant submits that, in the alternative, the Letter Agreement was made pursuant to or is covered by the Subcontract Agreement."

27 The arbitrators summarised the contentions of Aircraft Support in some detail:

“25.2.1 The Letter Agreement is not in accordance with the Contract Provisions or Binding Because of an Absence of Writing

The Respondent maintains that the alleged Letter Agreement is not a formal agreement to vary or modify the terms of the Contract and that as there were or are outstanding issues under the Contract that no ‘Final Payment’ is due.

The Respondent states that one short meeting does not represent a formal agreement between the Parties to modify their existing written agreement and formal contract agreement, without any formal documentation and particulars and that the Claimant has not established under law that the provisions of the agreement (Contract) have been varied or modified.

The Respondent maintains that under Clause 16.5 of the Subcontract (which under the particular conditions of Subcontract states that ‘*Payment will be made based on the valuation mutually agreed & prepared by the Contractor*’ and that therefore any documents submitted by the Claimant are irrelevant and that therefore any review of these documents by the respondent is similarly irrelevant.

The Respondent further alleges that there was no agreed variation to this procedure and that the Claimant has failed to provide any evidence that the principal of the Respondent agreed to any variation of this procedure.

Mark Langbein states that he did not sign off or authorise any final account because the Final Account had not been provided as per the terms of the Subcontract.

On 19th September 2012, the Respondent (Mr Bush) wrote to the Claimant stating that the purported agreement of was not completed in accordance with the Final Account procedure (Clauses 4.1 and 13.10) in the Main Contract and requested that the Claimant submit their draft Final Statement.

The Respondent states that the alleged ‘agreement’ between the parties, in the form of a 3 paragraph letter from the Respondent’s Commercial Manager dated 10th May 2011 may not meet the UAE law requirements for a Contract.

Reliance is placed on the UAE Civil Code regarding contract formation:

> *Article 129*
>
> *The necessary elements for the formation of a contract are:*
>
> *a. Meeting of minds of the contracting parties on the main elements.*
>
> *b. The object of the contract must be something possible, specified or specifiable, and negotiable.*
>
> *c. The obligations arising out of the contract must have a licit cause.*

The Respondent thus notes that industry custom in the UAE and prior dealings between the parties are important factors in determining whether a contract amendment must be in writing. The industry custom in the UAE is that significant amendments to a substantial construction contract must be in writing.

25.2.2 That the Letter Agreement and Meeting on 10th May did not Represent Mutual Agreement

> The Respondent alleges that the 10th May, 2011 meeting did not involve discussion of an agreement relating to the contended issues between the Parties.
>
> The Respondent maintains that the procedure would have been for the Respondent to produce a valuation document that the Parties then 'mutually agree'. The Respondent maintains that this valuation document did not come into existence until September 2012 and so no mutual agreement can have been made prior to that point in time.
>
> The Respondent alleges, at Para 15.7 of its Defence, that the document prepared for the 10th May 2011 meeting was prepared by the Claimant and that the Claimant has misrepresented its contents and that the meeting was preliminary to the formal preparation of the Clause 16.5 valuation by the Respondent. Paul Brennan at para 27 of his Witness Statement states that a Final Account was never provided by the Claimant and therefore the amount could not be calculated."

28 It should be noted that in dealing with the position of Aircraft Support, the arbitrators particularly referred to the reliance on cl 16.5 in the pleadings, notwithstanding that no reliance was placed on this provision in the closing submissions.

29 The arbitrators expressed their conclusions as follows:

> "25.3.1 The Letter Agreement: - The Tribunal has reviewed the evidence. In its considered view, having deliberated, it concludes that the Letter Agreement is part of the evidential matrix in this arbitration. The dispute between the parties revolves around US $797,500. The resolution of that dispute must be based on evidence, of which the Letter Agreement is a significant part. The evidence of those who gave oral evidence must be weighed in the balance. The 10th May 2011 meeting in the offices of the Respondent is a central part of the case. We accept the evidence put forward for the Claimant concerning this crucial meeting and the consequential production of the Letter Agreement. It is noteworthy that the letter was produced on the Respondent's letterhead, was signed by Robert Haslam of the Respondent, and contained the clear and unambiguous wording 'Retention monies will be released as agreed..'. The agreement was plainly one to release the sum of US $797,500, and we find as a fact that this was the case.
>
> 25.3.2 The law to be applied is that of the UAE. The parties concluded an agreement for the payment of an outstanding amount of money. Such agreement is clearly within the power of the parties.
>
> …
>
> 25.3.4 We accept that Robert Haslam for the Claimant had the authority to agree the Letter Agreement [sic]. Whether such authority was his within his own scope, or because Mark Langbein permitted Robert Haslam to draw up the Letter, does not matter. Robert Haslam had obvious actual and ostensible authority. If Mark Langbein had wished to restrict Robert Haslam's authority he could, and should, have done so.
>
> 25.3.5 The Claimant makes a valid point when it states that after the May 2011 meeting and the issuing of the Letter Agreement there was no objection

