[2012] WASC 228

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA IN CHAMBERS
CITATION	**:**	CAPE LAMBERT RESOURCES LTD -v- MCC AUSTRALIA SANJIN MINING PTY LTD [2012] WASC 228
CORAM	**:**	CORBOY J
HEARD	**:**	24 NOVEMBER 2010, 14 APRIL, 25 OCTOBER & 28 NOVEMBER 2011
DELIVERED	**:**	26 JUNE 2012
FILE NO/S	**:**	CIV 2408 of 2010
BETWEEN	**:**	CAPE LAMBERT RESOURCES LTD First Plaintiff MT ANKETELL PTY LTD Second Plaintiff AND MCC AUSTRALIA SANJIN MINING PTY LTD First Defendant MCC MINING (WESTERN AUSTRALIA) PTY LTD Second Defendant METALLURGICAL CORPORATION OF CHINA LTD Third Defendant

Catchwords:

Arbitration - Whether dispute resolution clause was an arbitration agreement - Whether sufficient reason to refuse to refer dispute to arbitration - Whether applicant for a stay ready and willing to do all things necessary for the proper conduct of an arbitration - Whether relationship between parties to a guarantee a commercial relationship for the purpose of reservations by the People's Republic of China to the application of the New York Convention - Whether interim order should be made for payment of disputed amount into escrow account - Whether interlocutory injunction should be granted requiring payment into escrow account

Legislation:

Commercial Arbitration Act 1985 (WA)
International Arbitration Act 1974 (Cth)

Result:

Application for stay of action granted
Application for interlocutory injunction dismissed
Third defendant required to pay $80 million into an escrow account

Category: B

Representation:

Counsel:

First Plaintiff	:	Mr M L Bennett
Second Plaintiff	:	Mr M L Bennett
First Defendant	:	Mr G R Donaldson SC on 24 November 2010 and 14 April 2011, Mr M S van Brakel on 25 October 2011, Dr A S Bell SC on 28 November 2011
Second Defendant	:	Mr G R Donaldson SC on 24 November 2010 and 14 April 2011, Mr M S van Brakel on 25 October 2011, Dr A S Bell SC on 28 November 2010 and 14 April 2011
Third Defendant	:	Mr G R Donaldson SC on 24 November 2011 and 14 April 2011, Mr M S van Brakel on 25 October 2011, Dr A S Bell SC on 28 November 2011

Solicitors:

First Plaintiff	:	Bennett & Co
Second Plaintiff	:	Bennett & Co
First Defendant	:	Corrs Chambers Westgarth
Second Defendant	:	Corrs Chambers Westgarth
Third Defendant	:	Corrs Chambers Westgarth

Case(s) referred to in judgment(s):

ABB Power Plants Ltd v Electricity Commissioner of New South Wales t/as Pacific Power (1995) 35 NSWLR 596

BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd [2008] FCA 551; 168 FCR 169

Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd (1996) 39 NSWLR 160

Hammond v Wolt [1975] VR 108

Mulgrave Central Mill Company Ltd v Hagglunds Drives Pty Ltd [2001] QCA 471; (2002) 2 Qd R 514

O'Brien v Tanning Research Laboratories Inc (1988) 14 NSWLR 601

PMT Partners Pty Ltd v Australian National Parks and Wildlife Service (1995) 184 CLR 301

Tanning Research Laboratories Inc v O'Brien (1990) 169 CLR 332
Westrac Pty Ltd v Eastcoast OTR Tyres Pty Ltd [2008] NSWSC 894

CORBOY J:

The applications and the result

1 The plaintiffs agreed to sell to the second defendant (MCC WA) certain mining tenements and related assets (the Assets) by an agreement made on 11 June 2008 (the Asset Sale Agreement). The Asset Sale Agreement was subsequently novated by a deed made between the plaintiffs, the first defendant (MCC Sanjin) and MCC WA so as to substitute MCC Sanjin for MCC WA (the Deed of Novation). The third defendant (MCC) agreed at the same time to guarantee the obligation of MCC Sanjin and MCC WA to pay for the Assets (the Guarantee).

2 The Asset Sale Agreement provided that the purchase price for the Assets was to be paid by a deposit and three instalments, the final instalment being a payment of $80 million to be made 'within seven days of the conditions described in schedule 2 [of the Asset Sale Agreement] … being satisfied on terms satisfactory to the Buyer, acting reasonably, within two years of the date of this agreement' (cl 3.5(c)). A dispute arose between the plaintiffs and MCC Sanjin over whether the final instalment of the purchase price was due and payable.

3 The plaintiffs commenced proceedings by a writ dated 7 September 2010 seeking payment of the sum of $80 million (the Disputed Amount). They also alleged that they had made a valid demand on MCC under the Guarantee for payment of the Disputed Amount but the demand had not been met. They sought a declaration that the Disputed Amount was due and payable under the Guarantee and an order enforcing payment.

4 The defendants applied by summons dated 29 September 2010 for a stay of the plaintiffs' action on the ground that the Asset Sale Agreement and the Guarantee contained arbitration agreements for the purpose of the *Commercial Arbitration Act 1985* (WA) (CAA) and the *International Arbitration Act 1974* (Cth) (IAA) and the plaintiffs' action ought to be stayed under s 53 CAA or s 7 IAA or in the inherent jurisdiction of the court.

5 The plaintiffs responded to the defendants' application by seeking an interlocutory injunction requiring MCC to pay the Disputed Amount into an escrow account pursuant to the terms of the Guarantee. Orders were sought in the alternative, including that MCC be required to pay the Disputed Amount into escrow as a condition of any stay of the plaintiffs' action.

6 I have decided that a stay should be granted and that an interim order should be made under s 7(3) IAA requiring MCC to pay the Disputed Amount into an escrow account.

The relevant provisions of the Asset Sale Agreement

7 Clause 3.5(c) of the Asset Sale Agreement referred to the conditions described in sch 2 to the agreement being satisfied. However, sch 2 merely referred to 'all Mining Approvals'. The term 'Mining Approvals' was defined in schedule 1 to the agreement. In substance, cl 3.5(c), read with sch 2 and the definition of 'Mining Approvals', obliged the plaintiffs to obtain all necessary government and private approvals, permits and agreements that might be required for the sale and purchase of the Assets.

8 Clause 3.6(a) of the Asset Sale Agreement required MCC WA and following novation of the agreement, MCC Sanjin, to act in good faith and to use all reasonable endeavours to do all things reasonably requested by the plaintiffs to assist them in satisfying the conditions in sch 2 within the time specified by cl 3.5(c). Clause 3.6(b) provided that if MCC WA/MCC Sanjin breached the obligation imposed by cl 3.6(a) or an event or occurrence outside the control of the plaintiffs resulted in the plaintiffs being unable to satisfy the conditions within the period specified in cl 3.5(c):

(a) the period was extended by such time as the plaintiffs could demonstrate to MCC WA/MCC Sanjin's satisfaction, acting reasonably, that the breach or the event or occurrence delayed the plaintiffs' satisfaction of the approvals conditions; and

(b) MCC WA/MCC Sanjin was to pay the plaintiffs $80 million within seven days of the expiration of the period specified in cl 3.5(c).

9 Clause 16.2 of the Asset Sale Agreement contained procedures for resolving disputes between the parties.

10 Clause 16.2(b) stated that, 'subject to cl 16.2(d), the procedures prescribed in this clause 16 must be strictly followed to settle a dispute arising under this agreement'. Clause 16.2(c) provided that if any dispute arose 'out of or in connection with this agreement, including any question regarding the existence, validity or termination of this agreement':

(a) 'within ten Business Days of the dispute arising senior representatives from each party must meet in good faith, act

reasonably and use their best endeavours to resolve the dispute by joint discussions' (cl 16.2(c)(1));

(b) failing settlement by negotiation, either party 'may' by notice to the other party refer the dispute for resolution by mediation (cl 16.2(c)(2));

(c) failing settlement by mediation, either party 'may' by notice to the other party refer the dispute for 'final and binding resolution by arbitration' (cl 16.2(c)(3)).

11 Mediation was to be held at the Singapore Mediation Centre under SMC Mediation Procedures (cl 16.2(c)(2)). Arbitration was to be conducted at the Singapore International Arbitration Centre under the *United Nations Commission on International Trade Law Arbitration Rules* (UNCITRAL) in force at the date of the agreement. Those rules were deemed to be incorporated by reference into cl 16.2. The substantive law of the arbitration was the law of Western Australia (cl 16.2(c)(3)).

12 Finally, cl 16.2(d) provided that:

> Nothing in this clause 16:
>
> (1) prevents either party seeking urgent injunctive or declaratory relief from the Supreme Court of Western Australia in connection with the dispute without first having to attempt to negotiate and settle the dispute in accordance with this clause 16.

The relevant provisions of the Guarantee

13 Clause 2.1 of the Guarantee provided that:

> (a) Subject to clause 3(a), on and from the Start Date the Guarantor:
>
> (i) guarantees for the benefit of the Beneficiaries the full, complete and prompt payment of each Guaranteed Obligation (allowing for any defence, set-off or counterclaim that MCC WA, or MCC Sanjin if the Principal Agreement is novated from MCC WA to MCC Sanjin, asserts) and indemnifies the Beneficiaries from and against all loss, damage, costs, claims and expenses suffered or incurred by the Beneficiaries by reason of MCC WA's, or MCC Sanjin's if the Principal Agreement is novated from MCC WA to MCC Sanjin, default, breach or non-performance or non-observance of any of the Guaranteed Obligations; and

(ii) within 24 hours of receiving a Valid Demand, must pay the Beneficiaries the Guaranteed Obligation that is the subject of the Valid Demand (all payment obligations must be satisfied by the payment of a bank cheque).

(b) Immediately upon receiving any amount under clause 2.1(a)(ii) the Beneficiaries must:

(i) provide a receipt of payment to the Guarantor and MCC WA, or MCC Sanjin if the Principal Agreement is novated from MCC WA to MCC Sanjin; and

(ii) release MCC WA, or MCC Sanjin if the Principal Agreement is novated from MCC WA to MCC Sanjin, from any obligation to pay that amount under the Principal Agreement.

14 The term 'Guaranteed Obligation' was defined to mean, prior to novation of Asset Sale Agreement, the obligation of MCC WA to pay the purchase price for the Assets under cl 3.5 of the agreement and the obligation of MCC Sanjin to pay for the Assets following novation.

15 Clause 2.2 provided that MCC's obligations remained in force until the Guaranteed Obligation had been completely performed or the Asset Sale Agreement had been terminated.

16 Clause 2.1(a) of the Guarantee was expressly made subject to cl 3(a). Clause 3 provided that:

3. Valid Demand

(a) The Guarantor is only liable to pay the Beneficiaries under clause 2.1(a) if:

(i) subject to clause 3(b), upon a Guaranteed Obligation becoming due under the Principal Agreement the Beneficiaries:

(A) demands MCC WA, or MCC Sanjin if the Principal Agreement is novated from MCC WA to MCC Sanjin, to pay the Guaranteed Obligation;

(B) provides a copy of the demand to the Guarantor; and

(C) notifies MCC WA, or MCC Sanjin if the Principal Agreement is novated from MCC WA to MCC Sanjin, and the

> Guarantor of its intention to demand the Guarantor to pay the Guaranteed Obligation under this document; and
>
> (ii) upon MCC WA, or MCC Sanjin if the Principal Agreement is novated from MCC WA to MCC Sanjin, failing to pay the Guaranteed Obligation in accordance with clause 3(a)(i)(A), the Beneficiaries demand the Guarantor to pay the Guaranteed Obligation, providing evidence substantiating the amount of the Guaranteed Obligation owed.
>
> (b) If there is any dispute between the parties to this document regarding whether an amount is payable that amount will be paid into an escrow account organised by a solicitor that is independent from the parties (on such reasonable escrow terms as the parties may agree in good faith) and must be released as soon as practicable in accordance with the outcome or decision of the mediation or arbitration (as the case may be).

17 Clause 9.9 of the Guarantee contained governing law and dispute resolution provisions that mirrored cl 16 of the Asset Sale Agreement (the dispute resolution provisions were contained in cl 9.9(c)).

The proceedings commenced by the plaintiffs

18 The statement of claim indorsed on the plaintiffs' writ alleged that:

(a) it was a requirement of the grant of the Mining Approvals that a mining proposal be submitted for approval by the Department of Industry and Resources;

(b) it was necessary for the proposal to include assessments and information about the environmental impact of mining on the subject tenements;

(c) the plaintiffs made various requests to MCC WA for assistance in undertaking and completing the assessments and studies required for the mining proposals;

(d) MCC WA failed to comply with those requests in breach of the Asset Sale Agreement;

(e) MCC Sanjin was liable to pay the Disputed Amount by reason of MCC WA's breach of the Asset Sale Agreement;

(f) MCC Sanjin and MCC, as guarantor, had failed to pay the Disputed Amount despite demands having been made for payment.

19 The plaintiffs sought declarations that MCC Sanjin and MCC had breached the Asset Sale Agreement in addition to orders for payment of the Disputed Amount.

The dispute over payment of the Disputed Amount

20 It was apparent from the statement of claim and correspondence exchanged between the parties prior to the commencement of proceedings (see annexures 'CTE-4' to 'CTE-15' to the affidavit of Carl Thomas Ellinghaus sworn 29 September 2010 (Mr Ellinghaus' first affidavit)) that the Mining Approvals were not obtained within the time specified by the Asset Sale Agreement and that the plaintiffs contended that the Disputed Amount became payable two years after the date of the Asset Sale Agreement as a consequence.

21 The defendants disputed that the plaintiffs had demonstrated to their reasonable satisfaction that the failure to obtain the Mining Approvals was caused by any breach of the Asset Sale Agreement by MCC WA/MCC Sanjin and/or any event or occurrence that was outside the plaintiffs' control. It was to be inferred that the dispute included issues over whether MCC WA was in breach of the obligations imposed by cl 3.6(a) of the Asset Sale Agreement to act in good faith and use all reasonable endeavours to do all things reasonably requested by the plaintiffs.

