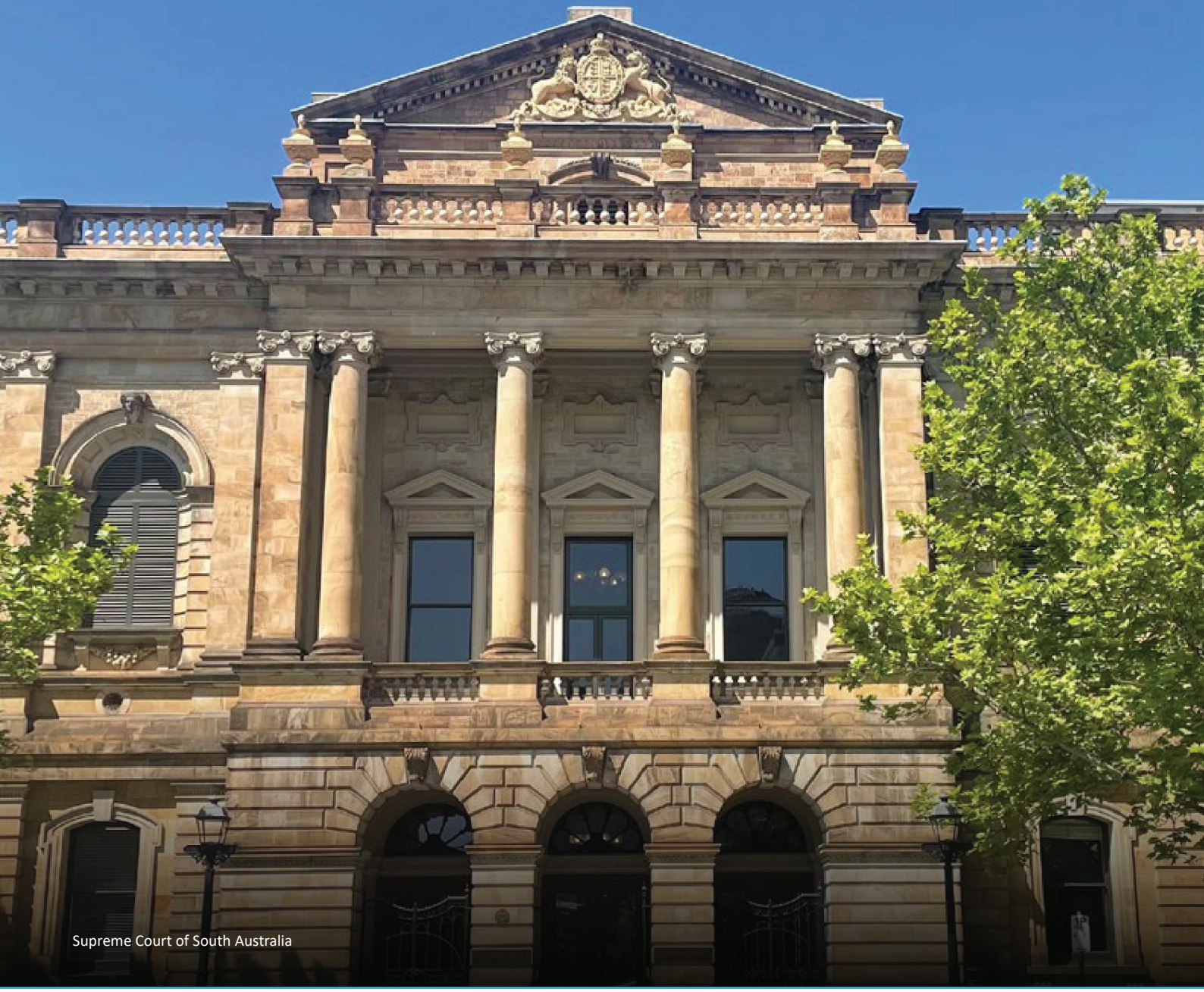
A departure for Australia from solidary liability in commercial arbitrations

Tesseract International Pty Limited v Pascale Construction Pty Ltd [2024] HCA 24



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Supreme Court of South Australia

Penny Thew
State Chambers

On 7 August 2024, a High Court majority overturned a decision of the South Australian Court of Appeal, holding that proportionate liability provisions in pt VIA of the *Competition and Consumer Act 2010* (Cth) ('*Consumer Act*') – and corresponding South Australian law reform legislation – applied to an arbitration conducted under the *Commercial Arbitration Act 2011* (SA) ('*CA Act*'). The finding signifies a departure from solidary liability for apportionable claims in commercial arbitrations where the substantive law is the law of an Australian jurisdiction.