to the terms of the Letter Agreement in, for example in emails in July, August, October, November, December and January 2012 between Claimant and Respondent. This indicates a very contrary position on the payment due to that of the Respondent. This stance indicates clearly a factual position; the Respondent in fact, as we have held, had agreed the sum [sic]. It is not for the Tribunal to guess why such sum was not paid, nor does the failure to pay support the Respondent's submissions.

25.3.6 The question of waiver is, in the Tribunal's view, not relevant. There is a binding agreement to pay."

The Act

30 There was no issue that the award was a foreign award or that the United Arab Emirates was a convention country. The Act thus had application and the following provisions were relevant:

"8(1) Subject to this Part, a foreign award is binding by virtue of this Act for all purposes on the parties to the arbitration agreement in pursuance of which it was made.

(2) Subject to this Part, a foreign award may be enforced in a court of a State or Territory as if the award were a judgment or order of that court.

…

(5) Subject to subsection (6), in any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may, at the request of the party against whom it is invoked, refuse to enforce the award if that party proves to the satisfaction of the court that:

(a) that party, being a party to the arbitration agreement in pursuance of which the award was made, was, under the law applicable to him or her, under some incapacity at the time when the agreement was made;

(b) the arbitration agreement is not valid under the law expressed in the agreement to be applicable to it or, where no law is so expressed to be applicable, under the law of the country where the award was made;

(c) that party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his or her case in the arbitration proceedings;

(d) the award deals with a difference not contemplated by, or not falling within the terms of, the submission to arbitration, or contains a decision on a matter beyond the scope of the submission to arbitration;

(e) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(f) the award has not yet become binding on the parties to the arbitration agreement or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.

(6) Where an award to which paragraph (5)(d) applies contains decisions on matters submitted to arbitration and those decisions can be separated from decisions on matters not so submitted, that part of the award which contains decisions on matters so submitted may be enforced.

(7) In any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may refuse to enforce the award if it finds that:

(a) the subject matter of the difference between the parties to the award is not capable of settlement by arbitration under the laws in force in the State or Territory in which the court is sitting; or

(b) to enforce the award would be contrary to public policy.

(7A) To avoid doubt and without limiting paragraph (7)(b), the enforcement of a foreign award would be contrary to public policy if:

(a) the making of the award was induced or affected by fraud or corruption; or

(b) a breach of the rules of natural justice occurred in connection with the making of the award.

…

19 Without limiting the generality of Articles 17I(1)(b)(ii), 34(2)(b)(ii) and 36(1)(b)(ii) of the Model Law, it is declared, for the avoidance of any doubt, that, for the purposes of those Articles, an interim measure or award is in conflict with, or is contrary to, the public policy of Australia if:

(a) the making of the interim measure or award was induced or affected by fraud or corruption; or

(b) a breach of the rules of natural justice occurred in connection with the making of the interim measure or award."

31 By virtue of s 16 of the Act, the UNCITRAL Model Law (Model Law), which is Schedule 2 to the Act, has the force of law in Australia. Article 36 of the Model Law, so far as relevant, provides as follows:

"Article 36(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

…

(b) if the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the recognition or enforcement of the award would be contrary to the public policy of this State."

