JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA IN CIVIL
CITATION	**:**	THE STATE OF WESTERN AUSTRALIA -v- MINERALOGY PTY LTD [2020] WASC 58
CORAM	**:**	KENNETH MARTIN J
HEARD	**:**	7 FEBRUARY 2020
DELIVERED	**:**	28 FEBRUARY 2020
FILE NO/S	**:**	GDA 13 of 2019
BETWEEN	**:**	THE STATE OF WESTERN AUSTRALIA Appellant AND MINERALOGY PTY LTD First Respondent INTERNATIONAL MINERALS PTY LTD Second Respondent

Catchwords:

Arbitration - Application for summary dismissal of proceeding - Whether *Commercial Arbitration Act 1985* (WA) or *Commercial Arbitration Act 2012* (WA) applicable to the relevant award - Avenue of wider potential challenge against the award under *Commercial Arbitration Act 1985* challenged as untenable - Whether arbitrator can determine the jurisdiction of an appeal to set aside an award - Consideration of transitional provisions of *Commercial Arbitration Act 2012* - Whether an arbitration had been commenced - Considerations of when the dispute arose and whether an arbitral tribunal had been constituted - Whether arbitrator *functus officio* post first award and fresh

reference by same parties to former arbitrator for new determination - Where dispute and constitution of arbitral tribunal found to occur post commencement of *Commercial Arbitration Act 2012* only avenue of relief is under that Act

Legislation:

Commercial Arbitration Act 1985 (WA)
Commercial Arbitration Act 2012 (WA)

Result:

Summary dismissal of State's appeal

Category: B

Representation:

Counsel:

Appellant	:	Mr J A Thomson SC & Mr J F Bennett
First Respondent	:	Mr J Shaw
Second Respondent	:	Mr P Dunning QC & Mr P Ward

Solicitors:

Appellant	:	State Solicitor's Office
First Respondent	:	Jonathan Shaw
Second Respondent	:	Mineralogy

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

Commonwealth of Australia v Albany Port Authority [2006] WASCA 185
Port of Melbourne Authority v Anshun Pty Ltd (1981) 147 CLR 589
Spaseski v Maldenovski [2019] WASC 65
Walton v Gardiner [1993] HCA 77; (1993) 177 CLR 378

KENNETH MARTIN J:

Introduction

The summary dismissal applications

1 I am dealing with two applications made on 8 November 2019, by each of the first and second respondents (Mineralogy and International Minerals) respectively. At times I will refer to Mineralogy and International Minerals collectively as 'the respondents'. Both corporations apply for the summary dismissal of the appellant's (the State's) proceeding GDA 13 of 2019. By the action GDA 13 of 2019, the State seeks leave to appeal and to appeal against an arbitral award made by the Hon Michael McHugh AC QC (Mr McHugh) on 11 October 2019 (the 2019 Award).

2 The essential contention of both respondents (as applicants for summary dismissal) is that the State's attempt to challenge aspects of the 2019 Award (via GDA 13 of 2019) through utilising the appeal and review regime of the former now repealed *Commercial Arbitration Act 1985* (WA) (the 1985 Act), rather than under the narrower review regime of the subsequent *Commercial Arbitration Act 2012* (WA) (the 2012 Act), is erroneous. The respondents contend that GDA 13 of 2019 is so fundamentally misconceived and without merit that it is unarguable and so ought be dismissed in the court's inherent jurisdiction. If the respondents' challenges are correct, then there is no dispute that summary dismissal should follow. The State accepts that if I find the appeal to be incompetent, I have the power to dismiss, essentially as part of the ordinary course of administering the court's process: see ts 5. See also ***Walton v Gardiner*** [1993] HCA 77; (1993) 177 CLR 378, 393 (Mason CJ, Deane & Dawson JJ) as applied by Steytler P in ***Commonwealth of Australia v Albany Port Authority*** [2006] WASCA 185 [20] - [21]. However, there exists strong dispute over the respondents' challenges.

The appeal (GDA 13 of 2019)

3 It is apparent from the State's form 83 appeal notice of 31 October 2019, ostensibly lodged pursuant to *Rules of the Supreme Court 1971* (WA) O 65 r 10 and thereby commencing GDA 13 of 2019, that the State would seek thereby to invoke s 38(2) of the former 1985 Act to challenge components of the 2019 Award.

4 Omitting the particulars provided, the State's form 83 notice as filed seeks to raise two grounds of appeal - in respect of which leave to appeal is sought, pursuant to s 38(4)(b) of the former *Commercial Arbitration Act 1985*. The two grounds of appeal the subject of the State's form 83 appeal notice read in the following terms (absent their particulars):

> 1. The Arbitrator erred in law in determining that the appellant's single breach of contract gave rise to two distinct causes of action for different damages.
>
> 2. By reason of the error in ground 1, the Arbitrator erred in law in declaring that the respondents are not foreclosed from further pursuing claims for damages arising from any breach or breaches of the Iron Ore Processing (Mineralogy Pty Ltd) Agreement.

5 The observed reference in ground 2 above to the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement* (the State Agreement) is a reference to an agreement that is found in sch 1 of the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA) to which agreement the State of Western Australia and the respondents were all parties. Schedule 1 identifies the State Agreement as being made on 5 December 2001. Relevantly, the State Agreement contains the parties' arbitration submission clause, cl 42, reading in the following terms (cl 42(1)):

> Any dispute or difference between the parties arising out of or in connection with this Agreement the construction of this Agreement or as to the rights duties or liabilities of the parties or any of them under this Agreement or as to any matter to be agreed upon between the parties under this Agreement shall in default of agreement between the parties and in the absence of any provision in this Agreement to the contrary be referred to and settled by arbitration under the provisions of the Commercial Arbitration Act 1985 and notwithstanding s 20(1) of that Act each party may be represented before the arbitrator by a duly qualified legal practitioner or other representative.