22 MCC WA/MCC Sanjin advised the plaintiffs prior to the commencement of these proceedings that they considered that a dispute had arisen under the Asset Sale Agreement for the purpose of cl 16.2(c) (letter dated 6 August 2010 from the defendants' solicitors to the plaintiffs' solicitors; attachment 'CTE-11' to Mr Ellinghaus' first affidavit). It was not in issue that the dispute arose out of or in connection with the Asset Sale Agreement.

The primary dispute under the Guarantee

23 MCC denied that it was presently liable under the Guarantee. It contended that its liability could only be determined after the dispute between the plaintiffs and MCC WA/MCC Sanjin under the Asset Sale Agreement had been resolved. The basis for that contention is further explained later in these reasons but it should be noted that the effect of the argument was to deny that the plaintiffs had made a 'Valid Demand' for

the purpose of cl 3 of the Guarantee (or that they could make such a demand until the dispute under the Asset Sale Agreement had been resolved and MCC Sanjin had failed to pay any amount determined to be payable to the plaintiffs).

24 MCC advised the plaintiffs after the commencement of these proceedings that it considered that a dispute had arisen under the Guarantee for the purpose of cl 9.9(c) (letter dated 17 September 2010 from the defendants' solicitors to the plaintiffs' solicitors; attachment 'CTE-15' to Mr Ellinghaus' first affidavit; there was subsequently a question over whether a dispute had been notified by MCC which is briefly mentioned in the next section of the reasons). The plaintiffs did not accept the construction of the Guarantee contended by MCC. They accepted, however, that the dispute over the proper construction of the Guarantee fell within cl 9.9(c).

The dispute over the escrow provisions in the Guarantee

25 There was a further dispute regarding the terms of the Guarantee that was ancillary to the dispute over whether MCC was presently liable to the plaintiffs. The dispute concerned whether MCC was obliged under cl 3(b) of the Guarantee to pay the Disputed Amount into an escrow account. As has been noted, the dispute was the subject of the plaintiffs' application for an interlocutory injunction. The plaintiffs also contended that the dispute was relevant to whether the defendants' application for a stay of proceedings should be allowed and if so, the terms on which the stay should be granted.

26 The plaintiffs contended that MCC was obliged to pay the Disputed Amount into an escrow account as there was a dispute over whether an amount was payable within the meaning of cl 3(b). MCC denied that it was required to pay the Disputed Amount into escrow. Again, it argued that the plaintiffs were only entitled to the benefit of the Guarantee after the dispute with MCC WA/MCC Sanjin had been resolved. On MCC's interpretation of the Guarantee, cl 3(b) only operated once the dispute under the Asset Sale Agreement had been resolved, MCC Sanjin had failed to pay any amount agreed or found to be owing to the plaintiffs for the purchase of the Assets, a demand had been made under the Guarantee and MCC had disputed its liability to meet that demand. It was only at that point that MCC was required to pay the amount of the disputed demand into escrow.

27 The plaintiffs' solicitors demanded that MCC pay the Disputed Amount into an escrow account by letter dated 30 September 2010

(attachment 'CTE-20' to the affidavit of Mr Ellinghaus sworn 22 November 2010 (Mr Ellinghaus' second affidavit)). The defendants' solicitors replied by letter dated 14 October 2010 'confirming' that MCC disputed the plaintiffs' 'assertion' that it was obliged to pay the Disputed Amount into an escrow account under cl 3(b) of the Guarantee. The letter concluded, 'accordingly, a dispute has arisen for the purposes of clause 9.9 of the [Guarantee] in relation to whether the monies are required to be paid into escrow. That dispute must be resolved in accordance with the dispute resolution procedure in clause 9.9(c)'.

28 Subsequently, the defendants' solicitors wrote to the plaintiffs' solicitors stating that an assertion that had been made by the plaintiffs' solicitors that a 'dispute' existed between the parties under cl 3(b) of the Guarantee was incorrect and that MCC did not concede that there was such a dispute. It was said that the assertion demonstrated a misconception about the nature and operation of the Guarantee - that is, that there could be a dispute under the Guarantee prior to the resolution of the dispute under the Asset Sale Agreement (letter dated 29 October 2009; attachment 'MS-4' to the affidavit of Martina Sedic sworn 12 November 2010 (Ms Sedic's second affidavit)).

The course of the proceedings

29 The defendants' application for a stay of the action and the plaintiffs' application for an interlocutory injunction were listed to be heard together. However, the court was advised at the commencement of the hearing on 24 November 2010 that only the stay application was to be argued.

30 Regrettably, other commitments delayed the preparation of the reasons on the stay application. In the interim, on 23 March 2011 the solicitors for the plaintiffs advised the defendants' solicitors that they intended to refer the various disputes between the parties to mediation in Singapore (attachment 'CTE-31' to the affidavit of Mr Ellinghaus sworn 5 April 2011 (Mr Ellinghaus' fourth affidavit)). The plaintiffs' solicitors wrote to the Singapore Mediation Centre on the same day ('CTE-32').

31 I indicated to the parties in June 2011 that there might be points of connection between the stay application and the application for the interlocutory injunction. I inquired whether the parties wished to have the application for an injunction determined before I delivered my reasons on the stay application. The parties advised that they did wish to have each application simultaneously determined and directions were made for the filing of further evidence and submissions.

32 There were delays in that evidence being filed and served. As a consequence, the plaintiffs' application only came before the court for a final hearing on 11 and 28 November 2011. Further, the plaintiffs served subpoenas shortly prior to the hearing on the Director General of the Department of Mines and Petroleum, the Chairman of the Environmental Protection Authority and the proper officer of GHD Pty Ltd. The Director and the Chairman produced documents in response to the subpoenas. However, the defendants and GHD applied to set aside the subpoenas on various grounds, including that the subpoenaed documents were not sought for a legitimate forensic purpose. I did not rule on those applications but indicated that I would first hear the parties' applications. I expressly left open the possibility that the plaintiffs could renew their application for access to the documents that had been produced and for an order compelling compliance with the subpoena issued to GHD if it appeared that, in fairness, they required access to the documents that they had sought.

33 Further affidavits have been filed since the hearing in November 2011. Those affidavits produce correspondence between the parties' solicitors concerning attempts to fix a time for the mediation of the various disputes. The correspondence is said by the plaintiffs to be relevant to the question of whether the defendants are ready and willing to do all things necessary for the proper conduct of any arbitration that might be required to resolve the disputes.

The power to stay the proceedings

Section 53 CAA

34 The defendants relied on s 53 CAA and the inherent jurisdiction of the court to seek a stay of that part of the proceedings that concerned whether MCC Sanjin was liable to pay the Disputed Amount to the plaintiffs under the Asset Sale Agreement. They relied on s 53, s 7 IAA and the inherent jurisdiction of the court in respect of their application to stay the proceedings brought against MCC to enforce the Guarantee.

35 The parties assumed, without arguing, that the court had inherent jurisdiction to grant the stay sought by the defendants. However, as Finkelstein J explained in ***BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd*** [2008] FCA 551; 168 FCR 169 [42] - [45], High Court authority is against recognising an inherent power in Australian courts to grant a stay in favour of an arbitration or a foreign jurisdiction. Accordingly, I do not propose to further consider whether a stay might be

granted in the exercise of an inherent jurisdiction that was assumed but not established.

36 Section 53 CAA provides that:

> (1) If a party to an arbitration agreement commences proceedings in a court against another party to the arbitration agreement in respect of a matter agreed to be referred to arbitration by the agreement, that other party may, subject to subsection (2), apply to that court to stay the proceedings and that court, if satisfied -
>
> (a) that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the agreement; and
>
> (b) that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary for the proper conduct of the arbitration,
>
> may make an order staying the proceedings and may further give such directions with respect to the future conduct of the arbitration as it thinks fit.
>
> (2) An application under subsection (1) shall not, except with the leave of the court in which the proceedings have been commenced, be made after the applicant has delivered pleadings or taken any other step in the proceedings other than the entry of an appearance.

37 It is suggested by M S Jacobs, *Commercial Arbitration Law and Practice* (Loose leaf edition, 2008) at [50.130] that the defendant-applicant for a stay under s 53(1) must prove:

(a) a valid and binding arbitration agreement in respect of a matter agreed to be referred to arbitration by the agreement;

(b) a dispute within the parameters of the arbitration agreement;

(c) an action in respect of the same dispute instituted by the plaintiff-respondent;

(d) the criteria set out in s 53(1)(b) have been satisfied;

(e) all other preconditions to an arbitration have been satisfied.

38 Those matters are characterised as 'jurisdictional facts'. It is suggested that once those 'facts' have been established, the burden shifts to the plaintiff-respondent to persuade the court that there are circumstances

cogent enough to outweigh the *prima facie* case that has been made out by the defendant-applicant for a stay: see at [50.140].

39 The parties did not contest the question of onus in their submissions. Consequently, it is only necessary to observe that s 53(1) CAA requires the court to be satisfied about the matters referred to in the section prior to exercising the discretion conferred by the section. It is in that sense that the matters identified above can be characterised as jurisdictional facts. Plainly, the defendant-applicant carries a persuasive onus on those matters as the party seeking the stay. It is not necessary to otherwise consider what, if any, onus either party carries on the question of whether the court should exercise its discretion.

Section 7 IAA

40 So far as is relevant, s 7 IAA provides that:

> (1) Where:
>
> …
>
> (d) a party to an arbitration agreement is a person who was, at the time when the agreement was made, domiciled or ordinarily resident in a country that is a Convention country;
>
> this section applies to the agreement.
>
> (2) Subject to this Part, where:
>
> (a) proceedings instituted by a party to an arbitration agreement to which this section applies against another party to the agreement are pending in a court; and
>
> (b) the proceedings involve the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration;
>
> on the application of a party to the agreement, the court shall, by order, upon such conditions (if any) as it thinks fit, stay the proceedings or so much of the proceedings as involves the determination of that matter, as the case may be, and refer the parties to arbitration in respect of that matter.
>
> (3) Where court makes an order under subsection (2), it may, for the purpose of preserving the rights of the parties, make such interim or supplementary orders as it thinks fit in relation to any property that is the subject of the matter to which the first-mentioned order relates.

> (4) For the purposes of subsections (2) and (3), a reference to a party includes a reference to a person claiming through or under a party.
>
> (5) A court shall not make an order under subsection (2) if the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

41 It was not in issue that MCC was domiciled in the People's Republic of China (the PRC) (see par 2 of the statement of claim) or that the PRC was a Convention country (that is, a Contracting State under the *Recognition and Enforcement of Foreign Arbitral Awards* adopted at the twenty-fourth meeting of the United Nations Conference on International Commercial Arbitration (the 'New York Convention')). However, the declarations and reservations made by the PRC in signing the New York Convention included that it would only apply the Convention to 'differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law'. The plaintiffs contended that it was necessary for MCC to adduce expert evidence on what was considered to be a commercial relationship under Chinese national law to establish that the IAA and the New York Convention applied. As I understood the contention, it was to the effect that the expression 'domiciled or ordinarily resident in a country that is a Convention country' appearing in s 7(1)(d) was to be interpreted by reference to the declarations and reservations made by the PRC as a party to the Convention.

42 Initially, MCC sought to rely on the common law presumption that foreign law is the same as the law of the forum (ts 24; and see also at ts 38). However, the parties filed expert evidence prior to the November 2011 hearings on the question of whether any award made under the dispute resolution provisions of the Asset Sale Agreement and the Guarantee could be registered and enforced through an appropriate PRC court. That evidence dealt with the application of the New York Convention.

43 It might be argued that s 7(1)(d) only required MCC to establish that it was a party to an arbitration agreement; that it was, at the time that the agreement was made, domiciled or ordinarily resident in the PRC and that the PRC had ratified or acceded to the New York Convention (see the definition of 'Convention country' in s 3 IAA and art VIII and art IX of the Convention) and that MCC was not required to also prove that its disputes with the plaintiffs arose out of legal relationships that were considered to be commercial under Chinese national law. However, the parties did not develop any argument on the interpretation of s 7(1) and it was not

necessary to further consider the question in light of the expert evidence that was tendered at the November 2011 hearing. That evidence is considered later in the reasons. However, in my view, it established that a dispute for the purpose of cl 9.9(c) would arise out of a legal relationship that would be considered commercial under the national law of the PRC.

The issues in the defendants' stay application

44 The following issues were raised by the parties in their submissions on the defendants' application to stay the proceedings:

(a) Were the dispute resolution procedures in cl 16.2(c) of the Assets Sale Agreement and 9.9(c) of the Guarantee mandatory? The plaintiffs contended that the use of the word 'may' in cl 16.2(c)(2) and (3) of the Asset Sale Agreement and 9.9(c)(ii) and (iii) of the Guarantee indicated that the dispute resolution procedures were facilitative not obligatory. Proceedings had been commenced prior to any party invoking the procedures. Accordingly, there was no operative arbitration agreement that provided a basis for the defendants' application for a stay.

(b) Was the dispute between the plaintiffs and MCC over whether MCC was required to pay the Disputed Amount into escrow a dispute within the meaning and for the purpose of cl 9.9(c) of the Guarantee?

(c) Was there a sufficient reason why the disputes between the parties should not be referred to arbitration (s 53(1)(a) CAA)? The plaintiffs contended that MCC's refusal to pay the Disputed Amount into an escrow account provided such a reason. In particular, it was submitted that the refusal manifested an intention by the defendants not to be bound by any arbitration award that might be made. That submission raised four issues:

(i) Was MCC obliged to pay the Disputed Amount into an escrow account? Obviously, that issue was also central to the plaintiffs' application for an interlocutory injunction. As has been noted, the issue involved a question of construction of the Guarantee.

(ii) Did MCC's refusal to pay the Disputed Amount into an escrow account manifest an intention not to be bound by

any arbitration award made pursuant to cl 9.9(c) of the Guarantee?