32 Section 8(7A) was inserted by an amendment to the Act in 2010, the *International Arbitration Amendment Bill 2010* (Cth). The Explanatory Memorandum to the Bill, which introduced the section, stated that s 19 of the Act was passed for the purpose of clarifying the meaning of public policy under

articles 34 and 36 of the Model Law. The Explanatory Memorandum went on to say as follows:

> "49. At the time this provision [referring to s 19] was enacted – through the *International Arbitration Amendment Act 1989* – it was decided not to make an equivalent amendment with respect to the public policy ground of refusal in section 8 even though Articles 34 and 36 are based on Article V of the New York Convention. The Explanatory Memorandum to the 1989 legislation states that this decision was made 'so as to avoid any possible inference that the term "public policy" which is referred to in the New York Convention does not contain those elements'. Despite this explanation, the application of section 19 has the potential to lead to the misinterpretation of the public policy ground in section 8. Accordingly, this item replicates the terms of section 19 and applies them to the public policy ground in subsection 8(7) of the Act."
>
> [emphasis added]

The reasoning of the primary judge

33 The primary judge summarised the pleadings and the decision of the arbitrators, to which I have referred above. Applying the decision of the Full Court of the Federal Court in *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2014] FCAFC 83; 311 ALR 307 (*TCL Air Conditioner*) at [111], he accepted the statement in that case that "no international award should be set aside unless, by reference to accepted principles of natural justice, real unfairness and real practical injustice has been shown to have been suffered … in the conduct and disposition of a dispute in an award".

34 In dealing with the submission of Aircraft Support that the arbitrator did not deal with its contention that unless the 2011 letter was a formally executed variation to the subcontract, then it was of no legal effect, as there could not be two inconsistent contracts in existence, the primary judge reviewed the pleadings and submissions to which I have referred above. The primary judge concluded that the contention was not clearly articulated in the course of the arbitration, nor developed in any detail and not given prominence in the opening or closing submissions: Trial Judgment at [80].

35 In these circumstances, the primary judge concluded, at [81], that he was "unable to discern any unfairness or practical injustice" to Aircraft Support or any deficiency in reasoning. He concluded that it was implicit in the Tribunal's conclusion that it rejected the arguments put forward by Aircraft Support that there was no binding agreement because of the absence of formalities. He

concluded that the Tribunal essentially found that the 2011 letter was a settlement with respect to the final account.

36 The primary judge also concluded that the reasons given were adequate. This conclusion was as follows:

> "[102] The reasons given in paragraph 25.3 of the Award make it clear that the tribunal:
>
> (1) accepted the evidence of the plaintiff's witnesses as to the events of 10 May 2011;
>
> (2) concluded that a binding agreement was thereby made, in accordance with the law of the United Arab Emirates, for the payment of an outstanding amount of money;
>
> (3) construed the agreement as plainly one that required the defendant to pay US $797,500 to the plaintiff as part of the retention monies;
>
> (4) did not accept that the agreement included items that should not have been there;
>
> (5) found that Mr Haslan had authority to bind the defendant to the Agreement; and
>
> (6) concluded that the Agreement was not entered into by mistake.
>
> [103] In my view, the reasons meet the standard enunciated by Donaldson LJ in *Bremer Handelsgesellschaft m.b.H. v Westzucker G.m.b.H. (No.2)* (supra). The reasons sufficiently state the basis upon which the defendant was found to be obliged to pay US $797,500 to the plaintiff. That amount was payable as part of the retention monies the parties agreed would be paid on the dates specified in the letter of 10 May 2011. Moreover, the tribunal clearly appreciated, and dealt with, the essence of the defences advanced by the defendant. The defendant has not shown, by reference to the reasons of the tribunal or otherwise, that any particular defence was not in fact considered by the tribunal, or that real unfairness or prejudice was suffered by it as a result. Accordingly, grounds 4, 5 and 6 are not made out."

37 In these circumstances, the primary judge rejected the claim that there was a denial of natural justice to Aircraft Support in respect of the claim for the retention monies.

38 The primary judge also rejected the argument that s 8(7A) of the Act posed any restriction on circumstances in which foreign arbitral awards could be enforced in part. He pointed out, at [125], that "principles of severance have been applied to arbitral awards for centuries" and permitting severance in cases where there was no injustice was consistent with the approach taken in other jurisdictions. He concluded that in the circumstances of the present case, no injustice would be caused by severance.

Was there a denial of natural justice in the making of the award in respect of the retention monies

39 Aircraft Support submitted that its principal defence was that the 2011 letter had to be a variation to the subcontract, or it had no legal effect, and that it was not a variation because of its terms and manner of execution. It submitted that the arbitrators did not deal with this issue.

40 Senior counsel for Aircraft Support submitted that it was his client's case at trial that, as a matter of law, the only form of agreement which could bind the parties was a formal variation of the subcontract. He submitted that this issue was ignored.

41 Aircraft Support relied on the statement by Gummow and Callinan JJ in *Dranichnikov v Minister for Immigration & Multicultural Affairs* [2003] HCA 26; 177 ALR 389 at [24] that "To fail to respond to a substantial, clearly articulated argument relying upon established facts was at least to fail to accord … natural justice".