The relevant West Australian arbitration legislation

6 The contention of both Mineralogy and International Minerals under their respective summary dismissal applications is straightforward. Essentially, they contend that the former 1985 Act was repealed at the coming into force of the substantive provisions of the 2012 Act.

The 2012 Act

7 The provisions of the 2012 Act took effect substantively in Western Australia from 7 August 2013. To that end, see s 1B(b) of the 2012 Act and Western Australia, *Government Gazette*, No 142 (6 August 2013) at 3,677.

8 A repeal of the former 1985 Act was effected by s 44 which is to be found within pt 11 of the 2012 Act. So much is straightforward.

9 Nevertheless, pt 10 of the 2012 Act contains transitional provisions which bear upon the present arguments.

10 Towards the respondents' summary dismissal arguments, it is necessary to review the terms of s 43 found within pt 10 of the 2012 Act. Section 43 addresses the designated law of the State governing an arbitration and arbitration agreement, for circumstances where an arbitration was already commenced (in effect) before 7 August 2013. Section 43 reads:

> **43. Savings and transitional provisions**
>
> (1) Subject to subsection (2) -
>
> (a) this Act applies to an arbitration agreement (whether made before or after the commencement of this section) and to an arbitration under such an agreement; and
>
> (b) a reference in an arbitration agreement to the *Commercial Arbitration Act 1985*, or a provision of that Act, is to be construed as a reference to this Act or to the corresponding provision (if any) of this Act.
>
> (2) If an arbitration was commenced before the commencement of this section, the law governing the arbitration and the arbitration agreement is to be that which would have been applicable if this Act had not been enacted.
>
> (3) For the purposes of this section, an arbitration is taken to have been commenced if -
>
> (a) a dispute to which the relevant arbitration agreement applies has arisen; and
>
> (b) the arbitral tribunal has been properly constituted.

11 Section 7 of the 2012 Act contains an elaborate definition of the term 'arbitration agreement'. However, for present purposes, there

looks to be no dispute about the arbitration clause that is cl 42(1) within the State Agreement fulfilling that description and so meeting the term 'arbitration agreement' as it is used under s 43 of the 2012 Act as now seen.

12 Hence, prima facie, the observed reference to the 1985 Act made in cl 42(1) of the parties' agreement would, post 7 August 2013, be read by reason of s 43(1)(b) as directing to the replacement 2012 Act, as regards those parties' further disputes arising thereafter.

13 Next, I direct attention to the terms of s 43(2), as regards the transitional provisions made applicable to circumstances where an arbitration '**was commenced**' before commencement of s 43 of the 2012 Act. Where s 43(2) is engaged, the law governing an already commenced arbitration and the arbitration agreement, is stipulated to be the former commercial arbitration legislation, namely, the 1985 Act.

14 As also now seen by s 43(3), the process of ascertainment as to whether or not an arbitration 'was commenced' before the commencement of s 43 (ie, before 7 August 2013) requires the fulfilment of the conjoint, dual criteria as set by s 43(3)(a) and (b).

15 In essence then, in order for the governing law of the arbitration (and the agreement) to be other than the 2012 Act, the parties' dispute (arising under their relevant agreement) needs to have arisen temporally prior to 7 August 2013. Along with that first touchstone, it also needs to be shown that the relevant arbitral tribunal was 'properly constituted' before 7 August 2013.

Evidentiary materials and sundries

16 The evidentiary materials relied upon by the parties for the purposes of resolving the present applications can be identified as follows. In addition to the parties' written submissions, the following evidence was adduced:

(a) the second respondent, International Minerals, read and relied upon two affidavits of Mr Shane Robert Bosma, affirmed 8 November 2019 and 24 January 2020;

(b) the first respondent, Mineralogy, in addition to relying upon the evidentiary materials under Mr Bosma's affidavits, also read and relied upon an affidavit of Mr Clive Frederick Palmer, affirmed 24 January 2020; and

(c) the State tendered four books containing the arbitral documents put before Mr McHugh for the purposes of the parties' 2018 reference to him - which culminated in the 2019 Award.

17 I will also note formally that Mr Shaw, who is the Queensland based lawyer of record for the first respondent, Mineralogy, wished it to be recorded that albeit he made some brief verbal submissions for his client at the hearing, he undertook that task as a solicitor and not as counsel.

The parties' rival arguments

Mineralogy and International Minerals

The 2019 Award

When the relevant dispute arose

18 As mentioned, the essential contention of both Mineralogy and International Minerals is that the parties' submitted dispute, which thereafter became the subject of Mr McHugh's 2019 Award, was essentially an interpretative dispute arising under the State Agreement as to the effect and implications of an earlier award made by the same arbitrator for the same parties on 20 May 2014. Hence, axiomatically, that the parties' dispute resolved under the 2019 Award arose **after 7 August 2013**.