(iii) What was the significance of MCC's refusal to pay the Disputed Amount into an escrow account for the purpose of the defendants' application for a stay? MCC relied on s 53 CAA as a source of the court's power to stay the plaintiffs' action to enforce the Guarantee. The plaintiffs contended that the refusal was relevant to the exercise of the court's discretion under that section. However, MCC primarily relied in the November 2011 hearings on the power conferred by s 7 IAA to stay the action that had been commenced against it. Section 7 does not contain an equivalent provision to s 53(1)(a). Further, MCC was not a party to the Asset Sale Agreement and MCC WA and MCC Sanjin were not parties to the Guarantee. The defendants contended that MCC could not be required to pay the Disputed Amount into an escrow account as a result of a dispute between the plaintiffs and MCC WA/MCC Sanjin under the Asset Sale Agreement. Accordingly, MCC's refusal to do so was irrelevant to the defendants' application to stay the action commenced against MCC WA and MCC Sanjin. The plaintiffs, on the other hand, contended that the reference in cl 3(b) of the Guarantee to 'any dispute … regarding whether an amount is payable' was sufficiently wide to encompass the dispute under the Asset Sale Agreement when the clause was construed in context.

(iv) Did the refusal by MCC to pay the Disputed Amount into an escrow account constitute a sufficient reason to dismiss the defendants' application for a stay?

(d) Were the defendants ready and willing to do all things necessary for the proper conduct of an arbitration under of the Asset Sale Agreement and the Guarantee? As has been noted, the plaintiffs contended that the defendants had manifested an intention not to be bound by any arbitration award that might be made. They also contended that the defendants had failed to adhere to the dispute resolution provisions contained in the agreements. A number of affidavits were read on that issue. Again, the issue only arose under s 53 CAA and was, therefore, primarily relevant to the

application for a stay of proceedings made by MCC WA and MCC Sanjin.

(e) Were the requirements of s 7 IAA satisfied? There are obvious and significant differences between s 53 CAA and s 7 IAA. In particular, s 7 does not refer to the 'jurisdictional facts' that condition the application of s 53 and proceedings must be stayed under s 7 once the requirements of the section have been satisfied. Consequently, different considerations were relevant to the application to stay the action against MCC WA/MCC Sanjin under the Asset Sale Agreement and the application to stay that part of the proceedings that sought to enforce the Guarantee against MCC. The only question about the application of s 7 IAA that was raised by the plaintiffs was whether the legal relationship between the plaintiffs and MCC constituted by the Guarantee was considered commercial under Chinese national law.

(f) Should the court exercise its discretion to stay the proceedings and if so, should the stay be subject to a condition requiring the Disputed Amount to be paid into an escrow account?

Did cl 16.2(c) and cl 9.9(c) create 'options' to arbitrate or binding arbitration agreements?

45 The stay application by the defendants was largely argued by reference to s 53 CAA in the hearings prior to November 2011. Consequently, the parties' submissions on whether cl 16.2(c) of the Asset Sale Agreement and cl 9.9(c) of the Guarantee contained 'arbitration agreements' concentrated on the application of the CAA.

46 However, it is also necessary to separately consider whether cl 9.9(c) constituted an arbitration agreement for the purpose of the IAA having regard to the grounds on which MCC has applied for a stay. It is convenient to commence with the question of whether cl 9.9(c) and cl 16.2(c) contained arbitration agreements under the CAA.

The CAA and arbitration agreements: *Hammond v Wolt* and *PMT Partners v Australian National Parks and Wildlife Service*

47 The plaintiffs contended that, by using the word 'may', cl 16.2(c)(3) and cl 9.9(c)(iii) merely created options to arbitrate, a binding arbitration agreement for the purpose of s 53 CAA only taking effect when either party exercised the option by electing to refer a dispute to arbitration: see ***Hammond v Wolt*** [1975] VR 108. The defendants were not entitled to

seek a stay as the plaintiffs had commenced proceedings prior to any party electing to invoke the arbitration option.

48 The defendants, however, pointed to the stipulation in cl 16.2(b) of the Asset Sale Agreement and cl 9.9(b) of the Guarantee that 'the procedures prescribed in this clause … must be strictly followed to settle a dispute' to contend to the contrary. They also referred to the decision of the High Court in ***PMT Partners Pty Ltd v Australian National Parks and Wildlife Service*** (1995) 184 CLR 301.

49 The reasoning of Menhennitt J in ***Hammond v Wolt*** has been considered in a number of subsequent cases. Much of that attention has focussed on the question of whether a provision allowing for arbitration constituted an arbitration agreement within the meaning of the CAA even if the provision created an option to arbitrate in the sense described by his Honour. That issue was resolved by the High Court in ***PMT Partners*** (at least for the purpose of the CAA). It was held that a term that conferred an election on one party to a construction contract to arbitrate if it was dissatisfied with a decision of the principal under the contract was an arbitration agreement for the purpose of the *Commercial Arbitration Act 1985* (NT). Section 4 of the CAA defines an arbitration agreement to mean 'an agreement in writing to refer present or future disputes to arbitration'. The High Court held that there was no reason to read down the definition; the term referred future disputes to arbitration for the purpose of the CAA even if the referral was at the election of one party to the agreement. Brennan CJ, Gaudron and McHugh JJ stated (310):

> The words 'agreement … to refer present or future disputes to arbitration' in s 4 of the Act are, in their natural and ordinary meaning, quite wide enough to encompass agreements by which the parties are bound to have their dispute arbitrated if an election is made or some event occurs or some condition is satisfied, even if only one party has the right to elect or is in a position to control the event or satisfy the condition. To some extent, that meaning is confirmed by s 53(1) which, as already indicated, confers a power exercisable on the application of a party to an arbitration agreement with respect to 'a matter agreed to be referred to arbitration'. However and more important, there is nothing in the Act which requires that the natural and ordinary meaning of the words used in the definition be qualified in any way. And when it is given its natural and ordinary meaning, the definition is clearly satisfied by cl 45, even if, as was held by the Court of Appeal, cl 45 does not preclude the contractor from pursuing its claim in the courts.'

50 Similarly, Toohey and Gummow JJ endorsed the dissenting judgment of Cole JA in ***ABB Power Plants Ltd v Electricity Commission of New South Wales t/as Pacific Power*** (1995) 35 NSWLR 596 (325):

> In our view, the reasoning of Cole JA is to be preferred. This was described by the respondent as 'simplistic', as if that were necessarily pejorative. Simplistic it may be, but it accords with the scheme of the legislation and the weight of logic. His Honour said (70):
>
> > 'If the parties have agreed by a clause such as cl 22.1 that, upon one party electing, the dispute in consequence will be arbitrated, they have agreed to refer such a dispute to arbitration. That falls within the definition of s 4. The expression 'agreement in writing to refer present and future disputes to arbitration' is not limited to existing or mutually accepted references: it includes references which flow in the future in consequence of an election, conferred by the contract on a party, by that party.'

51 The effect of the decision in ***PMT Partners*** was to disapprove of those cases that had applied the reasoning in ***Hammond v Wolt*** to hold that, for the purpose of the commercial arbitration legislation, an arbitration agreement was only made after an option or election to arbitrate had been exercised. The decision of the majority of the Queensland Court of Appeal in ***Mulgrave Central Mill Company Ltd v Hagglunds Drives Pty Ltd*** [2001] QCA 471; (2002) 2 Qd R 514 indicated that ***PMT Partners*** also applied to an agreement that involved multiple dispute resolution procedures culminating in arbitration at the option of one or both parties to the agreement.

52 Consequently, the disagreement between the parties over the effect of the word 'may' in cl 16.2(c) of the Asset Sale Agreement and cl 9.9(c) of the Guarantee was not to point for the purpose of determining the application to stay the plaintiffs' action under s 53 CAA. The clauses contained arbitration agreements for the purpose of the CAA on either of the interpretations contended for by the parties and the court had jurisdiction to stay the plaintiffs' action under s 53(1) provided that the other matters referred to in the section were established.

53 The reasoning in ***PMT Partners*** was also relevant to the parties' submissions on the proper construction of cl 16.2(c) and cl 9.9(c). I propose to express my views on that question in light of the parties' submissions (only the defendants referred to ***PMT Partners*** and then only as a subsidiary argument) and in case the conclusions that have been reached by applying ***PMT Partners*** are wrong. It is convenient to explain those views before further considering the question of whether cl 9.9(c)

contained an arbitration agreement for the purpose of the IAA or whether such an agreement could only be constituted by the plaintiffs or MCC 'electing' to refer a dispute under the Guarantee to arbitration.

The construction of cl 16.2(c) and cl 9.9(c)

54 In my view, cl 16.2(c) of the Asset Sale Agreement and cl 9.9(c) of the Guarantee created a mandatory dispute resolution regime rather than an optional procedure that might be invoked by one or other of the parties (it is convenient to only refer to cl 16.2(c) in what follows):

(a) The plaintiffs' interpretation focussed on the word 'may' as it appeared in cl 16.2(c)(2) and (3). However, in my view cl 16.2(b) governed the application of the dispute resolution regime created by cl 16.2. The subject matter and terms of cl 16.2(b) suggest that the parties would have made it clear that the mediation and arbitration steps of the dispute resolution regime were optional if that was what they had intended. On the plaintiffs' interpretation, the parties' intention to create an option was buried further within the clause so that the imperative in cl 16.2(b) was subordinate to what appeared later in cl 16.2(c)(2) and (3). That did not accord with the structure and sense of cl 16.2 read as a whole.

(b) The plaintiffs did not indicate how cl 16.2(b) would apply on their interpretation. Presumably, they would contend that the subclause required the parties to strictly follow the procedures specified by cl 16.2(c) once a party had opted to invoke one of the prescribed steps. For example, the parties were obliged to follow the procedures specified in pars (A) to (E) of cl 16.2(c)(2) once one of them had elected to mediate a dispute. However, it was not necessary to include cl 16.2(b) for that purpose; the obligation was already contained in cl 16.2(c).

(c) Similarly, the plaintiffs did not explain how their interpretation of cl 16.2(c) was consistent with the language of cl 16.2(d). An interpretation of cl 16.2(d) that limited its application to circumstances where an arbitration agreement had taken effect at the option of one of the parties did not reflect the language of the clause.

55 Those difficulties were resolved on the alternative interpretation advanced by the defendants:

(a) cl 16.2(b) indicated that the procedures that follow in 16.2(c) were mandatory;

(b) the word 'may' in cl 16.2(c)(2) and (3) indicated that either party could request mediation or arbitration if the dispute was not resolved by the preceding step in the dispute resolution procedures - that is, a party could choose to let the matter rest even if the dispute was not resolved or it could decide to invoke the next procedural step and either party had that option;

(c) cl 16.2(d) indicated that either party could seek urgent relief prior to the dispute resolution procedures being commenced.

56 That interpretation accorded with other authorities. In ***ABB Power Plants***, a dispute resolution clause stated that, 'all disputes or differences … shall be determined as follows' and then provided for a determination of disputes by the superintendent appointed under the relevant contract and that if either party was dissatisfied with the determination of the superintendent it 'may … give notice in writing to the other party requiring that the matter at issue be referred to arbitration …'. Handley JA stated (599):

> The use of the word 'may' in cl 46.2 is readily explicable because a party dissatisfied with the superintendent's decision, or with the breakdown in the procedure under cl 46.1 may prefer to take the matter no further.
>
> It has long been established that contractual or statutory provisions prescribing in positive terms a procedure to be followed necessarily imply that the same matter will not be dealt with under a different procedure. In ***King v Wallis*** (1949) 78 CLR 529 at 550, Dixon J said:
>
> > 'This accords with the general principles of interpretation embodied in the maxim *expressum facit cessare tacitum* and in the proposition that an enactment in affirmative words appointing a course to be followed usually may be understood as importing a negative, namely, that the same matter is not to be done according to some other course'.

57 Similarly, in ***PMT Partners***, the relevant clause provided that, 'all disputes or differences … shall be decided as follows' and then prescribed procedures for submission of the dispute to a superintendent and for one party to be able to take further steps if dissatisfied with the superintendent's decision. The contract stated that the party 'may' take those steps. Brennan CJ and Gaudron and McHugh JJ stated that (311):

> It may be accepted that contracts will only be construed as limiting the rights of the parties to pursue their remedies in the courts if it clearly appears that that is what was agreed. However, when it is provided, as it is in cl 45, that '[a]ll disputes or differences … shall be decided' in accordance with the specified procedures, the starting point must be that the parties are to be taken to have provided exclusively and exhaustively as to the procedures to be followed, unless something makes it plain that that is not the case. That is not simply because, in a context dealing with rights and obligations, the word 'shall' ordinarily involves a mandatory aspect. There is also the important consideration that cl 45 is concerned with dispute resolution. Disputes are not readily resolved if there are parallel proceedings permitting of different outcomes. Nor are they readily resolved by procedures which can be set at nought if one party elects to pursue some other course of action. … However, the subject matter with which cl 45 is concerned compels an approach which treats that clause as requiring the parties to have their disputes decided in accordance with the procedures specified - and only in accordance with those procedures, unless there is something which clearly indicates to the contrary …
>
> The change in language from 'shall' in cl 45(a) to 'may' in cl 45(b) and the paragraph following provides no reason for thinking that cl 45 does not provide an exclusive regime for the resolution of disputes.

58 Clause 16.2(b) did not use the word 'shall' but the expression 'the procedures prescribed in this cl 16 must be strictly followed' was obviously to the same effect.

59 Accordingly, in my view, cl 16.2(c) of the Asset Sale Agreement and cl 9.9(c) of the Guarantee did not provide for procedures that were merely facilitative. They required a dispute to be resolved according to the procedures specified, including referring the dispute to arbitration if mediation was unsuccessful and one or both parties still sought to have the dispute determined. The clauses contained arbitration agreements for the purpose of the CAA even if the test suggested by the plaintiffs reflected the correct interpretation of s 4.

The IAA and arbitration agreements

60 Section 3 IAA defines an arbitration agreement as an 'agreement in writing of the kind referred to in sub-article 1 of Article II of the New York Convention'. The sub-article defines an arbitration agreement as an agreement by which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship concerning a subject matter capable of settlement by arbitration.

