When will an arbitration agreement be incapable of being performed?

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The recent decision of the Supreme Court of Queensland in Bulkbuild Pty Ltd v Fortuna Well Pty Ltd & Ors [2019] QSC 173 considered the circumstances in which an arbitration agreement is "incapable of being performed" for the purposes of the Commercial Arbitration Act 2003 (Qld).

Bulkbuild was engaged by Fortuna to design and construct serviced apartments in Windsor, Queensland. A dispute arose between the parties in relation to Fortuna’s alleged failure to pay Bulkbuild for work under the contract. Bulkbuild commenced proceedings seeking $4.3 million in damages for breach of contract, or alternatively, on a quantum meruit basis. Bulkbuild also claimed against two other parties who were superintendents under the contract, for negligence relating to payment certificates and the treatment of variations.

The contract between Bulkbuild and Fortuna contained a dispute resolution clause in which the parties agreed to confer and attempt to resolve the dispute and, failing that, the dispute "shall be and is hereby referred to arbitration". Bulkbuild and Fortuna agreed that this clause was an "arbitration agreement" within the meaning of section 7(1) of the Act.

Fortuna applied for an order that Bulkbuild’s proceedings be stayed to allow the parties to follow the dispute resolution procedures in the contract. It argued that, in light of the valid arbitration agreement, the court was required to grant a stay of proceedings. This was on the basis of section 8(1) of the Act which provides that, if an action is brought in a matter which is subject to an arbitration agreement, and if a party so requests, the court must refer the matter to arbitration unless the agreement is null and void, inoperative or incapable of being performed. This provision of the Act is not unique to Queensland, with all other States and Territories having also adopted versions of the UNCITRAL Model Law on International Commercial Arbitration in their own Commercial Arbitration Acts to create a uniform framework for domestic arbitration in Australia.

Bulkbuild argued that the arbitration agreement was "incapable of being performed", as it would result in only part of the dispute being referred to arbitration and there would be a risk of different factual findings between related disputes. This was because the superintendents were not parties to the arbitration agreement, and as such, the court could not refer those claims to arbitration.

In finding that the arbitration agreement was not "incapable of being performed", Bowssill J held that:

- The phrase "incapable of being performed" relates to the parties’ capability to perform an arbitration agreement. There must be some obstacle which cannot be overcome even if the parties are ready, willing and able to perform the agreement.
- The inconvenience of claims against the superintendents being pursued in court at the same time as the arbitration of the claim against Fortuna does not render the arbitration agreement "incapable of being performed".

By reference to the recent decision of the High Court in Rinehart v Hancock Prospecting [2019] HCA 13 (see our previous update of that decision [here]), Bowssill J noted that the superintendents would appear to be persons "claiming through or under a party to the arbitration agreement". On this analysis, the superintendents would be considered "parties" to the arbitration agreement, and subject to any mandatory referral to arbitration pursuant to section 8(1) of the Act.

Bowssill J also expressed the view that, as a matter of discretion, the claims against the superintendents would be appropriate for a stay pending completion of Bulkbuild and Fortuna’s arbitration. Her Honour did not make any orders to this effect and instead gave the parties an opportunity to be heard further on this point.

This case acts as a timely reminder that the potential risk of inconsistent findings as a result of related proceedings in separate forums will not necessarily result in an arbitration agreement being "null and void, inoperative or incapable of being performed". Such inconvenience will however be a valid consideration in the exercise of a court’s discretion to stay court proceedings.

The full case can be found [here].