When the arbitral tribunal was constituted

19 But beyond that point, both respondents then argue further that even if they were to be ascertained as wrong about when this dispute arose, nevertheless, it is demonstrably clear that Mr McHugh was not constituted as the arbitral tribunal for that interpretative dispute (as resolved under his 2019 Award) until he had accepted an appointment as the parties' agreed arbitrator to resolve that dispute. That constituting event, it is said, was only in December 2018, obviously then at a time well after 7 August 2013. It is the primary contention of Mineralogy and International Minerals that Mr McHugh was constituted as their arbitrator under the consent directions as approved and issued by Mr McHugh to the parties at 20 December 2018, to determine a further dispute arising under the agreement then referred to him by these parties.

20 It is a matter of historic fact that Mr McHugh had earlier been engaged as arbitrator by these same parties to resolve a dispute arising

under the State Agreement and which became the subject of his arbitral award, issued on 20 May 2014 (the 2014 Award). In resolving that dispute, Mr McHugh had been determining a dispute which had arisen and in respect of which he was clearly appointed as their arbitrator, well prior to 7 August 2013.

21 Hence, as regards that arbitration and Mr McHugh's 2014 Award, the terms of s 43(2) of the 2012 Act look clearly to be engaged, as regards making the law governing that arbitration and appointment to be the 1985 Act.

22 But there was subsequent disputation over the legal implications of that 2014 Award. The base position of the respondents on their respective applications seeking summary dismissal of GDA 13 of 2019 is, that viewed from both a temporal and legal perspective, it is overwhelmingly clear that Mr McHugh's 2019 Award may **only** be the subject of a possible curial challenge taken to this court under the later regime of the 2012 Act and the 'set aside' provisions of s 34 of that Act.

23 Further, Mineralogy and International Minerals point out as well that there has been no 'agreement' for a purpose of possibly engaging with s 34A(1)(a) of the 2012 Act. Hence, there could be no question of any 'appeal' by the State under the 2012 Act against the 2019 Award.

24 Nor, they say, can there be any possible engagement of the transitional provisions of s 43(2) of the 2012 Act towards the 2019 Award. Their contention essentially is that these conclusions are demonstrable from the terms of and the timing of the arbitration that culminated in the 2019 Award.

Jurisdiction

25 Even further, Mineralogy and International Minerals say that even if none of that were the case, it is only for this court and for no-one else (and certainly not the arbitrator) to determine the jurisdiction of a court to hear an appeal or an application to set aside an arbitral award. To that end, they say, any observations by the arbitrator upon the applicable arbitration legislation governing his arbitration (or agreement) are simply not relevant. They argue that such observations are not to the point and, essentially, are not binding on me.

The State

The 2019 Award

26 The State contends to the contrary or says at least that its position is at least arguable as to the former 1985 Act and so cannot be summarily terminated. It directs particular reference at two early paragraphs within the 2019 Award. Mr McHugh's reasons, on their face, appear to be fully incorporated within the terms of the 2019 Award. As such, going forward a reference to 'reasons' should be read as a reference to the substantive body of paragraphs making up the 2019 Award.

27 In the next section of the reasons I will set out the ten (10) commencing paragraphs of the reasons of Mr McHugh which form, as I assess it, a part of his overall 2019 Award. Mr McHugh's reasons ultimately extend to some 122 paragraphs across 41 pages prior to the concluding page which sets out five specific declarations or orders - also under the heading of 'Award'. I will also set out his 2019 Award conclusion paragraphs.

The 2018 Disputes

28 It will be seen from Mr McHugh's commencing reasons that one of the disputes referred to Mr McHugh in 2018 by the parties for his arbitral resolution was an issue referred to as the 'Finality Issue'. This issue required a resolution of a dispute about whether or not Mineralogy and International Minerals were effectively barred or prohibited by the legal effects of the 2014 Award (under principles of res judicata, issue estoppel or by *Anshun* estoppel) against them subsequently (to the 2014 Award) prosecuting a claim or claims against the State for damages for breach of contract - namely, for a breach of the State Agreement. As will be seen by his 2014 Award, Mr McHugh had determined against the State (upon the issue of breach) as regards cl 7 of the State Agreement. This was in reference to Mineralogy's submission of a proposal to the relevant Minister and the Minister's failure then to consider that submission as a relevant proposal.

29 A question in dispute posed to Mr McHugh by the parties in 2018 was whether or not his 2014 Award now would inhibit the breach damages claims Mineralogy and International Minerals as were sought to pursue against the State post May 2014 by reason of the ascertained breach of the State Agreement by the State.

30 The 2019 Award of Mr McHugh concluded there were no relevantly applicable legal inhibitions against Mineralogy and International Minerals pursuing breach damages arising from the 2014 Award. He declared that Mineralogy and International Minerals could pursue their claims for breach damages for the as ascertained (at 2014) breach of the State Agreement.

GDA 13 of 2019

31 Under GDA 13 of 2019 the State seeks to curially challenge in this court aspects of Mr McHugh's 2019 Award by proceeding under the appeal and review provisions of the 1985 Act, which the State contends still apply and permit that course to be taken.

The 2019 Award

Three features to be highlighted

32 It may be helpful, before turning to the reasons and the concluding declarations of Mr McHugh, to highlight three particular features of the 2019 Award. First, I would direct attention at critical paragraphs 9 and 10, which are strongly emphasised by the State in resisting the present summary dismissal application.

33 The State's contention essentially is that paragraphs 9 and 10 convey Mr McHugh's determination as to his jurisdiction under the former 1985 Act in going about resolving a so-called 'First' and 'Second Damages Claims' (as seen defined).