61 In my view, cl 9.9(c) of the Guarantee was such an agreement according to the ordinary and natural meaning of the wording of the sub-article (subject to a finding that a dispute arising out of or under the Guarantee was capable of being settled by arbitration). I can see no reason why the reasoning in ***PMT Partners*** should not apply. The differences between the definitions of 'arbitration agreement' in the CAA and IAA were not material. An agreement to arbitrate did not arise only on the plaintiffs or MCC 'electing' to refer a dispute to arbitration under cl 9.9(c)(iii); the clause, by its very terms, was an arbitration agreement for the purpose of the IAA.

62 The expression 'capable of being settled by arbitration' appears in the definition of the term 'arbitration agreement' in sub-article 1 of article II of the New York Convention and in s 7(2). The concern in the former context is with the subject matter of the parties' arbitration agreement; in the latter context, the concern is with the subject matter of the proceedings that have been commenced and which are the subject of the stay application (that is, whether proceedings involve a matter that is within the ambit of the parties' arbitration agreement). The expression in both contexts refers to the capacity of an arbitrator to determine a dispute and to make a binding award that will settle the dispute.

63 Mustill and Boyd, *Commercial Arbitration* (2nd ed, 1989) state (149):

> … English law has never arrived at a general theory for distinguishing those disputes which may be settled by arbitration from those which may not. The general principle is, we submit, that any dispute or claim concerning legal rights which can be the subject of an enforceable award is capable of being settled by arbitration.

64 In my view, that statement captures the essence of the expression 'capable of being settled by arbitration' for the purpose of identifying an arbitration agreement according to sub-article 1, article II. Clause 9.9(c) referred to any dispute 'arising out of or in connection with' the Guarantee. The kind of dispute that might arise under the Guarantee is considered later in the reasons. However, there is no doubt that any dispute would concern a subject matter that was capable of being settled by arbitration. Accordingly, cl 9.9(c) contained an arbitration agreement for the purpose of the IAA.

Did the disputes fall within cl 16.2(c) and cl 9.9(c)?

65 As has been previously noted, the plaintiffs accepted that the disputes over whether the Disputed Amount was payable under the Asset

Sale Agreement and whether the plaintiffs could make a demand under the Guarantee prior to the resolution of that dispute fell within cl 16.2(c) and s 9.9(c). Clearly, the disputes 'arise out of or in connection with' each instrument.

66 However, the plaintiffs did not accept that the dispute over whether MCC was obliged to pay the Disputed Amount into an escrow account was a dispute within the meaning of the dispute resolution provisions of the Guarantee (plaintiffs' submissions in opposition to the defendants' application for a stay of proceedings, par 46). It was said that to hold that the dispute was caught by the dispute resolution provisions of the Guarantee would render cl 3(b) nugatory. That submission highlighted difficulties with the drafting of the Guarantee that were central to the issues that were contested in the applications before the court. It is necessary to further consider the operation of the Guarantee before returning to the question of whether a dispute over the application of the escrow provision was a dispute within the meaning of cl 9.9(c).

The proper construction of the Guarantee

67 It was not necessary or appropriate to express a concluded view on the proper construction of the Guarantee to determine the defendants' application for a stay of the proceedings and the plaintiffs' application for an interlocutory injunction. What follows reflects what I consider to be an arguable view of the meaning and effect of the relevant provisions of the Guarantee. It will, however, be necessary to comment on the strength of the parties' arguments concerning the proper construction of the Guarantee.

The Guarantee

68 Several points about the Guarantee should be noted:

(a) The obligation imposed on MCC by cl 2(a)(i) of the Guarantee was to guarantee the 'full, complete and prompt' payment of the Guaranteed Obligation - that is, the obligation to pay the purchase price for the Assets under cl 3.5 of the Asset Sale Agreement. The first instalment of the purchase price was payable on the settlement date and the second instalment was due 45 days later. Those instalments had been paid by the time that the Deed of Novation was made and the guarantee was given by MCC. Consequently, the Guarantee was, in effect, only concerned with the obligation of MCC Sanjin to pay the third and final instalment of the purchase price for the Assets.

(b) The obligation under cl 2(a)(i) was to guarantee payment of the Guaranteed Obligation allowing for any defence, set-off and counterclaim asserted by MCC WA or MCC Sanjin. The Macquarie Dictionary defines the word 'assert' to mean 'to state as true, affirm … to maintain or defend (claims, rights, etc)'. The noun 'assertion' is defined as meaning 'a positive statement; an unsupported declaration'.

(c) The distinction between the Guaranteed Obligation and an amount owed by MCC Sanjin to the plaintiffs after allowing for any set-off or counterclaim was not made in the balance of cl 2.1(a)(i). The indemnity given by MCC was in respect of a default, breach or non-performance or non-observance of any Guaranteed Obligation.

(d) Clause 2.1(a)(ii) imposed an obligation on MCC to pay the Guaranteed Obligation within 24 hours of receiving a 'Valid Demand'. A valid demand was a demand issued strictly according to cl 3 of the Guarantee. Clause 2.1(a)(ii) and cl 3 referred only to the 'Guaranteed Obligation' without expressly allowing for any defence, set-off or counterclaim asserted by MCC WA or MCC Sanjin. Similarly, cl 3.5 of the Asset Sale Agreement provided that the instalments of the purchase price were payable 'without set-off and counterclaim'.

(e) A valid demand under cl 3(a) required the plaintiffs to demand that MCC Sanjin (following novation) pay the Guaranteed Obligation (cl 3(a)(i)(A)). The plaintiffs were then required to make a demand on MCC if MCC Sanjin failed to pay the Guaranteed Obligation. However, cl 3(a) did not specify a time within which MCC Sanjin was to meet a demand and accordingly, there was no period stipulated between when a demand was made on MCC Sanjin and when a demand could be made on MCC under the Guarantee.

(f) A demand could be made under cl 3(a) when a Guaranteed Obligation became due. Clause 3.5(c) and cl 3.6(b)(4) of the Asset Sale Agreement apparently contemplated that the third instalment of the purchase price for the Assets would become due on a particular date and MCC Sanjin would be given seven days from that date to make payment. The date on which the instalment became due depended on when MCC Sanjin accepted that the approval conditions had been satisfied on terms that it regarded as

being satisfactory. Accordingly, that date - the date on which the Guaranteed Obligation fell due - would be fixed by MCC Sanjin notifying the plaintiffs to that effect. Clause 3(a) apparently permitted a demand to be made on MCC Sanjin on that day for the purpose of the Guarantee. MCC Sanjin would fail to meet the demand if it did not pay within the seven day period allowed by the Asset Sale Agreement. Alternatively, MCC Sanjin would have a reasonable time to meet any demand made under cl 3(a)(i) if the demand was made after the date on which the Guaranteed Obligation fell due. What was a reasonable time would be determined primarily by reference to the period allowed for payment under the Asset Sale Agreement.

(g) A valid demand under cl 3(a) required the plaintiffs to provide MCC with 'evidence substantiating the amount of the Guaranteed Obligation owed'. That was a curious requirement given that the amount of the third instalment of the purchase price for the Asset was fixed; what was uncertain under cl 3.5 and cl 3.6 of the Asset Sale Agreement was when the instalment became due for payment, not the amount. Consequently, it was not clear what was to be substantiated - the amount, the fact that the instalment was payable (that is, evidence that MCC Sanjin was satisfied about the approval conditions) or that a particular amount was payable after allowing for, or in spite of, a set-off or counterclaim asserted by MCC WA or MCC Sanjin. However, the last of those alternatives would be inconsistent with the wording of cl 3(a) as the clause only referred to the Guaranteed Obligation.

(h) MCC's obligations under the Guarantee remained in full force and effect until the Guaranteed Obligation had been fully and completely performed (cl 2.2).

(i) The obligation to pay an amount into escrow under cl 3(b) was triggered by 'any dispute' between 'the parties to this document' regarding 'whether an amount is payable'. The plaintiffs emphasised the width of the expression 'any dispute'. The defendants emphasised that the dispute to which cl 3(b) referred was a dispute between the parties to the Guarantee. It was also relevant to note that the clause referred to a dispute regarding whether an amount was payable. It was not clear whether cl 3(b) would be triggered by a dispute over the requirements imposed by cl 3(a)(i)(B) or (C) or 3(a)(ii) of the Guarantee. Further, and

perhaps more significantly, cl 3(b) did not expressly refer to the Guaranteed Obligation or the amount of that obligation.

(j) Clause 3(a)(i) was expressed to be subject to cl 3(b) (the escrow provision) and conditional upon a Guaranteed Obligation becoming due under the Asset Sale Agreement (and on other conditions being satisfied).

(k) It was possible that there might have been no dispute over whether a Guaranteed Obligation had become due but that there was a dispute between the plaintiffs and MCC Sanjin over whether MCC Sanjin was entitled to a set-off or counterclaim and if so, the amount to be allowed. As has been noted, cl 3(a) would apparently permit a demand to be made in those circumstances and cl 2.1(a)(ii) would require that demand to be met by MCC if MCC Sanjin defaulted - cl 2.1(a)(ii) referred only to the Guaranteed Obligation and not to the Guaranteed Obligation allowing for any defence, set-off or counterclaim.

MCC's contentions

69 MCC contended that it was not presently obliged to perform any obligation under the Guarantee, including paying any amount into escrow under cl 3(b). The contention rested on two propositions:

(a) MCC could only be required to perform the obligation imposed by cl 2.1(a)(i) to guarantee payment by MCC Sanjin once any dispute between the plaintiffs and MCC Sanjin had been resolved: 'the plaintiffs are only able to call on [MCC] pursuant to the Guarantee once the [dispute between MCC Sanjin and the plaintiffs] has been determined (and then, of course, only if determined in the plaintiffs' favour) as it is only then that a "defence, set-off or counterclaim" is no longer asserted, or "cannot be allowed for"' (defendants' submissions in response, par 19).

(b) Clause 3(b) operated if, at that point in time, MCC disputed that money was payable under the Guarantee. That was said to be clear from the terms of cl 3(b) that 'specifies a condition precedent for the escrow obligation to arise as being "a dispute **between the parties to this document** regarding whether an amount is payable". [MCC WA and MCC Sanjin] are not parties to the Guarantee' (defendants' submissions in response, par 20; original emphasis).

The effect of MCC's construction

70 The effect of the defendants' interpretation of cl 2.1(a)(i) was to decouple the primary obligation to pay the third instalment of the purchase price for the Assets from the security provided for that obligation by the Guarantee. MCC Sanjin was obliged by cl 3.5 of the Asset Sale Agreement to pay the instalment once it fell due without set-off or counterclaim. However, no 'call' could be made on the Guarantee if a set-off or counterclaim was asserted by MCC Sanjin. Further:

(a) the limitation on the Guarantee would apply merely on the assertion (a positive but unsupported - and untested - statement) by MCC Sanjin of a defence, set-off or counterclaim and regardless of the amount of the set-off or counterclaim asserted;

(b) no call on the Guarantee could be made even where MCC Sanjin accepted that the third instalment of the purchase price for the Assets was payable but it had asserted a set-off or counterclaim.

71 MCC's second proposition regarding the interpretation of the Guarantee was also problematic when considered with the first proposition. It was apparent from the terms of the Asset Sale Agreement and the Guarantee and the circumstances in which the Guarantee was made that a dispute between the plaintiffs and MCC over whether an amount was payable for the purpose of cl 3(b) would most likely concern:

(a) whether a valid demand had been made - that is, whether a Guaranteed Obligation had become due under the Asset Sale Agreement (a pre-condition for making a valid demand under cl 3(a)(i));

(b) the amount that might be allowed for a set-off or counterclaim asserted by MCC Sanjin.

72 Indeed, it was difficult to envisage what other matters of substance could generate a dispute between MCC and the plaintiffs regarding whether an amount was payable (a dispute might occur over whether the plaintiffs had provided evidence that substantiated the amount of the Guaranteed Obligation that was owed for the purpose of cl 3(a)(ii) but that would, almost inevitably, be a manifestation of an underlying substantive dispute). On the defendants' interpretation of the Guarantee:

(a) any dispute between the plaintiffs and MCC Sanjin concerning whether the third instalment of the purchase price for the Assets

(the Guaranteed Obligation) had become due or any dispute over a defence, set-off or counterclaim asserted by MCC Sanjin would have been resolved by an agreement or determination that bound the plaintiffs and MCC Sanjin before the plaintiffs could have recourse to the Guarantee;

(b) MCC was free to dispute those matters afresh despite the agreement or determination made under the Asset Sale Agreement - that is, MCC could put in issue the primary obligation owed by MCC Sanjin notwithstanding that any dispute over that obligation had been finally determined and despite, as the defendants recognised, the obvious purpose of the Guarantee being to 'provide security for any payment *determined* to be owing to the plaintiffs' (defendants' submissions in response, par 21; emphasis added);

(c) the obligation to a pay the disputed amount into an escrow account provided 'assurance' to the plaintiffs but only if a dispute arose under the Guarantee between the plaintiffs and MCC - there was no 'assurance' provided throughout the period that any defence, set-off or counterclaim that had been asserted by MCC Sanjin remained unresolved.

73 Again, that interpretation divorced the primary obligation of MCC Sanjin from the guarantee given by MCC. It also meant that the same issue could be the subject of separate dispute resolution procedures culminating in potentially different determinations, with the plaintiffs being required to twice establish that they were entitled to be paid where MCC Sanjin had defaulted.