42 There are a number of difficulties with this argument. The first is that it does not deal with the fact that, as the Full Court of the Federal Court held in *TCL Air Conditioner*, it is necessary, in the context of an international arbitration, to show real practical unfairness and real practical injustice to the party resisting enforcement in order to decline to enforce an award under s 8(7A) of the Act or article 36 of the Model Law by reason of a breach of the rules of natural justice: at [55], [110], [111].

43 Further, even outside of the context of international arbitration, it has been stated that in this area, "the concern of the law is to avoid practical injustice": *Rodger v De Gelder* [2015] NSWCA 211 at [93] per Gleeson JA, Macfarlan and Leeming JJA agreeing.

44 In the present case, no attempt was made to demonstrate practical unfairness or injustice. Apart from asserting that the argument was raised, but not dealt with, no submissions were made as to its merits or the reason why the law in question prohibited the making of a compromise agreement.

45 More fundamentally, the principle to be derived from *Dranichnikov* applies in the case of a substantial, clearly articulated argument. I have set out the

pleadings so far as relevant and Aircraft Support's opening and closing submissions. They demonstrate that the issue of whether a binding agreement was needed to amount to a variation of cl 16.5 was raised. However, apart from asserting that this was the case, neither the pleadings, nor the opening submissions, provided any argument in support of the proposition. The closing submissions did not raise the issue at all.

46 In these circumstances, there was no failure by the arbitrators to respond to a clearly articulated argument. The obligation to give reasons does not extend to require arbitrators to deal with mere assertions which are unsupported by argument and apparently abandoned at the close of the case.

47 Aligned to the submission that there was a failure to deal with the argument based on cl 16.5 was an argument that the arbitrators failed to give adequate reasons for their award, as a result of which Aircraft Support was not accorded natural justice.

48 In *Bremer Handelsgesellschaft mbH v Westzucker GmbH (No 2)* (1981) 2 Lloyd's LR 130, Donaldson LJ (as his Lordship then was) with whom Shaw and Stephenson LLJ agreed, summarised the obligation to give reasons in the following terms (at 132-133):

> "At the end of the hearing they will be in a position to give a decision and the reasons for that decision. They should do so at the earliest possible moment. The parties will have made their submissions as to what actually happened and what is the result in terms of their respective rights and liabilities. All this will be fresh in the arbitrators' minds and there will be no need for further written submissions by the parties. No particular form of award is required. Certainly no one wants a formal 'Special Case'. All that is necessary is that the arbitrators should set out what, on their view of the evidence, did or did not happen and should explain succinctly why, in the light of what happened, they have reached their decision and what that decision is. This is all that is meant by a 'reasoned award'."

49 That summary was described by Allsop P (as his Honour then was) in *Gordian Runoff Ltd v Westport Insurance Corporation* [2010] NSWCA 57; 267 ALR 74 at [220] as a "crisp summary" of the principle. On appeal in that case, the plurality stated that there was no wholly satisfactory formula to flesh out the requirement to give reasons (for the purpose of s 29(1)(c) of the *Commercial Arbitration Act 1984* (NSW)): *Westport Insurance Corporation v Gordian Runoff Ltd* [2011] HCA 37; 244 CLR 239 at [54]. However, it was not argued in the

present case that the primary judge was incorrect in concluding, at [103] of the Trial Judgment, that the standard enunciated by Donaldson LJ was the appropriate standard.

50 The primary judge was correct in concluding that the reasons met that standard. I have already set out why the arbitrators were not required to deal any further with the cl 16.5 issue. The arbitrators set out the competing contentions. They dealt with the oral evidence, giving reasons why an agreement was reached on 11 May and how subsequent conduct supported that conclusion. Their reasons, having regard to the issues ultimately raised by the submissions, met the standard laid down by Donaldson LJ.

51 It follows that, in making the order in respect of the retention monies, there was no failure to accord Aircraft Support natural justice.

Was the award in respect of the retention monies capable of severance.

52 In submitting that the whole of the award should not be enforced because of the failure to accord natural justice to Aircraft Support in respect of the $50,000 claim, primary reliance was placed on the fact that s 8(6) of the Act dealt with the particular circumstances in which an award can be severed. It was suggested that, at least by implication, that precluded a severance in any other circumstances.