34 The State submits that those determinations under pars 9 and 10 of the arbitrator as to his jurisdiction are conclusive and that they presently remain unchallenged. Therefore, it is put, in effect, that they must in turn bind this court as regards the contended applicability of the applicable law under the 1985 Act. That in turn determines, it seems, the legislative regime of an appellate challenge open to the State in challenging the 2019 Award under GDA 13 of 2019.

35 Second, I would direct attention to Mr McHugh's reference (to be seen at par 2) to three 'Preliminary Issues', as referred to him by the parties, as a '**further arbitration**'.

36 Third, I direct specific attention at Mr McHugh's references in pars 7 and 8 of his reasons (and, indeed, also again at par 105, but which I will not cite) recording the parties' agreement before him, that

he was then '*functus officio*', in respect of the arbitration the subject of the 2014 Award.

37 The State, by its resistance arguments, explains those references to '*functus officio*' on the basis that there had been only general agreement about that position, which general agreement it is said was subject to the parties' 'particular' agreement that Mr McHugh would have jurisdiction to determine the matters as referred to him by pars 1.1(a) and 1.2(a) of the proposed orders made on 20 December 2018. Those orders in turn were said to be (historically) based upon a letter of the State of 17 June 2014.

38 The State says that the parties had agreed that Mr McHugh held the arbitral jurisdiction to determine what was decided by the 20 May 2014 arbitration: see par 36 of the State's amended written submissions of 5 February 2020.

Reasons and final award

39 Under Mr McHugh's 2019 Award, Mineralogy and International Minerals are, from a nomenclature perspective, respectively referred to as 'Applicants'. In turn, the State of Western Australia is referred to as the 'Respondent'.

40 Under a commencing heading 'Award', the 2019 Award proceeds as follows:

> 1. By an Award made on 20 May 2014 in an arbitration between the above parties (the First Arbitration), I held that a document described as a Proposal to develop the Belmont South Iron Ore Project was a Proposal (the BSIOP Proposal) for the purposes of the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement* (the State Agreement) made between those parties. I further held that the Premier of Western Australia, as Minister for State Development, had failed to give a decision within the time limit required by clause 7(2) of the Agreement and noted that this failure was a breach of the Agreement.
>
> 2. The parties have now referred to me a further arbitration to determine three preliminary issues concerning whether the Applicants have a right to damages for the breach of the State Agreement. At the time of referral, those issues were:
>
> (a) whether the Applicants' right to recover damages (the First Damages Claim) was heard and determined in the May 2014 Award and whether they are now precluded from pursuing that claim (the Finality Issue);

(b) alternatively, if the First Damages claim was not determined in that Award and remains to be determined in that arbitration, whether I should adjourn those proceedings to allow the Respondent to apply to the Supreme Court of Western Australia under section 46 of the *Commercial Arbitration Act* (WA) 1985 to terminate the arbitration (the Section 46 Issue);

(c) whether there has been inordinate and inexcusable delay on the part of the Applicants in conducting another or alternative damages claim and conducting a claim that the Minister had erred in subsequently making the carrying out of the Proposal subject to 46 conditions. If there had been such delay, whether those claims should be dismissed under section 25(2) of the *Commercial Arbitration Act* (WA) 2012 (the Section 25 Issue).

3. By letters to the Applicants dated 22 July 2014, that is, after the publication of the May [2014] Award, the Minister exercised his power under clause 7(1)(c) of the State Agreement to impose conditions precedent to the giving of his approval to the BSIOP Proposal.

4. The Applicants claim that the conditions precedent were so unreasonable that the Minister's decision constituted a breach of the State Agreement, and the Applicants seek damages in respect of that breach (the Second Damages Claim).

5. Alternatively, in the event that the conditions precedent imposed in respect of the BSIOP Proposal are not found to be so unreasonable as to give rise to a breach of the State Agreement, the Applicants claim that they have referred to arbitration the reasonableness of the Minister's decision pursuant to clause 7 of the State Agreement (the Clause 7 Claim).

6. The Applicants have not particularised the nature of the damages they claim in respect of either the First Damages Claim or the Second Damages Claim. However, as the Respondent pointed out, the act of the Minister on 22 July [2014] in imposing conditions on carrying out the BSIOP Proposal was an acceptance that the Proposal was valid. His breach in refusing to accept the Proposal was valid did not continue after that date. It follows then that:

(a) the First Damages Claim must be a claim for damage sustained by the Applicants between the submission of the BSIOP Proposal in August 2012 and the Minister's decision on 22 July 2014; and

(b) the Second Damages Claim must be a claim for damage sustained by the applicants after the Minister's decision on 22 July 2014.

7. The parties now agree that I am *functus officio*, in respect of the First Arbitration which was the subject of the 20 May 2014 Award and that I have no continuing jurisdiction in respect of that arbitration. As a result, the [S]ection 46 [I]ssue which was originally referred to me can no longer be an issue.

8. Although the parties do not dispute that I am *functus officio* in respect of the First Arbitration, they disagree as to what was determined by the [May 2014] Award in that arbitration. The Respondent contends that in those proceedings the Applicants sought to have determined a limited claim for damages for the Minister's breach of the Agreement and are now precluded from claiming any further damages for that breach. The Applicants contend that they are entitled to pursue a general claim for damages (*the First Damages Claim*) in respect of the Minister's breach. Their contention is based on the assertion that, in the earlier arbitration the only claim in respect of damages was for a Declaration that the Applicants were entitled to damages for any costs that they would incur in connection with any further environmental approvals that were required as a result of being unable to substantially commence the project by 22 December 2014.