Background

The appeal arose from a domestic construction dispute, which the parties agreed was to be settled by arbitration: *Tesseract International Pty Limited v Pascale Construction Pty Ltd* [2024] HCA 24 ('*Tesseract*'), [4] (Gageler CJ, in the majority with Gordon, Gleeson, Jagot and Beech-Jones JJ).

Gageler CJ observed that the *lex arbitri* ('place' or 'seat') of the arbitration agreement was South Australia, meaning the law of the seat was the *CA Act*: at [4], [27]. The law applicable to the substance of the dispute ('governing law') was also the law of South Australia: at [4]. The law of the seat or place is unrelated to geographical location but instead dictates the curial law of the arbitration (at [26]–[27]) and does not necessarily coincide with the jurisdiction of the substantive or governing law: see *UniCredit Bank GmbH v RusChemAlliance LLC* [2024] UKSC 30, [55]–[63].

The *CA Act* is an adaptation of the *UNCITRAL Model Law on International Commercial Arbitration (1985)* (with its 2006 amendments) ('*Model Law*'), adopted in Australia under the *International Arbitration Act 1974* (Cth) ('*IA Act*'): at [86]. Under the *Model Law*, as reflected in the *CA Act*, parties to an arbitration agreement can choose the substantive law (*Model Law* art 28; *CA Act* s 28), the arbitral procedure (*Model Law* art 19; *CA Act* s 19) and the curial law (or law of the seat) (*Model Law* art 1(2); *CA Act* s 1(2)): at [28] (Gageler CJ), [87], [101] (Gordon and Gleeson JJ), [311] (Jagot and Beech-Jones JJ).

The parties made no express choice on these critical matters, meaning the choice of the parties was to be inferred: at [88]–[100] (Gordon and Gleeson JJ, Edelman J dissenting at [185], [194]).

In the arbitration, Pascale claimed damages for breach of contract, negligence and misleading or deceptive conduct in contravention of s 18 of the *Australian Consumer Law*. Tesseract denied liability and alternatively contended that any damages ought to be reduced either as a result of Pascale's contributory negligence or under statutory proportionate liability regimes, or further, that a Mr Penhall was liable for all or part of the claimed losses: at [80]–[81], [312]. Pascale denied the application of the proportionate liability laws to the arbitration.

The arbitrator consequently ordered Tesseract to seek leave under s 27J of the *CA Act* for a determination from the South Australian Supreme Court on that question of law, namely whether the proportionate liability laws applied to the arbitration. The South Australian Supreme Court referred the question to the South Australian Court of Appeal, which answered the question in the negative.

Reasoning in the High Court

Before the High Court, the parties did not dispute that the proportionate liability laws formed part of the law of South Australia, and therefore the substantive governing law of the arbitration, within the meaning of s 28 of the *CA Act* (and art 28 of the *Model Law*): at [104].

Tesseract argued that, as a consequence, the arbitrator was required (under s 28 of the *CA Act*, reflecting art 28 of the *Model Law*) to apply the proportionate liability provisions of the laws of South Australia, being pt 3 of the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) ('*Law Reform Act*') and/or pt VIA of the *Consumer Act*.

Pascale argued that, because of the general inability to join non-consenting parties to arbitrations, proportionate liability provisions could not be applied to arbitrations consistently with pt 3 of the *Law Reform Act* and/or pt VIA of the *Consumer Act* and, further, that Tesseract had waived its right to rely on proportionate liability laws by submitting to a two-party arbitration: at [119]–[124], [134], [357].

The appeal was allowed by the majority in three separate judgments.

The majority held that the operation of the proportionate liability provisions does not require that all concurrent wrongdoers be parties to one proceeding for a determination to be made as to the proportionate liability of any one concurrent wrongdoer, and nor does their operation depend on any effect that the resolution of a dispute between parties might have on third parties: at [63]–[64] (Gageler CJ), [130], [138] (Gordon and Gleeson JJ), [360]–[364] (Jagot and Beech-Jones JJ). In addition, Gordon and Gleeson JJ observed that a right to solidary liability in fact no longer formed part of the laws of South Australia (nor the common law of Australia): at [133] (Steward J agreeing at [281] (otherwise in dissent)).

The effect of *Tesseract* is that respondents in commercial arbitrations in Australia can now rely upon proportionate liability statutory provisions to reduce their liability commensurate with loss caused by third parties, notwithstanding the refusal of those third parties to be joined to the arbitration, although parties could arguably choose, in advance, a governing law that excludes proportionate liability provisions. BN