74 The difficulty with MCC's interpretation of cl 2.1(a) and cl 3(a) was reflected in its submissions. The interpretation was inconsistent with the submission that the purpose of the Guarantee was to provide security for the amount determined as owing to the plaintiffs. Further, it was submitted that 'if, subsequent to an arbitral award being made against [MCC Sanjin] in favour of the plaintiffs, a failure to pay that award by [MCC Sanjin], *a valid demand* on the guarantee, and [MCC] disputing whether that amount was payable, then a dispute "between the parties to this document" would have arisen with respect to the Guarantee and it is only then that clause 3(b) is activated' (defendants' responsive submissions, par 23; emphasis added). That submission begged the question: what did the parties intend might be the subject of a dispute after a valid demand had been made? A valid demand was a demand that

satisfied the requirements of cl 3(a), including that the Guaranteed Obligation had 'become due' - that is, due for the purpose of the Guarantee (or at least, on MCC's interpretation, for the purpose of making a demand that the parties had chosen to describe as a 'valid' demand and which was to be paid within 24 hours under cl 2.1(a)(ii)). It seems unlikely that the parties objectively contemplated that a dispute could arise following a demand that satisfied the requirements of the Guarantee.

75 On MCC's interpretation, a determination that the Guaranteed Obligation was owed by MCC Sanjin or a determination of the amount that was owing (the Guaranteed Obligation less any amount that it was determined MCC Sanjin could set-off or counterclaim) might only satisfy a condition precedent to the plaintiffs' right to make a demand under the Guarantee; it would not necessarily fix the extent of MCC's obligation to guarantee payment of the determined amount. Accordingly, the resolution of a dispute between the plaintiffs and MCC Sanjin would enable the plaintiffs to make a valid demand under the Guarantee but making a valid demand did not necessarily trigger the obligation of MCC to pay the guaranteed amount; rather, it merely opened the door to a dispute over whether there had been a valid demand. That would be an odd intention to attribute to parties engaged in a commercial transaction of the kind here being considered.

76 Further, as has been noted, on MCC's interpretation there could be inconsistent determinations of MCC Sanjin's liability to the plaintiffs. The plaintiffs might have the benefit of an enforceable agreement or arbitral award made under the Asset Sale Agreement establishing that MCC Sanjin was liable to pay the Guaranteed Obligation or a particular amount after allowing for a set-off or counterclaim. However, a finding to the contrary could be made in an arbitration under the Guarantee. Not surprisingly, that latter determination would be inconsistent with MCC's obligation under cl 2.1(a)(i) - to guarantee full, complete and prompt payment of an amount owed by MCC Sanjin to the plaintiffs.

77 I consider that MCC's interpretation of cl 2.1(a) and cl 3(a) of the Guarantee arguably conflated its obligation to guarantee the payment of any amount owed by MCC Sanjin with a dispute over that obligation in a way that was not intended. In my view, it is likely that the plaintiffs and MCC contemplated that a demand might be made under the Guarantee prior to the resolution of any dispute under the Asset Sale Agreement and that cl 2.1(a) was not intended to prevent a dispute arising for the purpose of cl 3(b) in those circumstances. Objectively considered, it is unlikely

that the parties intended that the Guarantee would operate in the way for which MCC contended with the consequences that have been identified.

The plaintiffs' construction

78 The plaintiffs made a number of submissions regarding the principles relevant to construing contracts: plaintiffs' outline of submissions in opposition to the defendants' stay application, pars 39 - 43 and plaintiffs' outline of submissions in support of application for a mandatory injunction, pars 19 - 23. They also made submissions on why, on a proper construction of the Guarantee, MCC should be required to pay the Disputed Amount into escrow: plaintiffs' outline of submissions in opposition to the defendants' stay application, pars 44 - 51. However, those submissions were directed to why a payment should be ordered as a condition of any stay. Consequently, they dealt with matters that did not bear directly on the problems involved in interpreting the Guarantee.

79 Similarly, the plaintiffs did not directly address how the Guarantee should be construed in the light of MCC's contentions regarding the effect of cl 2.1(a)(i). Rather, the plaintiffs argued that the words 'any dispute' in cl 3(b) of the Guarantee should be widely interpreted to embrace a dispute between the plaintiffs and MCC Sanjin under the Asset Sale Agreement (plaintiffs' outline of submissions in opposition to the defendants' stay application, par 50). However, the actual wording of cl 3(b) was 'any dispute between the parties to this [Guarantee]'. The plaintiffs' submissions did not explain how cl 3(b) could have the effect for which they contended having regard to the words qualifying 'any dispute'. A similar observation can be made about the plaintiffs' submission that MCC's interpretation of the Guarantee 'affords no efficacy to the escrow provision' (plaintiffs' outline of submissions in support of application for a mandatory injunction, par 41).

80 In my view, the argument that the words 'any dispute' in cl 3(b) were intended to expressly refer to any dispute between the plaintiffs and MCC Sanjin was, at best, tenuous notwithstanding the difficulties that have been identified with MCC's submissions about the meaning and effect of cl 2.1(a)(i).

The parties' objective intentions

81 An aspect of cl 3(a) that appeared significant was the requirement for the plaintiffs to make a demand under the Guarantee on MCC Sanjin as well as on MCC. It appeared that cl 3(a)(ii) might have been intended to create an obligation on MCC Sanjin to meet the demand independently of

its obligation to pay the third instalment of the purchase price for the Assets under the Asset Sale Agreement, especially as a demand under cl 3(a) could only be made on a Guaranteed Obligation becoming due. However, one of the many difficulties with the Guarantee was that MCC Sanjin was not a party to the agreement. Nevertheless, the requirement that a separate demand be served on MCC Sanjin provided a point of connection between the primary obligation imposed on MCC Sanjin by the Asset Sale Agreement and the Guarantee and arguably, a means by which disputes under the former could be assimilated with MCC's obligations under the latter.

82 I consider that it was arguable that the parties objectively intended that:

(a) a demand for payment of the Guaranteed Obligation could be made on MCC Sanjin under cl 3(a)(i)(A) of the Guarantee contemporaneously with a claim for payment of the third instalment of the purchase price under the Asset Sale Agreement;

(b) a further demand would be made on MCC under cl 3(a)(ii) of the Guarantee where MCC Sanjin had failed to meet the demand made on it - that would be so even if MCC Sanjin disputed its obligation to pay the amount claimed against it;

(c) the demand under the Guarantee would be disputed by MCC on the same grounds as MCC Sanjin disputed the claim made against it where there was a dispute over payment of the third instalment of the purchase for the Assets or about any defence, set-off or counterclaim asserted by MCC Sanjin;

(d) disputes would arise contemporaneously under the Asset Sale Agreement and the Guarantee in those circumstances;

(e) the parties would pursue the dispute resolution procedures concurrently so that they were conducted, in effect, as a single procedure or so as to ensure consistent outcomes;

(f) there would be a dispute regarding whether an amount was payable for the purpose of cl 3(b) of the Guarantee in those circumstances - the dispute would be between the plaintiffs and MCC under the Guarantee.

83 The idea behind the limitation in the first limb of cl 2.1(a)(i) of the Guarantee seemed obvious: to limit MCC's obligation to guarantee

payment to whatever amount MCC Sanjin might actually be required to pay the plaintiffs. However, as has been noted, cl 2.1(a)(ii) and cl 3(a) did not import that limitation; the clauses referred only to the Guaranteed Obligation. The Guaranteed Obligation could become due independently of the determination of any asserted set-off or counterclaim. The plaintiffs could make a demand under cl 3(a) and payment would be required under cl 2.1(a)(ii). That, of course, was a consequence that MCC contended favoured its construction of the Guarantee. However, in addition to the problems that have been identified, MCC's construction of the Guarantee required the expression 'Guaranteed Obligation' to be given a different meaning to its defined meaning: the amount represented by the Guaranteed Obligation less the amount of any agreed or determined set-off. On MCC's construction, it was only that amount that could be validly demanded following a determination of any defence, set-off or counterclaim and which MCC could be obliged to pay under cl 2.1(a)(ii).

84 Clause 2.1(a)(i) was concerned with the amount that MCC might ultimately be required to pay to the plaintiffs. In my view, it is arguable that the limitation in the first part of the clause was intended to be incorporated in, at least, cl 2.1(a)(ii). That would accommodate the following possibilities:

(a) The plaintiffs could make a demand under cl 3(a) for payment of a Guaranteed Obligation by MCC Sanjin and subsequently, on MCC. That demand might be disputed on the ground that there was a dispute over whether the Guaranteed Obligation was due. That would be a dispute between MCC Sanjin and the plaintiffs under the Asset Sale Agreement and MCC and the plaintiffs under the Guarantee. MCC would be required to pay the amount of the Guaranteed Obligation into an escrow account under cl 3(b).

(b) It was also possible that MCC Sanjin could accept that the Guaranteed Obligation was due but assert a set-off or counterclaim. In those circumstances, MCC would dispute that the full amount of the Guaranteed Obligation was payable and pay the amount in dispute (the amount of the set-off or counterclaim asserted) into an escrow account pending resolution of the dispute as there would be a dispute 'regarding whether an amount is payable' within the meaning of cl 3(b).

(c) The balance of the amount represented by the Guaranteed Obligation would be paid to the plaintiffs under cl 2(a)(ii).

85 That interpretation would require words to be added to cl 2.1(a)(ii) (and possibly cl 3(a)). However, the construction contended for by MCC also required words to be added to qualify the defined term 'Guaranteed Obligation' wherever that term appeared in the Guarantee. The construction contended for by the plaintiffs required words appearing in cl 3(b) to be ignored.

86 It was also to be noted that none of the interpretations that have been canvassed gave effect to the intention expressed in cl 3.5(c) of the Asset Sale Agreement that the third instalment of the purchase price for the Assets was to be paid 'without counterclaim or set-off'. However, it was difficult to see how the inconsistency between cl 3.5(c) and cl 2.1(a)(i) of the Guarantee could be resolved by any particular construction of the Guarantee.

87 The problems in interpreting the Guarantee suggest that the qualifying words appearing in the first limb of cl 2.1(a)(i) were added as an afterthought and without full consideration being given to their effect on the balance of the agreement. However, in my view the interpretation suggested in this part of the reasons best gave effect to the object of the Guarantee. It gave the Guarantee a commercial operation that reflected the context in which it was made.

88 A final point should be noted regarding the submissions made by MCC. It was said that the effect of the plaintiffs' interpretation of the Guarantee - and, I accept, the interpretation foreshadowed above - was that any demand under the Guarantee would trigger an obligation to pay an amount into escrow. That would be so even if, for example, the Guaranteed Obligation had been paid. There are various aspects of the drafting of the Guarantee that apparently reflect an assumption that the parties will act reasonably and in good faith and I do not consider that the instrument should be construed against possibilities that lay entirely outside the object of the agreement and what the parties clearly intended. In any event, the circumstances suggested by MCC in argument would provide an example of where a party would be justified in seeking urgent relief under cl 9.9(d) of the Guarantee.

89 Three further points about cl 3(b) of the Guarantee should be noted:

(a) The obligation to pay the disputed amount into an escrow account was triggered by a dispute between the plaintiffs and MCC. It was, therefore, intended that the disputed amount would be paid into an escrow account at the commencement of the dispute

resolution procedure. The disputed amount was to remain in escrow until the dispute was resolved and the amount was to be released as soon as practicable according to the outcome or decision of any mediation or arbitration.

(b) MCC contended that the purpose of the escrow provision was to provide an 'assurance' to the plaintiffs if a dispute arose under the Guarantee as it was incorporated in China (defendants' submissions in response, par 22). No doubt that was one reason for the provision but, in my view, the primary purpose was probably more immediate. Clause 2.1(a)(ii) of the Guarantee required MCC to pay the Guaranteed Obligation within 24 hours of receiving a valid demand. The escrow provision was apparently intended to ensure that there was no delay in the plaintiffs receiving payment if a dispute was resolved in their favour.

(c) A dispute about whether a Guaranteed Obligation had become due or over the amount that might be payable to the plaintiffs after allowing for a set-off or counterclaim was obviously a dispute for the purpose of cl 3(b). However, that dispute did not also constitute a dispute over whether MCC was obliged to pay a disputed amount into an escrow account. A dispute, for example, over whether a Guaranteed Obligation had become due:

(i) was a dispute for the purpose of cl 9.9(c) - a dispute over whether a demand made under cl 3(a) was a valid demand;

(ii) triggered the obligation to pay the disputed amount into escrow under cl 3(b);

(iii) did not constitute an additional dispute over whether there was an obligation to pay the disputed amount into escrow - there was a dispute over the preconditions for a valid demand under cl 3(a) but no dispute over the application of cl 3(b).

90 The distinction made in the subparagraph above is important for understanding why a submission made by the plaintiffs that the dispute with MCC over whether the Disputed Amount is required to be paid into escrow could not be a dispute for the purpose of cl 9.9(c) has been rejected in the next section of the reasons. The dispute raised by MCC is

truly a dispute over the meaning and effect of cl 3(b) and is a dispute caught by cl 9.9(c).

91 MCC did not suggest that there was any ambiguity in the actual wording of cl 3(b). It accepted that it was necessary for a disputed amount to be paid into an escrow account once a dispute had arisen under the Guarantee for the purpose of cl 9.9(c), the point of its contentions being that a dispute could not arise under the Guarantee until any dispute between the plaintiffs and MCC Sanjin had been resolved. It followed that there was no issue between the parties about the application of cl 3(b) if it was found that a dispute could arise under the Guarantee contemporaneously with an unresolved dispute under the Asset Sale Agreement.

92 It has been found that it was arguable that a demand could be served on MCC under the Guarantee and a dispute could arise between it and the plaintiffs prior to any dispute between the plaintiffs and MCC Sanjin being finally resolved. Accordingly, I consider that it was arguable that MCC was required to pay the Disputed Amount into an escrow account.

Was the dispute over the application of cl 3(b) a dispute within cl 9.9(c)?

93 MCC contended that the dispute over whether MCC was obliged to pay the Disputed Amount into an escrow account was a dispute for the purpose of cl 9.9(c) (see, for example, at ts 162). The plaintiffs, on the other hand, contended that such an interpretation would render the escrow provision ineffective. However, their argument failed to draw the distinction between a dispute for the purpose of engaging cl 3(b) and a dispute over the application of cl 3(b) that was referred to in the previous section of the reasons. MCC's contention did not strip cl 3(b) of its intended effect once that distinction is recognised.