9. The First Damages Claim arose in an arbitration, which was commenced before the commencement of the *Commercial Arbitration Act 2012* (WA) (**CAA (2012)**). However, s 43(2) of the CAA (2012) provides that the law governing the arbitration is that which would have been applicable if the CAA (2012) had not been enacted. This means that the *Commercial Arbitration Act 1985* (WA) (**CAA (1985)**) governs the First Damages Claim.

10. Accordingly, the First Damages Claim involving what the Respondent called the 'Finality Issue' has to be determined by reference to the CAA (1985). In contrast, the Second Damages Claim and the Clause 7 claim were disputes that arose in 2014 after the CAA (2012) had commenced and have to be determined under that Act.

41 I also set out the concluding paragraph of the 2019 Award which precedes the last five paragraphs that appear under the word 'Award'. These concluding components say:

122. Having regard to the issues to be determined by me as minuted in the Proposed Directions dated 20 December 2018, I make the following Declarations and Order.

AWARD

1. **DECLARE** that the Applicants' right to recover damages was not heard and determined in the Award of 20 May 2014.

2. **DECLARE** that the Applicants are not foreclosed from further pursuing claims for damages arising from any breach or breaches of the State Agreement.

3. **DECLARE** that the Award of 20 May 2014 was a Final Award which terminated the First Arbitration and that the Arbitrator has no jurisdiction to adjourn the proceedings to allow time for the Respondent to apply to the Supreme Court under section 46 of the *Commercial Arbitration Act* 1985 (WA) to terminate the First Arbitration.

4. **DECLARE** that there has not been inordinate and inexcusable delay on the part of the Applicants in progressing the Second Damages Claim or the Clause 7 of the State Agreement claim.

5. **LIBERTY TO APPLY** in respect of the above Declarations.

Perth

11 October 2019 **Michael McHugh**

Arbitrator

Two satellite proceedings

42 Before turning back to the substance of the parties' rival contentions concerning the summary dismissal applications, I should note two further surrounding actions.

ARB 9 of 2019

43 First, I should record that the State has commenced another proceeding in this court, namely, ARB 9 of 2019, by originating summons against Mineralogy and International Minerals. By this proceeding, the State seeks to challenge the 2019 Award by proceeding under s 34 of the 2012 Act.

44 ARB 9 of 2019 was commenced on 4 December 2019. It is effectively stood over pending my further directions - to be issued in the wake of the determination of the present summary dismissal applications in GDA 13 of 2019. Effectively, the State is seen by the further proceeding of ARB 9 of 2019 to be preserving its (less preferred) arbitral review position in the event its present arguments are not accepted.

ARB 12 of 2018

45 Next, I should note a proceeding that was commenced as ARB 12 of 2018 by Mineralogy and International Minerals against the State on 2 August 2018.

46 That proceeding had sought orders pursuant to the 2012 Act, via s 11(3), appointing another distinguished retired judge to be appointed as those parties' sole arbitrator to:

> ... determine the dispute between the plaintiffs and the defendant as to the defendant's liability to pay damages to the plaintiffs consequent upon the Minister's failure to consider the plaintiffs' proposal dated August 2012 for the Balmoral South Iron Ore Project pursuant to clause 6 of the [State Agreement] ('the Dispute').

47 Albeit the proceeding has been listed for directions before me on several occasions post its 2018 commencement, the proceedings have essentially not progressed. The further referral to Mr McHugh in December 2018 by the parties likely explains that. As such, that appointment proceeding in ARB 12 of 2018 may now be redundant.

48 Nevertheless, it stands over for further directions as well, likewise pending resolution of the present controversy.

The 20 December 2018 proposed directions

49 I divert briefly to incorporate the explicit terms of the parties' agreed 20 December 2018 proposed directions, seen as referred to by Mr McHugh at par 122 of the 2019 Award, as earlier set out at [41].

50 It will be remembered it is the joint contention of Mineralogy and International Minerals in seeking summary dismissal that it is demonstrable by reference to the terms of the transition provision, s 43(3)(b) of the 2012 Act, that Mr McHugh as the parties' nominated arbitral tribunal to determine a dispute (which came ultimately to be the subject of the 2019 Award) was only 'constituted' upon the parties' reference of those disputes to him in December 2018. That was, of course, long after the commencement of s 43 of the 2012 Act (at 7 August 2013). The arbitration conducted by Mr McHugh culminating in his 2019 Award was plainly not commenced before 7 August 2013. Consequently, say both Mineralogy and International Minerals, the regime of laws under the former 1985 Act is not applicable to this award.

51 On 20 December 2018, Mr McHugh issued the proposed directions seen below:

Mineralogy Pty Ltd and International Minerals Pty Ltd v State of Western Australia

Arbitration Proceedings before the Hon. Mr McHugh AC QC

Minute of Proposed Directions

20 December 2018

1. Issues for determination

1.1 The Claimants have referred the following claims to the Arbitrator for determination:

(a) A claim for damages consequent upon the Minister reusing to accept the Claimants' August 2012 submission (**BSIOP Proposal**) as a proposal under the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement* (**State Agreement**), which refusal was in breach of the State Agreement as determined in the Award of 20 May 2014 (the **First Damages Claim**).

