

AUSTRALIA: INTERNATIONAL ARBITRATION | AUGUST 2024

PROPORTIONATE LIABILITY REGIME APPLIES TO ARBITRATIONS IN AUSTRALIA

Australia's proportionate liability regime enables a judicial body to apportion liability across multiple wrongdoers to a dispute, such that each concurrent wrongdoer is held responsible for their respective share of loss and damage suffered by the plaintiff. There had been consensus for some time that the regime did not apply to arbitration, including because an arbitral tribunal does not have the power to join concurrent wrongdoers, unless consent has been obtained from all concurrent wrongdoers and the parties to the arbitration.

In *Tesseract International Pty Ltd v Pascale Construction Pty Ltd*,¹ the High Court has held (by majority) that Australia's proportionate liability laws apply to arbitrations.

Key Takeaways

What does this decision mean to you? The case related to a domestic arbitration seated in South Australia, the substantive law of which was South Australian law. However, the case has broad implications. If the majority's reasoning is applied to any domestic and international arbitration governed by the law of a state or territory in Australia, the proportionate liability regime of that state or territory will apply as part of the substantive law, unless it has been excluded by the parties.

For the drafters of contracts for multi-party projects, such as large and complex construction projects, careful consideration needs to be given to the drafting of dispute resolution clauses, including arbitration agreements. Drafters also need to consider what law should govern the contract as the proportionate liability regime of the substantive law will apply, unless it can and has been expressly excluded.

For construction projects, designers, consultants and subcontractors may, as respondents to an arbitration, benefit from the apportionment of liability between multiple parties. However, principals, owners or main contractors may find that, as claimants, their chance to recover the full amount of the loss and damage suffered against the counter party to the contract is reduced by apportionment under the regime.

Accordingly, it is essential to consider the applicable substantive law prior to entering into a contract and whether the proportionate liability laws may be excluded in the contract. Parties may contract out of the proportionate liability laws in NSW, Western Australia and Tasmania. Whilst Queensland prohibits contracting out, Victoria, South Australia and Northern Territory do not expressly permit or prohibit exclusion.²

Parties are also recommended to review existing contracts, in particular, the dispute resolution and the governing law clauses, and to re-negotiate or amend these clauses to exclude the proportionate liability regime if appropriate.

Background

The dispute arose from a contract for the design and construction of a warehouse building in South Australia. The applicant (**Tesseract**) provided engineering and consultancy services to the respondent (**Pascale**). Pascale alleged that the work done by Tesseract did not meet the standard required under the contract. As a result, Pascale suffered

¹ [2024] HCA 24.

² For New South Wales, see *Civil Liability Act 2002* (NSW), s 3A(2); for Western Australia, see *Civil Liability Act 2002* (WA), s 4A; for Tasmania, see *Civil Liability Act 2002* (Tas), s 3A(3). For Australian Capital Territory, South Australia and Northern Territory, see *Civil Law (Wrongs) Act 2002* (ACT), *Civil Liability Act 1936* (SA) and *Personal Injuries (Liabilities and Damages) Act 2003* (NT) generally. For Queensland, see *Civil Liability Act 2003* (Qld), s 7(3).

loss and damage. Pascale referred the dispute to arbitration in accordance with the contract.³ The arbitration was conducted under the *Commercial Arbitration Act 2011* (SA) (**Commercial Arbitration Act**).

Tesseract denied the allegations made by Pascale. In the alternative, Tesseract claimed that any damages should be reduced to reflect the proportionate liability of a third party concurrent wrongdoer under the proportionate liability laws that apply in South Australia, these being in Part 3 of the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) (**Law Reform Act**) and Part VIA of the *Competition and Consumer Act 2010* (Cth) (**CCA**) (**Proportionate Liability Laws**).

Pascale contended that the arbitrator was not entitled to invoke the proportionate liability provisions in the arbitration proceedings.

High Court Decision

The question before the High Court was whether the Proportionate Liability Laws applied to arbitration. The majority of the High Court held that they do apply to arbitration.