94 Clause 9.9(c) referred to a dispute 'arising out of or in connection with' the Guarantee. That is an expression of the widest possible import: see, for example, the discussion in *Commercial Arbitration* at 119 - 120 ('arising out of' has been held to cover every dispute except a dispute as to whether there was ever a contract at all). The dispute over whether MCC was presently obliged to pay the Disputed Amount into escrow was a dispute within the meaning and for the purpose of cl 9.9(c).

95 MCC would only be required to dispute that it was obliged to pay an amount into escrow to avoid the obligation imposed by cl 3(b). As with MCC's contention that the plaintiffs could trigger the escrow provisions by making a demand without proper cause, I consider that the width of

cl 9.9(c) should not and cannot be read down to accommodate the possibility that MCC might deliberately engineer a dispute solely for the purpose of avoiding the application of cl 3(b).

MCC's refusal to pay the Disputed Amount into escrow - s 53(1)(a) CAA

96 It is suggested at [50.170] of *Commercial Arbitration Law And Practice* that the reference to 'no sufficient reason' in s 53(1)(a) CAA was to whether the defendant-applicant had established the facts upon which the court's jurisdiction to grant a stay of proceedings rested and whether the plaintiff-respondent was able to rely on any absolute or discretionary 'defence' to the application. The mere fact that MCC had disputed the plaintiffs' construction of the Guarantee to deny that it was obliged to pay the Disputed Amount into an escrow account could not, in itself, provide a reason for refusing to grant a stay of the plaintiffs' action. MCC's refusal to pay the Disputed Amount into escrow could only have provided a sufficient reason for dismissing the stay application if the refusal manifested an intention not to be bound by the arbitration agreement contained in cl 9.9(c) of the Guarantee and any award made pursuant to that agreement.

97 The plaintiffs contended that MCC had indicated such an intention in the letter dated 29 October 2010 from the defendants' solicitors to the plaintiffs' solicitors (attachment 'MS-4' to Ms Sedic's second affidavit) in which the construction of the Guarantee contended for by MCC was explained:

> MCC China (as guarantor) is not bound by an arbitral award against MCC Sanjin (as principal) and the potential for MCC China to itself contest whether 'an amount is payable' is specifically contemplated. If, subsequent to an arbitral award being made against MCC Sanjin in favour of your client, MCC China then chose to contest whether that amount was payable, then a dispute 'between the parties to this document' would have arisen and it is only then that clause 3(b) is activated.

98 I do not read that statement as indicating that MCC did not intend to be bound by the arbitration agreement contained in cl 9.9(c) and any award made under the agreement. The statement entailed two propositions. First, that MCC could not be bound by any arbitration award made under the Asset Sale Agreement as it was not a party to that agreement. Second, the expression 'whether an amount is payable' appearing in cl 3(b) indicated that the parties intended that MCC could dispute its liability to pay under the Guarantee on grounds that included contesting whether any amount was due and payable by MCC Sanjin to the plaintiffs under the Asset Sale Agreement. As has been seen, that was

a question of construction. The fact that MCC had adopted a particular position reflecting those propositions did not, in my view, manifest an intention not to be bound by the arbitration agreement contained in cl 9.9(c). MCC had merely asserted a particular interpretation of the Guarantee. That interpretation might be tested if the issue arose in a subsequent arbitration. The fact that MCC had made the assertion did not mean that it would not abide by the arbitrator's determination if the issue did arise.

99 The fact that MCC was not a party to Asset Sale Agreement and MCC Sanjin was not a party to the Guarantee raised the possibility that questions concerning MCC Sanjin's liability to pay the final instalment of the purchase price for the Assets or its entitlement to a set-off or counterclaim could be the subject of determinations in different arbitrations unless the Guarantee was construed in some way that limited what MCC could put in issue. However, that possibility was not avoided by the choice of forum for resolving the various disputes between the parties. The cost, inconvenience and risk of inconsistent verdicts would be avoided by appropriate directions being made under the *Rules of the Supreme Court 1971* (WA) if the disputes were dealt with in this court. There is no reason why similar orders could not be made in any arbitrations conducted under the Asset Sale Agreement and the Guarantee. The court could make suitable directions under s 53(1) CAA on granting a stay and it retains a general power to make interlocutory orders in respect of arbitrations under s 47. There are similar powers for the court to make supplementary orders when granting a stay under s 7 IAA.

100 In my view, there was no sufficient reason why the various disputes under the Asset Sale Agreement and the Guarantee should not be referred to arbitration.

Compliance with the dispute resolution procedures - s 53(1)(b) CAA

The chronology of events

101 It is not helpful to recount the full detail of the matters said by the parties to be relevant to the question of whether the defendants were and remain ready and willing to do all things necessary for the proper conduct of the arbitration. The following chronology is sufficient:

(a) The plaintiffs advised MCC WA by letter dated 14 June 2010 that it had been unable to satisfy its obligations to procure the Mining Approvals as MCC WA 'had not progressed the pre-requisite works required to support the applications for the approvals'.

Consequently, they considered that the Disputed Amount was due for payment on 18 June 2010 (see attachment 'CTE-4' to Mr Ellinghaus' first affidavit). The plaintiffs followed that letter with a demand for payment made on 21 June 2010 (attachment 'CTE-5').

(b) By letter dated 2 July 2010, the defendants' solicitors wrote to the plaintiffs requesting further information on the mining approval process 'to properly consider the contentions set out in your letter dated 14 June 2010' (attachment 'CTE-6').

(c) After further correspondence between the plaintiffs' and the defendants' solicitors, the plaintiffs' solicitors wrote making a demand on MCC Sanjin to pay the Disputed Amount. The letter, dated 30 July 2010, advised that the plaintiffs' solicitors had instructions to make a demand under the Guarantee and to commence proceedings if the Disputed Amount was not paid within seven days (attachment 'CTE-9').

(d) The defendants' solicitors replied by letter dated 6 August 2010 denying the claim for payment of the Disputed Amount and contending that a dispute had arisen for the purpose of cl 16.2(c) of the Asset Sale Agreement. The letter concluded by enquiring about the plaintiffs' availability for a senior representatives meeting as required by cl 16.2(c)(1) (attachment 'CTE-11').

(e) The executive chairman of Cape Lambert Resources Ltd, Mr Tony Sage, wrote to the president of MCC, Shen Heting, on 8 August 2010 requesting a 'face to face meeting' to resolve payment of the Disputed Amount. The letter made no reference to the dispute resolution provisions (attachment 'JH-1' to the affidavit of Jeffrey Charles Hamilton sworn 12 November 2010; Mr Hamilton is the chief engineer for the Cape Lambert group of companies). Mr Shen replied by letter dated 16 August 2010 indicating that Mr Sage should confer with MCC Sanjin. On the same day, the managing director of MCC Sanjin, Wang Jianxin, wrote to Mr Sage insisting that the plaintiffs adhere to the procedures specified in the dispute resolution provisions of the Asset Sale Agreement (attachments 'JH-2' and 'JH-3' to Mr Hamilton's affidavit).

(f) On 10 August 2010, the plaintiffs made a demand on MCC for payment of the Disputed Amount pursuant to the Guarantee (attachment 'CTE-19' to Mr Ellinghaus' second affidavit).

(g) Mr Sage and Mr Hamilton met with Mr Wang and other representatives of MCC Sanjin on 19 August 2010. Mr Hamilton and Mr Wang and others met on 20 and 23 August (pars 12 and 13 of Mr Hamilton's affidavit). Those meetings did not resolve the dispute over payment of the Disputed Amount. Mr Sage wrote to Mr Shen on 23 August complaining about the stance that MCC Sanjin had taken in the negotiations (attachment 'JH-7' to Mr Hamilton's affidavit).

(h) A further meeting was to have been held on 25 August 2010 but the plaintiffs' representatives were advised when they arrived at the meeting place that Mr Wang was unavailable. The plaintiffs then wrote to the president of MCC advising that they were breaking off negotiations (pars 16 and 17 of Mr Hamilton's affidavit and attachment 'JH-9').

(i) Mr Sage endeavoured unsuccessfully to meet with the president of MCC while in China in August 2010 (Mr Hamilton's affidavit, par 20).

(j) The plaintiff commenced proceedings on 7 September 2010. It appeared that representatives of the plaintiffs and MCC Sanjin had met again shortly prior to 7 September 2010 but MCC Sanjin's representatives had been unable to obtain further instructions as Mr Wang had departed for China (attachment 'JH-12' to Mr Hamilton's affidavit).

(k) The defendants' solicitors contended in a letter dated 16 September 2010 that the meetings between representatives of the plaintiffs and MCC Sanjin in mid-August 2010 had satisfied the requirements of cl 16.2(c)(1) of the Asset Sale Agreement. The letter gave notice that 'the dispute' was referred to mediation under cl 16.2(c)(2) (attachment 'CTE-13' to Mr Ellinghaus' first affidavit). The plaintiffs' solicitors responded the next day denying that a meeting for the purpose of cl 16.2(c)(1) had occurred (attachment 'CTE-14').

(l) The defendants' solicitors wrote to the plaintiffs' solicitors on 17 September 2010 stating that the plaintiffs were not entitled to claim the benefit of the Guarantee until the dispute between the

plaintiffs and MCC WA/MCC Sanjin had been resolved. The plaintiffs were invited to withdraw their claims made in their action against MCC, 'failing which a dispute will have arisen for the purpose of cl 9.9 of the Guarantee which must be resolved in accordance with the dispute resolution procedure in cl 9.9(c)' (attachment 'CTE-15' to Mr Ellinghaus' first affidavit).

(m) On 30 September 2010, the plaintiffs' solicitors wrote to the defendants' solicitors referring to the letter of 17 September 2010 and requesting that the Disputed Amount be paid into an escrow account (attachment 'CTE-20' to Mr Ellinghaus' second affidavit). The defendants' solicitors replied by requesting a substantive response to their letter of 17 September 2010 (attachment 'CTE-21'). According to Mr Ellinghaus, no response was received to that request prior to the plaintiffs commencing their application for an interlocutory injunction (Mr Ellinghaus' second affidavit, par 21).

(n) The defendants' solicitors again wrote to the plaintiffs' solicitors on 14 October 2010 confirming that MCC disputed that it was required to pay the disputed amount into an escrow account (attachment 'MS-1' to Ms Sedic's second affidavit). The letter stated that a dispute had arisen for the purpose of cl 9.9(c) of the Guarantee over whether MCC was required to pay the Disputed Amount into an escrow account.

(o) The plaintiffs' solicitors again wrote to the defendants' solicitors on 25 October 2010. The letter stated that the plaintiffs' position was that they were presently entitled to the benefit of the guarantee given by MCC but they proposed that orders be made by consent that the plaintiffs' action be stayed subject to payment of the Disputed Amount into escrow (attachments 'MS-2' and 'MS-3' to Ms Sedic's second affidavit).

(p) The defendants' solicitors responded to that proposal by letter dated 29 October 2010 (attachment 'MS-4' to Ms Sedic's second affidavit). That was the letter that foreshadowed in some detail MCC's argument on why it was not obliged to pay the Disputed Amount into an escrow account. The plaintiffs contended that statements made in the letter indicated that MCC did not intend to be bound by any arbitration award.

(q) Mr Sage, Mr Shen and others met in late December 2010. That meeting failed to achieve a resolution of the disputes (further affidavit of Ms Sedic sworn 20 April 2011, par 3).

(r) The plaintiffs advised the defendants by letter dated 23 March 2011 that they had referred the various disputes between them to mediation pursuant to the dispute resolution provisions of the Asset Sale Agreement and the Guarantee. The defendants' solicitors responded by letter dated 29 March 2011 advising that the defendants agreed to the disputes arising under the Asset Sale Agreement and the Guarantee (whether MCC was presently liable under the Guarantee and whether it was obliged to pay the Disputed Amount into an escrow account) being referred to mediation (attachment 'CTE-32' to Mr Ellinghaus' fourth affidavit). The defendants further contended that the plaintiffs had now 'elected' to pursue a resolution of the disputes by the procedures provided in each of the agreements and that it would be inconsistent for them to maintain their action in this court. Further correspondence passed between the parties' solicitors regarding that contention and the history of the dispute (attachments 'CTE-33 to 'CTE-35').

(s) Considerable correspondence passed between the parties' solicitors from June 2011 onwards regarding further hearings in these proceedings, the filing of expert evidence in the defendants' stay application and arrangements for a mediation of the disputes (attachments 'MS-1' to 'MS-57' to the fourth affidavit of Ms Sedic sworn 25 October 2011; attachments 'CTE-38' to 'CTE-41' to affidavit of Mr Ellinghaus sworn 26 October 2011; third affidavit of Michelle Margaret Davies sworn 22 November 2011 and attachments; affidavit of Mr Ellinghaus sworn 24 November 2011 and attachments; fifth affidavit of Ms Sedic sworn 3 February 2012 and attachments and sixth affidavit of Ms Sedic sworn 16 February 2012 and attachments). It was said that the correspondence raised concerns about whether the defendants were acting reasonably.

Had a meeting of the senior representatives of the parties occurred for the purpose of cl 16.2(c)?

102 The plaintiffs asserted that the meetings held between Mr Sage, Mr Hamilton, Mr Wang and others from MCC Sanjin on 20 and 23 August 2010 were not meetings for the purpose of cl 16.2(c)(1).

However, they did not explain why that was so and I consider that the meetings did satisfy the requirements of the clause:

(a) The expression 'senior representatives' was not defined. However:

(i) Mr Sage signed the Asset Sale Agreement as a director of the plaintiffs; he was described by Mr Hamilton as 'executive director of Cape Lambert' (Mr Hamilton's affidavit, par 8) and he signed the correspondence to Mr Shen (written on the letterhead of Cape Lambert Resources Ltd) as 'executive chairman'.

(ii) Mr Hamilton described himself in his affidavit as the chief engineer for the 'Cape Lambert Group of Companies' and was authorised to swear his affidavit in the applications on behalf of the plaintiffs.