(b) A claim for damages consequent upon the Minister purporting, by letter of 22 July 2014, to require alterations to, and to impose conditions precedent to approval of, the BSIOP Proposal, which the Claimants assert was so unreasonable as to constitute a breach of the State Agreement (the **Second Damages Claim**).

(c) In the alternative to 1.1(b), if the conditions purported to be imposed were not so unreasonable as to give rise to a breach of the State Agreement, whether the decision of the Minister of 22 July 2014 was reasonable for the purposes of clause 7 of the State Agreement.

1.2 The parties agree that the following issues are to be determined by the Arbitrator:

(a) The **Res Judicata Issue**: whether, as the Respondent contends in the Respondent's solicitor's letter dated 17 June 2014, the Claimants' right to recover damages was heard and determined in the Award of 20 May 2014, and the Claimants are now foreclosed from further pursuing damages.

(b) The **Section 46 Issue**: whether the arbitrator should apply, or should adjourn the arbitration proceeding to

allow time for the Respondent to apply, to the Supreme Court under section 46 of the *Commercial Arbitration Act 1985* (WA), as raised in the Respondent's solicitor's letter to the Arbitrator dated 3 September 2018.

(c) The **Section 25 Issue**: whether, as the Respondent contends, there has been inordinate and inexcusable delay on the part of the Claimants in progressing the Second Damages Claim and the claim outlined at [1.1(c)] above, and, if so, whether those claims should be dismissed, or other directions should be made pursuant to section 25(2) of the *Commercial Arbitration Act 2012* (WA).

(d) Subject to the outcome of 1.2(a) and 1.2(b), whether the Claimants are entitled to an award of damages pursuant to the First Damages Claim.

(e) Whether the Claimants are entitled to an award of damages pursuant to the Second Damages Claim.

(f) The quantum of damages (if any) payable by the Respondent to the Claimants.

(g) If the Claimants are not entitled to an award of damages pursuant to the Second Damages Claim, whether the decision of the Minister of 22 July 2014 was reasonable for the purposes of clause 7 of the State Agreement.

...

6. Next Preliminary Conference

6.1 The matter is adjourned to a preliminary conference not before 19 May 2019 for the purposes of programming delivery of written submissions and a hearing of the Res Judicata Issue, the Section 46 Issue and the Section 25 Issue.

(Signature)

Michael H McHugh AC QC
Arbitrator

The parties' submissions (and considerations thereof)

Mineralogy and International Minerals

52 By par 4 of its further written submissions of 24 January 2020 the second respondent, International Minerals (with these submissions being agreed with and supported by Mineralogy) contends:

4. For an arbitral tribunal to be 'properly constituted', the arbitrator must have communicated to the parties his or her acceptance of the nomination: *Kudeweh v T & J Kelleher Builders Pty Ltd* [1990] VR 701 at 710-5. In the present case, when the arbitral tribunal was thus 'properly constituted' is clear, and beyond contest relevant to the present application, from the following evidence:

    a. The present Respondents commenced an arbitration by notice of dispute dated 7 November 2012, in which the relevant dispute was described as, '*The dispute involves the Minister's refusal to consider a proposal for the development of a project under the [State Agreement]*.': see affidavit of Shane Robert Bosma sworn 24 January 2020 (**Second Bosma Affidavit**) at annexure SRB-13.

    b. Mr McHugh was appointed as arbitrator for that dispute by order of the Honourable Chief Justice Wayne Martin on 19 March 2013: see Second Bosma Affidavit at annexure SRB-14.

    c. Mr McHugh delivered the 2014 Award on 20 May 2014 (affidavit of Shane Robert Bosma sworn 8 November 2019 (**First Bosma Affidavit**) at annexures SRB-1.

    d. Between 20 May 2014 and 20 December 2018, Mr McHugh took no steps as arbitrator.

    e. Following delivery of the 2014 Award, a new dispute arose between the parties as to the effect of the 2014 Award on the present Respondents' right to recover damages consequent upon the 2014 Award.

    f. In August 2018, the present Respondents commenced proceeding ARB 12 of 2018 in this Court seeking to have the Honourable Ray Finkelstein AO QC appointed to arbitrate their claim for damages.

    g. By the correspondence of annexures SRB-2 and SRB-3 to the First Bosma Affidavit, the parties agreed to refer to Mr McHugh the question of [to] whether the 2014 Award prevented the damages claims being pursued, and they defined that dispute as the 'Res Judicata Issue'.

    h. On 20 December 2018, Mr McHugh executed the directions proposed by the parties to resolve the 'Res Judicata Issue' and thereby communicated to the parties his acceptance of appointment as arbitrator for that dispute: see First Bosma Affidavit at annexure SRB-4.

> i. The arbitral hearing on the 'Res Judicata Issue' occurred on 10 September 2019: see First Bosma Affidavit at annexure SRB-5. At that hearing, all parties accepted that Mr McHugh was *functus officio* with respect to his 2013 appointment and his 2014 Award, and thereafter litigated the 'Res Judicata Issue' accordingly: see First Bosma Affidavit annexure SRB-5 at p 76 lines 26-32, and pp 97-100. Critically, this was the first point raised by Mr McHugh with counsel for the State at p 76 and Mr McHugh himself stated that '*this is a new Arbitration*': p 99, line 46.
>
> j. Mr McHugh confirmed that the 2019 Award was delivered in a '*further arbitration*' in paragraph 2 of the 2019 Award: see First Bosma Affidavit annexure SRB-5 at p 117.
>
> k. Subsequent to the 2019 Award, the present Respondents approached Mr McHugh to have him make further directions to progress the substantive damages claims. In response, by email of 22 November 2019, Mr McHugh indicated that, in his understanding, he had not agreed to arbitrate the damages claims: see Second Bosma Affidavit at annexure SRB-15.

