Tesseract: Don’t Over-React! The High Court of Australia, Proportionate Liability, Arbitration, and Private International Law

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On 7 August 2024, the High Court of Australia handed down its long-awaited decision in *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* [2024] HCA 24. The dispute arose out of a domestic commercial arbitration seated in South Australia, where the C*ommercial Arbitration Act 2011* (SA) is the relevant lex arbitri. That Act is a domestically focused adaptation of the UNCITRAL Model Law on International Commercial Arbitration (with its 2006 amendments).

The respondent to the arbitration sought to rely upon proportionate liability legislation found in the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) and in the *Competition and Consumer Act 2010* (Cth). The High Court was asked to determine whether those proportionate liability regimes could be applied in the arbitration. A very practical difficulty arose here, reflected in Steward J noting (in dissent) that the High Court was ‘faced with an invidious choice’: see [228]. Were the proportionate liability laws not to apply in the arbitration, the respondent might find themselves liable for 100% of the applicant’s loss, when they would not be liable to that same extent in court proceedings applying the same body of South Australian law. But were the proportionate liability laws to apply, the applicant might find themselves able to recover only a portion of their loss in the arbitration, and might then have to then pursue court proceedings against another third party wrongdoer to recover the rest: given that joinder is not possible in arbitration without consent.

By a 5-2 majority, the High Court decided that these proportionate liability regimes were to be applied in the arbitration. There has been much commentary published already as to what this means for arbitration law in Australia – including here, and here. What might be of most interest for this blog's audience, however, is to note that the High Court's reasoning was grounded in the application of private international law.

All of the High Court's judgments in *Tesseract* – both majority and dissenting – recognised that whether or not the substantive law aspects of the two relevant proportionate liability regimes applied in the arbitration was a question of applicable law, to be resolved via South Australia's implementation of Art. 28 Model Law. This is not the first time that this provision has been addressed by the High Court of Australia. The High Court was also required to analyse its effect in a failed constitutional challenge to Australia's implementation of the Model Law in the international commercial arbitration context in *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533. In that case, it was confirmed that Art. 28 Model Law does not require arbitrators to apply the law correctly. It was also confirmed that there is no separate term implied into an arbitration agreement having that effect.

It does not appear that the relationship between *TCL* and *Tesseract* has been appreciated in some existing commentaries on Tesseract, including in this blog which asks '[i]f the arbitrator gets it wrong, will that open the award to an enforcement challenge[?]' Viewing Tesseract in light of *TCL*'s previous analysis, it appears that there should be no recourse against an award if an arbitrator correctly identifies the law of an Australian jurisdiction as applicable, but incorrectly applies (or even completely fails to apply) that jurisdiction's proportionate liability laws. It is now trite law in Australia, as around the world, that errors of law do not ground recourse against an award under either the Model Law or the New York Convention.

Interestingly, the fact that Art. 28 Model Law was the key provision underpinning the High Court's analysis in *Tesseract* should also answer a matter identified in some other commentaries – including here, here, and here – around Queensland law prohibiting parties from contracting out of its proportionate liability regime, and Victorian, South Australian, ACT, and Northern Territory law being silent on that contracting out issue. Since Art. 28(1) Model Law permits parties to choose rules of law, and not only law in the sense of a complete State legal system, it is

arguably open to arbitrating parties to exclude the operation of proportionate liability laws in all Australian jurisdictions regardless of what they say about contracting out. In such cases, the parties would simply be choosing rules of law – which is a type of choice that Art. 28(1) Model Law permits.

Thus, whilst one of the first questions asked about *Tesseract* has been '[i]s the decision arbitration-friendly?', it is perhaps not too controversial to suggest that *Tesseract* was a case less about arbitration itself, and more about private international law.