(iii) According to Mr Hamilton, Mr Wang signed letters to the plaintiffs 'in his capacity as Managing Director and General Manager of MCC Sanjin' (Mr Hamilton's affidavit, par 8). A search of the details of MCC Sanjin registered with the Australian Securities and Investment Commission disclosed that Mr Wang was a director of the company (attachment 'MS-9' to the affidavit of Martina Sedic sworn on 23 November 2010 (Ms Sedic's third affidavit)). He also signed the Deed of Novation as the 'authorised representative' of MCC Sanjin and was specified as the person to whom notices should be sent under that deed. Mr Shen directed Mr Sage to confer with MCC Sanjin over the question of whether the Disputed Amount was payable under the Asset Sale Agreement. Mr Sage and Mr Hamilton then met with Mr Wang. Mr Sage's subsequent complaints to Mr Shen concerned the unavailability of Mr Wang for the purpose of continuing discussions.

I am satisfied that Mr Sage, Mr Hamilton and Mr Wang were senior representatives of the plaintiffs and MCC Sanjin within the meaning of cl 16.2(c)(1).

(b) Clause 16.2(c)(1) required a meeting to be held within 10 business days of a dispute arising out of or in connection with the Asset Sale Agreement. The term 'business days' was defined to mean weekdays. MCC Sanjin notified the plaintiffs of a dispute over

payment of the Disputed Amount on Friday 6 August 2010. The first meeting between Mr Sage, Mr Hamilton and Mr Wang was held on Friday 20 August 2010 - that is, on the tenth business day.

(c) Clause 16.2(c)(1) required the parties to meet in good faith, act reasonably and use their best endeavours to resolve the dispute by joint discussions. There was no evidence to suggest that the meetings commencing on 20 August 2010 were not conducted according to those requirements except for the complaint contained in Mr Sage's letter of 25 August 2010 that Mr Wang had not been available to meet with Mr Ariti on the afternoon of 25 August 2010 (attachment 'JH-9' to Mr Hamilton's affidavit). Mr Sage wrote on the same day complaining that Mr Wang's unavailability had been an insult to the plaintiffs' team and advising that the plaintiffs were immediately breaking off further negotiations. The reason why Mr Wang was unavailable was not disclosed in the evidence. According to Mr Hamilton, the meeting proceeded in the absence of Mr Wang but with no resolution of the dispute being achieved (Mr Hamilton's affidavit, par 16). I am unable to infer from Mr Sage's letter and Mr Hamilton's affidavit that what occurred on 25 August 2010 was contrary to the requirements imposed on MCC Sanjin by cl 16.2(c)(1).

Was MCC Sanjin ready and willing?

103 The chronology provided earlier indicated that further meetings were held after the discussions in August 2010 and immediately prior to these proceedings being commenced. They were apparently terminated by the plaintiffs when they were advised that Mr Wang was 'on leave at his home in Mongolia' (see attachment 'JH-12' to Mr Hamilton's affidavit). Again, I am unable to infer from the evidence whether MCC Sanjin was in breach of any obligation imposed by cl 16.2(c)(1) as a result of Mr Wang returning to China some time shortly prior to 7 September 2010.

104 The plaintiffs also referred to the fact that Mr Sage had been unable to arrange a meeting with Mr Shen in China. Mr Hamilton's evidence on that matter merely stated that Mr Sage attempted to arrange a meeting in August 2010 (Mr Hamilton's affidavit, par 20). He did not indicate whether Mr Sage attempted to arrange the meeting before or after Mr Shen's letter of 16 August 2010 indicating that the plaintiffs should confer with MCC Sanjin on the dispute over payment of the Disputed Amount (attachment 'JH-3' to Mr Hamilton's affidavit). That letter was written on the same day as MCC Sanjin's letter to the plaintiffs advising

that the procedures under l6.2(c) should be followed in relation to the dispute. In the circumstances, I am not prepared to draw any inference that the defendants were not ready and willing to resolve the dispute pursuant to the dispute resolution procedures prescribed by cl 16.2(c), including arbitration, by reason of the fact that Mr Shen declined to meet with Mr Sage at some unspecified time in August 2010.

105 The dispute under the Asset Sale Agreement has been referred to mediation since that time. The plaintiffs contended that the defendants had acted unreasonably notwithstanding that referral for two reasons: the defendants had responded to the referral by asserting that the plaintiffs were acting inconsistently by maintaining their action and they had not genuinely endeavoured to arrange a mediation (plaintiffs' outline of submissions in support of application for mandatory injunction, pars 68 - 71).

106 I do not regard the first of those matters as indicating that the defendants were attempting to frustrate the resolution of the disputes by the procedures prescribed in cl 16.2(c) and cl 9.9(c). Their assertion was consistent with the view that they have taken of the proper construction of the Guarantee in particular.

107 As has been noted, arrangements for the mediation have been protracted. That has led to allegations and counter-allegations over the reasons for the delay in correspondence exchanged between the parties' solicitors. No doubt, the correspondence has been animated by the amount of money in issue. However, I am not prepared to infer from the delay that MCC Sanjin is not ready and willing to do all things necessary for the proper conduct of an arbitration if the dispute is not resolved through mediation. I accept in that regard the matters to which the defendants referred at par 26 of their submissions in response to the plaintiffs' application for a mandatory injunction.

The position of MCC

108 The parties made submissions on whether MCC had been and remained ready and willing to participate in the dispute resolution procedures specified in cl 9.9(c) of the Guarantee. However, s 7 IAA does not require the court to be satisfied that the applicant for a stay is ready and willing to do all things necessary for the proper conduct of an arbitration. A finding is made later in the reasons that MCC has established that the requirements of s 7 have been satisfied so that, strictly, it was not necessary to make a finding about whether it was ready

and willing to do whatever was necessary to properly participate in an arbitration for the purpose of s 53 CAA.

109 However, I accept that MCC was, at the time that it made its application for a stay, and remains ready and willing to do all things necessary for the proper conduct of any arbitration under the Guarantee. I make that finding notwithstanding that there was no meeting of the senior representatives of the plaintiffs and MCC within 10 business days of a dispute arising under the Guarantee.

110 The plaintiffs made a demand on MCC on 10 August 2010. Mr Shen advised Mr Sage that the plaintiffs should confer with MCC Sanjin by letter dated 16 August 2010. However, there was no evidence to suggest that Mr Wang was authorised to negotiate on behalf of MCC. Proceedings were commenced on 7 September 2010. It might be contended that a dispute arose at that time. In any event, the defendants' solicitors wrote on 17 September contending that no demand could be made under the Guarantee until the dispute between the plaintiffs and MCC Sanjin had been resolved. Clearly, a dispute arose at that time for the purpose of cl 9.9(c). The plaintiffs made their demand that MCC pay the Disputed Amount into an escrow account by letter dated 30 September 2010. The demand was made the day after the defendants applied to stay the proceedings.

111 In my view, it cannot be inferred that MCC was not ready and willing to do all things necessary for the proper conduct of an arbitration in those circumstances.

112 There was evidence that Mr Sage and Mr Shen met in late December 2010. Ms Sedic gave that evidence. There was no evidence of what transpired at the meeting apart from the fact that no compromise had been achieved. However, Ms Sedic stated that she had been informed that the meeting had been instigated by the defendants in an attempt to resolve all disputes between the parties (Ms Sedic's third affidavit, par 3).

113 Plainly, Mr Sage and Mr Shen were 'senior representatives' of the plaintiffs and MCC. There was no evidence that the discussions were not conducted in good faith. The fact that the discussions were instigated by the defendants is an indication that MCC was willing to resolve the disputes. The disputes under the Guarantee have been subsequently referred to mediation. I am not prepared to infer from the delay in arranging the mediation that MCC is not ready and willing to do all things necessary for the proper conduct of an arbitration if the disputes are not

resolved in that forum for the reasons that have already been given in relation to the position of MCC Sanjin.

Findings on the application for a stay under s 53 CAA

114 I am satisfied about the matters to which s 53(1) CAA refers in relation to each of the claims made by the plaintiffs in these proceedings against the defendants. The court, nevertheless, retains a discretion whether to grant a stay. A number of the authorities that have considered the factors that may be relevant to the exercise of the discretion are reviewed in *Commercial Arbitration Law and Practice* at [50.250] and following. The review indicates that a stay has occasionally been refused on the ground that a court was the most appropriate forum having regard to the subject matter of the proceedings. Decisions to that effect may embody a view about arbitration that is no longer relevant having regard to its importance as an effective means of resolving commercial disputes. In any event, there is no reason why the disputes between the parties in this matter should not be resolved by arbitration. They are of a kind that the parties must have had in mind when they agreed the dispute resolution procedures in cl 16.2(c) of the Asset Sale Agreement and cl 9.9(c) of the Guarantee.

115 The plaintiffs contended that the subject matter of the dispute - whether MCC Sanjin had used its best endeavours and acted in good faith - was not suitable for an arbitration. That submission and the authority on which it was based reflect a view about arbitration that the court should no longer foster. As I have indicated, the disputes between the plaintiffs and the defendants are the very kind of differences that they must have contemplated might arise when they agreed the dispute resolution provisions of the Asset Sale Agreement and the Guarantee.

116 In my view, the proceedings against MCC Sanjin should be stayed under s 53 CAA.

The application for a stay under s 7 IAA

117 As previously noted, the only issue that was raised by the plaintiffs concerning the application of s 7 IAA was whether the requirement of s 7(1)(d) IAA had been satisfied, the submission being that it was necessary for MCC to establish that any differences that might emerge between it and the plaintiffs under the Guarantee would arise out of a legal relationship that was considered to be commercial under PRC national law. The parties adduced evidence regarding the registration and

enforcement of foreign arbitral awards in the PRC that included evidence on that issue.

118 The plaintiffs tendered a report prepared by Mr Xianyue Bai that described in some detail the procedures for registering and enforcing a foreign arbitration award in a PRC court (affidavit of Xianyue Bai sworn 10 October 2011 and attachment 'XB-1'). The plaintiffs' interest in adducing that evidence was to support submissions that it made on the balance of convenience for the purpose of its application for an interlocutory injunction. The defendants tendered a report by Professor Chuntian Liu that commented on Mr Bai's report (affidavit of Chuntian Liu sworn 9 November 2011 and attachment 'CL-1'). Mr Bai provided a further report that responded to Professor Liu's report (attachment 'MMD-5' to the fourth affidavit of Ms Davies sworn 28 November 2011).

119 The effect of the evidence given by Mr Bai and Professor Liu was that there was an established procedure by which any arbitral award made in favour of the plaintiffs might be registered in and enforced by an 'intermediate' court in the PRC. It was not necessary to describe the detail of that procedure other than to note that:

(a) Generally, an intermediate court has a designated department for examining foreign arbitral awards. The court is required to determine whether the award may be recognised and registered within two months.

(b) The designated department will appoint an officer who is to execute the award. The department may conduct an investigation into the financial circumstances of the award debtor. The court is required to complete the enforcement of the award within six months following registration. However, certain matters may arise in the enforcement process that are not counted in determining the six month period and there are grounds on which the process can be suspended.

(c) The eight month period specified for registering and enforcing an award was rarely achieved according to Mr Bai. However, Professor Lui emphasised that delays in the enforcement process were generally associated with the status of the award debtor; for example, that it did not apparently hold assets or was insolvent or nearly insolvent. There were defined procedures that governed the exercises of a discretion in the intermediate court to extend the time allowed for enforcement.

120 Mr Bai advised that PRC courts were required to determine as part of the registration process whether the subject matter of the arbitrated dispute was capable of being settled by arbitration under the laws of the PRC: 'according to the Decision of the Standing Committee of the National People's Congress on China's Accession to the Convention only disputes arising from contractual and non-contractual commercial relationships can be recognised as being capable of settlement through arbitration, such as sales contract, lease contract' (Mr Bai's first report, par 24.1). However, he did not express an opinion on whether disputes under the Guarantee were disputes of the kind that would be recognised by PRC courts for registration and enforcement.

121 Professor Liu considered that question in his report. He advised that an arbitration award determining disputes arising under the Asset Sale Agreement and the Guarantee would 'fall within the scope of China's declaration under the [New York] Convention' (Professor Liu's report, par 7). Mr Bai did not contest that opinion in his response to Professor Liu's report. Rather, he confirmed that he had not expressed an opinion on whether the subject matter of the disputes between the parties would be recognised according to the New York Convention or the national laws of China as being capable of settlement by arbitration (Mr Bai's second report, par 14).

122 I indicated earlier in the reasons that I did not consider that it was necessary for MCC to establish that the legal relationship created by the Guarantee was considered to be commercial under PRC law to satisfy the requirements of s 7(1)(d) IAA. However, I am satisfied by Professor Lui's opinion that the relationship between the plaintiffs and MCC created by the Guarantee would be regarded as commercial under Chinese national law.

123 There are two preconditions to the exercise of the court’s power under s 7(2) IAA: that there are proceedings pending between parties to an arbitration agreement and that the proceedings involve the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration. It has already been found that the Guarantee was an arbitration agreement for the purpose of the IAA. The second requirement under s 7(2) involves two steps: first, identifying the matter in the proceedings (as to which, see ***Tanning Research Laboratories Inc v O’Brien*** (1990) 169 CLR 332) and second, determining whether that matter is capable of being settled by arbitration pursuant to the arbitration agreement.

124 The matter involved in the plaintiffs' proceedings was whether MCC was liable to meet the demand that was made under the Guarantee. Plainly, that was a matter 'arising out of or in connection with' the Guarantee for the purpose of cl 9.9(c) and was, accordingly, a matter capable of being settled by arbitration. The plaintiffs did not argue to the contrary.

125 The court is bound to stay the proceedings against MCC once it is found that the requirements of s 7(2) have been satisfied.

Interim orders and measures under the IAA

126 Section 7(3) IAA provides that where a court stays proceedings and refers the parties to arbitration in respect of a matter it may make such interim or supplementary orders as it thinks fit in relation to any property that is the subject of the matter for the purpose of preserving the rights of the parties. Chapter IV of the UNCITRAL Model Law concerns interim measures and preliminary orders. Article 17 provides that an arbitral tribunal may grant 'interim measures'. An interim measure is defined as any temporary measure by which the tribunal orders a party to:

(a) maintain or restore the status quo pending determination of the dispute;

(b) take action that would prevent, or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process itself;

(c) provide a means of preserving assets out of which a subsequent award may be satisfied;

(d) preserve evidence that may be relevant and material to the resolution of the dispute.