[I note, however, as regards the above, that during the hearing before me it was explained by the learned Solicitor-General for the State that, subsequently, Mr McHugh has agreed to arbitrate the damages claims and will issue directions accordingly to that end (see ts 66 - 67).]

53 Essentially, the blunt but fatal (if accepted) submission by Mineralogy and International Minerals is that the factual history collected under par 4 above demonstrates (at par 5):

> ... the arbitral tribunal was only 'properly constituted' for the purposes of s 43(3)(b) on 20 December 2018.

54 In essence then, International Minerals (with Mineralogy agreeing) contends by par 9 of their written submissions:

> 9. Simply put, there was no dispute that arose prior to 7 August 2013 that was determined in the 2019 Award. The issues determined by the arbitrator in the 2019 Award all arose - and can only have arisen - after delivery of the 2014 Award. This may be illustrated by the fact that there would have been no dispute fit for, nor capable of, referral to arbitration (or any other means of litigation) at lest until after the existence of the 2014

> Award and the parties coming into dispute in relation to its effect.
>
> 10. Accordingly, both of the events in s 43(3) of the CAA 2012 occurred after 7 August 2013, and the arbitration and the Award were governed by that Act, not by the CAA 1985.
>
> ...

55 On the face of it, International Minerals and Mineralogy's submissions under pars 4, 9 and 10 as set out as regards s 43(3)(a) and (b) not being engaged above present to me as correct.

56 Mr McHugh's determination of the 'Finality Issue' (as it is defined under par 2(a) of the 2019 Award) is further explained at par 64 of the 2019 Award. As explained, the 'Finality Issue' actually required the resolution of three sub-issues as to possible application of principles of res judicata, an engagement of an issue estoppel which prevented relitigation of the first damages claim and, further or additionally, an estoppel arising under the principles explained by the High Court of Australia in ***Port of Melbourne Authority v Anshun Pty Ltd*** (1981) 147 CLR 589 being applicable.

57 The 'Finality Issue' had involved assessing the legal effects of the 2014 Award.

58 But those as submitted legal questions were not to be answered subjectively by Mr McHugh. The required legal analysis could, or would, have been applied by another arbitrator, or Judge, who might equally have been asked to resolve the same questions. The key point is that the 'Finality Issue' as submitted was a fresh interpretative dispute arising as between the parties under the State Agreement. Necessarily, it was a fresh dispute only arising following the 2014 Award. That was post 7 August 2013. Hence, it is the new 2012 Act regime of laws that is applicable to the 2019 Award.

59 For the purpose of determining the 'Finality Issue', Mr McHugh had been approached and duly engaged by the same parties in 2018. But the 'Finality Issue' might well have been the subject of a referral to another arbitrator that the parties had agreed upon, or that the court appointed at that time (and hence, the as seen commencement of ARB 12 of 2018).

60 There was, of course, an obvious convenience and utility by a re-engagement of Mr McHugh in 2018. Nevertheless, the process to be

conducted by Mr McHugh under the 20 December 2018 proposed directions towards resolving the res judicata, issue estoppel and *Anshun* estoppel disputed and submitted issues was a fresh or, using the arbitrator's own (2019 Award par 2) terminology, a 'further arbitration' to be conducted.

61 Irrespective of arguments about the historic origins of the 'legal disputes' over what the 2014 Award actually carried consequently as regards breach damages issues, it is plain, by reference to the terms of the s 43(3)(b) transitional provision of the 2012 Act, that Mr McHugh was only '**constituted**' to resolve these newly referred disputed issues in 2018. That further arbitral reference to him in 2018 had been long after the coming into operation of s 43 of the 2012 Act at 7 August 2013.

The State

62 The burden of arguments to the contrary as put by the State, on my respectful assessment, reads and puts far too heavy an emphasis on pars 9 and 10 of the 2019 Award as now seen.

63 In the first place, the State seeks to characterise the par 9 and 10 observations as being a determination of the jurisdiction of the arbitrator, as explained there, as by reference to the 1985 Act. I respectfully disagree. That is not my reading of the two paragraphs, when assessed in overall context.

64 At their highest, they see the arbitrator's reference to '**the law**' governing the earlier arbitration and so, to the 1985 Act which 'governs the First Damages Claim'. That and the following reference by Mr McHugh at par 10 to the 'Finality Issue' being determined 'by reference to the CAA (1985)', do not, on my assessment, say or mean that the arbitrator's **jurisdiction** as regards determining the 'Finality Issue' and the 'First Damages Claim' as referred in that context, were grounded then upon the former 1985 Act.

65 In any event, even if that were the meaning intended by those pars 9 and 10 observations of the arbitrator (which I do not accept to be the case), the observation would not be correct as a matter of law in my assessment.

Jurisdiction

66 Clearly, the jurisdiction of the arbitrator fundamentally arises out of the parties' contract. Here, it arises from cl 42(1) of these parties' State Agreement.

67 Moreover, the exercise of pursuing a curial challenge within this court against the 2019 Award is both distinct to, and very different to the anterior issue of the source of the arbitrator's own jurisdiction to hear and resolve the parties' as referred dispute to him.