53 Aircraft Support also pointed to the fact that s 8(7) of the Act, which dealt with the circumstances in which a court may refuse to enforce an award, made no provision for partial enforcement. It was submitted that the absence of any provision corresponding to s 8(6) in s 8(7) led to the conclusion that partial severance was unavailable in the circumstances contemplated by s 8(7).

54 Aircraft Support accepted that the decision of the English Court of Appeal in *Nigerian National Petroleum Corporation v IPCO (Nigeria) Ltd (No 2)* (2009) 1 Lloyd's Rep 89 (*Nigerian National*) was to the contrary. However, it submitted that this decision was distinguishable because of the provisions of s 8(7A) of the Act.

55 In that context, Aircraft Support submitted that the language of s 8(7A) was "perfectly general". Pointing to the present case, it submitted that a breach of

the rules of natural justice occurred in the making of the award. It submitted that, read in conjunction s 8(7)(b), s 8(7A) contained a legislative declaration that where a denial of natural justice occurs in connection with the making of an award, the enforcement of the award would be contrary to public policy.

56 At the hearing, senior counsel for Aircraft Support submitted that in those circumstances, there was no discretion to enforce part of the award.

57 If the argument promoted by Aircraft Support is correct, the result would be surprising. In *Evans v National Pool Equipment* (1972) 2 NSWLR 410, Jacobs JA (as his Honour then was) pointed out that not since before the time of King James I had an award which was void in part been considered to be void altogether. His Honour cited with approval the statement in the 8th ed of *Russell on Arbitration* (Francis Russell, Edward Pollock and Herbert Russell, *A Treatise on the Power and Duty of an Arbitrator: and The Law of Submissions and Awards* (8th ed 1900, Stevens)) to the effect that, provided the bad portion is clearly separate and divisible, the residue can be enforced: see also *ACN 006 397 413 Pty Ltd v International Movie Group (Canada) Inc* [1997] 2 VR 31 (*International Movie Group*) at 38 following.

58 A similar approach has been adopted in overseas jurisdictions, including in cases involving the enforcement of awards under the New York Convention: *J.J. Agro Industries (P) Ltd (a firm) v Texuna International Ltd* [1992] 2 HKLR 391 (cited with approval by the Court of Appeal of Victoria in *International Movie Group* at 45); *Nigerian National*. The latter case involved the enforcement of an award under the *Arbitration Act 1996* (UK). That legislation, like the Act, made provision for a foreign award, to which the New York Convention applied, to be enforced. It also contained provisions in identical terms to those contained in s 8(6) and s 8(7) of the Act (s 103(4) and s 103(3) of the *Arbitration Act 1996*, respectively). In rejecting an argument similar to the one advanced in the present case, Tuckey LJ, with whom the other members of the Court agreed, made the following remarks (at [16]):

> "16 Nor do I accept his argument on construction. There is nothing which expressly prevents part enforcement in the language of the Convention or the statute. At first sight section 103(4) supports Mr Nash's argument. It does allow for part enforcement where the tribunal has strayed beyond the limits of its jurisdiction. But this provision was necessary to make it clear that such an

> error does not give grounds for saying that no part of the award should be enforced. No such provision is required for the other cases in section 103(2) which contemplate all or nothing challenges to the whole of the award."

59 As was pointed out in *TCL Air Conditioner* at [75], it is essential to "pay due regard" to decisions in other countries "where their laws are either based on, or take their content from, international conventions or instruments such as the New York Convention and the Model Law". Further, it would be surprising, to say the least, if an Act designed to assist international trade and commerce by enforcement of foreign awards was required to be construed to take away a centuries old power to partially enforce awards where no injustice flows as a result.

60 Section 8(7A) neither expressly, nor by necessary implication, imposes such a restriction. The section, in its terms, simply clarifies the circumstances in which an award can be said to be contrary to public policy. To the extent that reference needs to be made to it, this construction is consistent with the Explanatory Memorandum.

61 It follows that the Court had power to partially enforce the award.

62 In the present case, it was not suggested that any injustice would flow from partial enforcement. The conclusion of the primary judge on this issue was correct.

Conclusion

63 In the result, the following orders should be made:

(1) Appeal dismissed.

(2) The appellant pay the respondent's costs of the appeal.

64 **BEAZLEY P:** I have had the advantage of reading in draft the reasons of the Chief Justice. I agree with his Honour's reasons and with the orders he proposes.

65 **SACKVILLE AJA:** I agree with Bathurst CJ.

****

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