Whilst the reasoning of the majority decisions differed, there was a common focus on the application of the Proportionate Liability Laws as part of the law of South Australia, this being the substantive law applicable to the arbitration. Under s 28 of the *Commercial Arbitration Act 2011* (SA), the law applicable to the resolution of the substance of the dispute was the law of South Australia. As the proportionate liability laws formed part of that law, the arbitrator was required to apply those laws with modifications, unless the effect of the modifications was that the laws could no longer be described as part of the substantive laws of South Australia.⁴

Some of the majority also noted that the Commonwealth and South Australian Parliaments intended that the legislation apply to arbitrations subject only to parties agreeing to the contrary.⁵ It was also noted that there was nothing to support a mutual contractual intention to exclude the proportionate liability regimes from an arbitration.⁶

The challenges that may be faced by a claimant in joining all wrongdoers to an arbitration or to bringing subsequent proceedings against additional wrongdoers did not excuse the application of the regime. The majority also considered that the proportionate liability regime was arbitrable and that the regime was not contrary to public policy.

Dissenting opinions

In dissent, Edelman J focused on the paramount objective of arbitrations, which is "*to facilitate the fair and final resolution of commercial disputes ...*" (emphasis added).⁷ The traditional approach of solidary liability ensured that the dispute was fully resolved. In contrast, proportionate liability may result in the partial resolution of the dispute, which is inconsistent with the paramount objective of arbitration.⁸

Edelman J considered in detail the development of the proportionate liability regime and whether it was intended to be applied to arbitration. He noted that prior to 2015 there was widespread consensus that the regime did not apply to arbitration.⁹ He also considered whether the regime could be applied to arbitration and concluded that it could not because substantial modifications were required for it to do so. These modifications were so substantial that it resulted in a different law being applied.¹⁰

Steward J also considered that the Proportionate Liability Laws were incapable of resolution by arbitration without substantial changes to the legislation. He considered that there were key features of the proportionate liability regime that were missing in arbitration, these being that there is no mechanism to enforce the obligation on a respondent to disclose the identity of other potential concurrent wrongdoers and there is no mechanism for the claimant to join the concurrent wrongdoers.¹¹

Steward J considered that without these key features, "*the carefully calibrated adjustment of rights and obligations found in each proportionate liability regime is distorted*". These features also "*reflect an expectation ... that all*

³ *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* [2022] SASCA 107, at [7].

⁴ *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* [2024] HCA 24, at [70] per Gageler CJ and at [85] per Jagot and Beech-Jones JJ.

⁵ *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* [2024] HCA 24, at [365].

⁶ *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* [2024] HCA 24, at [381].

⁷ *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* [2024] HCA 24, at [212], quoting *Commercial Arbitration Act 2011* (SA), s 1C(1).

⁸ *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* [2024] HCA 24, at [148], [220].

⁹ *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* [2024] HCA 24, at [198] - [210].

¹⁰ *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* [2024] HCA 24, at [182] - [184].

¹¹ *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* [2024] HCA 24, at [263].

claims will be resolved in the one proceeding".¹² Steward J was also concerned that a court would not be bound by the findings of a tribunal in an arbitral award, which may increase the risk of inconsistent findings.¹³

Conclusion

Whilst the application of proportionate liability regime to arbitrations where the substantive law is an Australia law is now settled, the decision has far-reaching consequences. The proportionate liability regime is often expressly excluded in contracts and if so, will not apply to any dispute referred to court or arbitration. However, if it is not excluded then it will apply to an arbitration if it is part of the substantive law that applies to the dispute.

Excluding the proportionate liability regime in the contract, where possible, will now be the recommended course of action when negotiating contracts that refer disputes to arbitration. Parties may also consider changing the substantive law so that the regime can be excluded.

Authors



JO DELANEY

Partner, Sydney

T +61 (0)2 9320 4621

E jo.delaney@hfw.com



LUYAN YU

Associate, Sydney

T +61 (0)2 9320 4622

E luyan.yu@hfw.com

¹² *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* [2024] HCA 24, at [264].

¹³ *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* [2024] HCA 24, at [265] - [266].

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