68 An appeal to a court is a creature of statute, not of the common law. Thus, it is only for the court, not for the arbitrator, to decide what is the applicable legislative regime, if any, conferring any appeal or review rights as against an arbitral award, as earlier made by an arbitrator.

69 For present circumstances, nothing seen as written by Mr McHugh at pars 9 and 10 of the 2019 Award could bind this court as regards resolving the legal question of ascertaining what regime of local arbitration legislation is applicable to the circumstances of the State's attempt at challenging some or all of the determinations as made by Mr McHugh under his 2019 Award.

70 The references seen under pars 9 and 10 of the 2019 Award are merely to the regime of surrounding laws of this State seen as applicable to the **conducting** of arbitrations by Mr McHugh under the parties' multiple references to him to act as their arbitrator, at different times.

71 The State, as explained by the Solicitor-General, contends that Mineralogy and International Minerals have not sought to review the arbitrator's decision about Mr McHugh's jurisdiction to make his res judicata award declaration: see par 30 of the State's amended written submissions of 5 February 2020. The submission proceeds, however, upon the State's contended interpretation of pars 9 and 10 of the 2019 Award which, again respectfully, I cannot accept. I do not read those paragraphs as indicating any decision made by the arbitrator as to his jurisdiction to render his award by declaration and orders. Correctly understood, Mr McHugh's jurisdiction arose from the combination of cl 42 of the State Agreement where the parties agreed to submit their disputes to an arbitration, the parties' referrals to him of their disputes to that end, and ultimately, his accepting of the referral in December 2018.

72 Viewed in the context of the three (3) preliminary issues resolution task submitted to Mr McHugh in December 2018 (ie, '[a]t the time of referral', see par 2 of the 2019 Award), the 'Finality Issue' required Mr McHugh to conduct the observed assembly of the

procedural history surrounding the first arbitration. The history task involved, in part, an appreciation and identification of the regime of arbitral laws as had been applicable to that first arbitration in 2014. Within that assembly exercise, however, there was a specific, explicit and repeated acknowledgement of the inescapable legal conclusion that Mr McHugh was at then, *functus officio* as regards the first (2014) arbitration. That legal conclusion relevantly led to the consequence then seen under par 7 of the 2019 Award - to the effect that the so-called 'Section 46 Issue' as it had been attempted to be referred to Mr McHugh, was thereby problematic and so, 'can no longer be an issue': see again par 7 of the 2019 Award.

73 The 'Section 46 Issue' arguments and a foreshadowed adjournment application by the State founded on the premise of a mooted application to court under s 46 of the 1985 Act, was simply untenable, for circumstances where Mr McHugh was *functus officio* as regards his 2014 Award, as the parties then accepted.

74 Another of the observed premises underlying that 'Section 46 Issue' was that the first damages claim 'remains to be determined in **that arbitration**' (see par 2(b) of the 2019 Award). Whilst there, with respect, is a level of dual definitional confusion seen as between pars 2(a) and 8 of the learned arbitrator's reasons, in terms of two given definitions for 'the First Damages Claim', the effect of the legal conclusion seen stated under par 7 as regards the 'Section 46 Issue' being untenable, is crystal clear.

Functus officio

75 The further submission of the State by its attempt to distinguish a level of general agreement over the arbitrator being *functus officio*, but subject to particular agreement about his jurisdiction is, with respect, also not persuasive: see par 36 of the State's amended written submissions. Spent means fully spent. There can be no half measures applicable to a status of *functus officio*, after the 2014 Award.

76 In any event, whether or not there was unqualified agreement as to Mr McHugh being *functus officio* as regards his 2014 Award, is ultimately irrelevant. The condition of *functus officio* arises as a matter of law, not by reason of agreement. Clearly, in December 2018 Mr McHugh was *functus officio* as regards the first 2014 arbitration. The consequence was that there needed to be a fresh arbitral reference to him in 2018, for him to act as the same parties' arbitrator once again. That new reference was duly effected under the parties' 20 December

2018 proposed directions. A fresh arbitration was constituted upon Mr McHugh's acceptance of his appointment to conduct a 'further arbitration' at 20 December 2018.

77 For the purposes of a temporal assessment as is required by s 43(3)(b) of the 2012 Act Mr McHugh was only 'constituted' to conduct a further arbitration at 20 December 2018.

78 Consequently, on my assessment, the 2019 Award may only be the subject of a possible limited challenge before this court under the regime of the 2012 Act by reference to s 34 thereof (and generally see my reasons in ***Spaseski v Maldenovski*** [2019] WASC 65 as to that exercise).

Conclusion

79 In the end, I must accept the submissions of Mineralogy and International Minerals to the effect that the State's application for leave to appeal and to appeal by GDA 13 of 2019 is untenable. On that basis, GDA 13 of 2019 must be dismissed under the inherent jurisdiction of the court. The State's recourse in this Court against Mr McHugh's 2019 Award, if any, is only under the 2012 Act.

80 That still leaves, of course, it open to the State to pursue ARB 9 of 2019 and, as I indicated to the parties, they should confer as to further directions to be made in that proceeding, following receipt of the reasons resolving the present application.

81 To that end, the parties should now confer and within a period of 14 days from the provision of these reasons provide my Associate with an agreed, or, if not agreement, their respective minutes of proposed orders and directions for:

(a) GDA 13 of 2019;

(b) ARB 9 of 2019; and

(c) if required, ARB 12 of 2018.

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

DW
Associate to the Honourable Justice Martin

28 FEBRUARY 2020