127 Article 17J provides that:

> A court shall have the same power of issuing an interim measure in relation to arbitration proceedings … as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration.

128 MCC contended that the order sought by the plaintiff requiring the Disputed Amount be paid into escrow was not an interim order or measure as it was, in effect, a final mandatory order. It submitted that (defendants' submissions in response, par 15):

> One of the key matters at issue between the parties is whether the plaintiffs have any right to payment of monies into an escrow account pending the resolution of the dispute between the plaintiffs and [MCC Sanjin]. The mandatory injunction, if granted, would involve a determination rather than a preservation of rights.

129 MCC further submitted that the limitation on the scope of relief contained in s 7(3) should not be circumvented by using the power conferred by s 7(2) to grant a stay on conditions (defendants' submissions in response, pars 16 - 22):

(a) the court should not impose a condition on the grant of a stay that effectively distorted the parties' agreement, reference being made to ***O'Brien v Tanning Research Laboratories Inc*** (1988) 14 NSWLR 601, 622 (Kirby P);

(b) it was not open to the court to impose conditions that would detract from the integrity of the arbitration process, reference being made to ***Westrac Pty Ltd v Eastcoast OTR Tyres Pty Ltd*** [2008] NSWSC 894 [30] (Barrett J);

(c) it was not for the court to pre-empt the decision of the arbitrator, reference being made to ***Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd*** (1996) 39 NSWLR 160, 167 (Gleeson J);

(d) there was no injustice in such a result as interim measures and preliminary orders could be made 'in the arbitration to which they agreed in clause 9.9 of the Guarantee';

(e) even if the plaintiffs had an arguable case, the balance of convenience would not support the injunctive relief sought and damages would provide an adequate remedy.

130 I accept MCC's statement of the principles relevant to the exercise of the court's discretion under s 7(3). However, in my view an interim order should be made requiring MCC to pay the Disputed Amount into an escrow account for the following reasons:

(a) While acknowledging the difficulties in interpreting the Guarantee, I regard the construction for which MCC contended as tenuous. I have not accepted the interpretation advanced by the plaintiffs but I consider that it was reasonably arguable that the parties objectively intended that a dispute could arise under the Guarantee contemporaneously with a dispute under the Asset Sale

Agreement and that the escrow provision would apply in those circumstances. I consider that the argument has sufficient merit that it would satisfy the test for an interlocutory injunction.

(b) The escrow provision was triggered by a dispute between the plaintiffs and MCC. No time was prescribed for when the payment into the escrow account was to be made. Consequently, it was to be paid within a reasonable time of the dispute arising; what was reasonable being determined by reference to the time reasonably required to negotiate in good faith the arrangements for the account and for giving effect to those arrangements. It was apparent that those negotiations were to occur immediately following the emergence of the dispute, the point being that the escrow payment was not just security for an arbitration but was to be available to pay any amount agreed to be paid to the plaintiffs following a mediation (and presumably, if organised in sufficient time, following the meeting of the senior representatives). In my view, the right to be preserved by an order under s 7(3) was the right to have the Disputed Amount paid into an escrow account prior to and pending the outcome of the mediation - and to have any amount agreed to be paid to the plaintiffs in a mediation paid out of the account. The effect of granting a stay will be not just to permit the dispute between the plaintiffs and MCC to be determined by arbitration; it will allow the dispute to be referred to mediation as required by cl 16.2(c) and cl 9.9(c).

(c) I am only prepared to make an interim order. That will preserve the rights of the parties pending the meditation. If the various disputes between the parties are not resolved in meditation, the arbitrator will be able to review the order if requested to do so. Neither the order nor the reasons that I have delivered are intended to bind any arbitrator who may be appointed. I am mindful of the need to respect the choice of dispute resolution procedures that the parties have made and to not take from any arbitrator who might ultimately be appointed the power to determine disputes that the parties have conferred. However, I do not consider that an interim order would undermine the integrity of the parties' agreement for the resolution of their disputes or pre-empt the arbitration given the multiple dispute resolution procedures prescribed by cl 9.9(c) of the Guarantee and the nature of the obligation imposed by cl 3(a).

(d) I consider that the balance of convenience favours the grant of an interim order to the extent that this was a relevant to the exercise of the court's discretion. First, subject to MCC's argument that no obligation could arise under the Guarantee until the dispute between the plaintiffs and MCC Sanjin have been resolved, the order gives effect to the *status quo* that the parties plainly intended would prevail during the dispute resolution process. Second, the intention expressed in cl 3(b) of the Guarantee was that the plaintiffs were to be paid out of the escrow account if a dispute was resolved in their favour by mediation or arbitration. That was obviously intended to avoid delay in the plaintiffs receiving any payment that was due according to the parties' agreement or a determination in circumstances where the Guarantee required MCC to pay any valid demand within 24 hours. The escrow provision also meant that the plaintiffs were not left having to enforce any mediation outcome (or arbitral award) in the PRC. Third, although an interim order requiring a payment into escrow would be mandatory in nature, it would not irrevocably alter the position between the parties. Obviously, MCC would lose the benefit of the use of the funds paid into escrow but that was what was contemplated by cl 3(b). However, characterising the order as mandatory over-states its effect as it would not permanently alter the parties' respective positions.

(e) To the extent that it may be a relevant matter, I do not consider that damages would be an adequate remedy. It would be necessary for the plaintiffs to recover the damages by registering and enforcing an award or judgment in their favour following a process of determination and assessment. The expert evidence disclosed that there was a developed procedure for registering and enforcing foreign arbitral awards but necessarily, the procedures involved take time and the PRC courts were required to make determinations and could exercise discretions that might introduce an element of uncertainty. The escrow provision avoided that risk of delay and uncertainty and obviated the need for an assessment of damages and enforcement proceedings in the PRC.

131 The plaintiffs' primary argument on its application for an interlocutory injunction was that MCC's approach stripped the escrow provision of its intended effect. On that approach, no interim order could be made because of the mandatory nature of the order (an argument that would also apply in an arbitration). Further, the dispute over whether MCC was obliged to pay an amount into escrow could only be resolved at

the same time as the dispute about whether it was obliged to pay the Guaranteed Obligation pursuant to the demand made by the plaintiffs. That was because MCC relied on the same argument to deny that it was obliged to pay an amount into escrow or to meet the demand. A determination in favour of the plaintiffs that MCC was obliged to pay an amount into escrow would be made at the conclusion of an arbitration if the disputes were not resolved through mediation. An order requiring MCC to pay an amount into escrow would be inutile at that time.

132 There was some force in MCC's response to that argument: the effect of an order requiring a payment of the Disputed Amount into escrow would depend on the timing of the determination of the disputes under the Guarantee and the Asset Sale Agreement. The question of whether the Guarantee could operate prior to the resolution of any dispute under Asset Sale Agreement was a discrete question that could be determined in advance of the dispute between the plaintiffs and MCC Sanjin.

133 In my view, the matters raised by the plaintiffs regarding the effect of MCC's approach and MCC's response should be left to the arbitrator to consider if the disputes between the plaintiffs and MCC are referred to arbitration and the question of the interim order requiring a payment into escrow is revisited. The purpose of the interim order I propose to make is to preserve the rights of the plaintiffs in the dispute resolution procedures prior to any referral to arbitration.

134 It was not necessary to consider whether the court should exercise its discretion to make an order under article 17J of the Model Law or to grant a stay on conditions under the CAA having regard to the finding made in this part of the reasons.

The plaintiffs' application for an interlocutory injunction

135 It is also not strictly necessary to determine the plaintiffs' application for an interlocutory injunction in light of the findings that have been made on the application of s 7 IAA. However, I will briefly express my view on two issues that were specific to the application in deference to the parties' submissions.

136 First, the defendants contended that the court had no jurisdiction to consider the application once it was determined that the proceedings were to be stayed. That resulted, not unexpectedly, in arguments about which application took precedence. The powers conferred on the court to make ancillary or interim or supplementary orders under the CAA and the IAA

will ordinarily avoid those arguments. It ought not to be necessary for a party to an arbitration agreement to resort to an interlocutory injunction to obtain an order that would, in substance, impose a condition on the grant of a stay. The court has ample power to grant a stay subject to conditions under each statute, including under the Model Law in the case of the IAA, so as to preserve the *status quo* and protect the parties' positions pending the arbitration.

137 Second, I do not consider that the plaintiffs established that there was any basis for seeking urgent relief against MCC under cl 9.9(d) of the Guarantee at the time that they made their application for an interlocutory injunction or subsequently.

138 The plaintiffs initially relied on two newspaper articles published in October 2010 (that is, shortly after the proceedings were commenced). The first article reported that a contractor had commenced proceedings to wind up the 'Australian arm of one of China's most powerful companies, MCC' (attachment 'JH-13' to Mr Hamilton's affidavit). The second article concerned the Sino Iron project in the Pilbara. It referred to 'persistent reports over the past month that … MCC, a 20 per cent shareholder in Sino Iron and in charge of building much of the ambitious project, was withholding payments from and terminating local contractors' (attachment 'JH-14' to Mr Hamilton's affidavit).

139 In my view, the articles provided no basis for seeking or granting urgent interlocutory relief within cl 9.9(d). It was apparent from the first article that the contractor's action was undertaken in the context of a dispute and not out of concern about the solvency of the 'Australian arm' of MCC or MCC. Indeed, the article stated that 'it was expected that a wind-up will not happen because MCC will now feel compelled to pay the debt'. The second article contained no information on the financial position of MCC.

140 The plaintiffs tendered further evidence regarding the financial circumstances of the defendants for the November 2011 hearings: affidavit of Timothy Paul Turner sworn 4 August 2011. Mr Turner, who is a director of each of the plaintiff companies, attached to his affidavit further media reports concerning disputes among those involved in the Sino Iron project, including MCC. I do not consider that any inference concerning the financial position of MCC can be drawn from the reports. Putting to one side the question of what weight might be given to such material, there was no suggestion in the reports that the genesis of the disputes lay in the financial position of MCC.

141 Mr Turner also gave evidence of searches that had been undertaken which lead him to believe that MCC had no assets in Australia. He stated that he was, accordingly, concerned that 'there is a real risk if the plaintiffs are successful in the proceedings as against [MCC] that the plaintiffs' victory may be hollow in that the plaintiff will not be able to recover against any assets of the third defendant within Australia' (par 13). However, on the evidence that was adduced by the plaintiffs, that concern was not as a result of any step taken by MCC since the disputes with the plaintiffs emerged. The evidence left open the real possibility inference that MCC did not hold assets in its own name in Australia at the time that the Guarantee was made.

142 In my view, Mr Turner's evidence did not establish that the plaintiffs' application for an interlocutory injunction was urgent within the meaning of cl 9.9(d) of the Guarantee. It was to be noted in that regard that the defendants tendered the audited accounts for MCC for the year ended 31 December 2009. The accounts disclosed that the corporation had net assets of approximately $AUD10 billion (Mr Ellinghaus' second affidavit, pars 26 - 28; attachment 'CTE-22').

143 Accordingly, I would dismiss the plaintiffs' application for an interlocutory injunction. The application did not come within cl 9.9(d) of the Guarantee so that the dispute the subject of the application was to be resolved according to the procedures prescribed by cl 9.9(c). The question of whether an interim order should be made requiring MCC to pay the Disputed Amount into escrow was to be determined within the context of those procedures and accordingly, by reference to the discretion conferred on the court by s 7(3) of the IAA and if necessary, article 17J of the Model Law.

144 There was a dispute between the plaintiffs and MCC regarding the proper construction of the provisos in cl 16.2(d) and cl 9.9(d). The plaintiffs contended that the provisos operated as a 'carve out' to the dispute resolution procedures prescribed by cl 16.2(c) and cl 9.9(c). There was no agreement that a dispute for which urgent relief was required would be resolved by any of the procedures prescribed by those clauses and accordingly, such a dispute would not form part of the arbitration agreement between the parties.

145 MCC accepted that there was a 'carve out' but contended that cl 9.9(d) only applied to cl 9.9(c)(i) of the Guarantee (defendants' submissions in response to the plaintiffs' application for a mandatory injunction, par 11 and following). That was because cl 9.9(c)(ii) referred

to 'failing by settlement' following the senior representatives meeting. It was said that the reference to 'without first having to attempt to negotiate and settle the dispute' picked up and reflected the wording of cl 9.9(c)(ii). Clearly, the clause contemplated that an application would ordinarily be made prior to any step being taken under cl 9.9(c); the clause referred to seeking urgent relief without '*first* having to attempt to negotiate and settle the dispute'. However, it was not necessary to determine whether MCC's interpretation of the clause captured its true meaning and effect or more generally, the extent of the carve out created by cl 16.2(d) and cl 9.9(d).

The subpoenas

146 There were significant differences between the parties over the forensic purpose for which the subpoenas had been issued by the plaintiffs. The defendants contended that the subpoenas could only be directed to obtaining documents that were relevant to the plaintiffs' application for an interlocutory injunction. The plaintiffs contended that it was permissible to issue the subpoenas for a wider purpose: the plaintiffs were entitled to subpoena documents 'for the purpose of evaluating their approach to the proceedings … to generally form a view as to the merits of the claim, including a view as to mediation and settlement' (plaintiffs' note on legitimate forensic purpose, par 8). It would appear that it is unnecessary to hear and determine the application to set aside the subpoenas in light of the findings that have been made in these reasons insofar as the documents were sought for purposes connected with the application for an interlocutory injunction. However, I will make further directions for hearing the application to set aside the subpoenas as part of the orders to be made to give effect to these reasons if the plaintiffs still press the subpoenas having regard to their submissions concerning the width of the forensic purpose for which they were entitled to seek the subpoenaed documents.