

## Tridon Australia Pty Ltd v Tridon ADC Inc

[2004] NSWCA 146 (4 May 2004)

New South Wales Court of Appeal

*Enforcement of arbitral award – power to make declarations – Section 33  
Uniform Commercial Arbitration Acts*

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The first interesting aspect of this decision of the New South Wales Court of Appeal is that it sheds some light on the operation of section 33 of the *Uniform Commercial Arbitration Acts*, which has received little judicial consideration. The section provides as follows:

**33 Enforcement of award**

*An award made under an arbitration agreement may, by leave of the Court, be enforced in the same manner as a judgment or order of the Court to the same effect, and where leave is so given, judgment may be entered in terms of the award.*

The second interesting aspect of the decision is that, notwithstanding that there is no express power in the *Uniform Commercial Arbitration Acts* for an arbitrator to make an award in the form of declarations (in contrast to a power under section 24 to order specific performance), the trial judge (Smart AJ) and the Court of Appeal appear to have accepted that an arbitrator has such a power.

The arbitrator was appointed to determine a complex series of disputes, in which five issues were isolated for separate decision. The arbitrator made an award in relation to those issues (described as a partial award) in the form of declarations which were, in broad terms, declarations as to whether certain conduct was in breach of an agreement between the parties to the arbitration and whether a purported termination of the agreement was effective. Smart AJ refused to make an order under section 33 giving leave to enforce that award, saying:

22. *I would not hold that declarations made by Arbitrators would never be enforced by an order of the Court. Section 75 of the Supreme Court Act 1970 provides: "No proceedings will be open to objection on the ground that a merely declaratory judgment or order is sought thereby and the Court may make binding declarations of right whether any consequential relief is or could*

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*be claimed or not.*" Ritchie at 75.2 and 75.3 (pp. 1142-1143) gives many examples of when declarations should be made and when they should be refused. Section 75, is read in conjunction with section 63 of the Supreme Court Act which provides:

*"63. The Court shall grant, either absolutely or on terms, all such remedies as any party may appear to be entitled to in respect of any legal or equitable claim brought forward in the proceedings so that, as far as possible, all matters in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of those matters avoided."*

23. *It is possible to envisage cases where one or more declarations may finally resolve the disputes between the parties and their rights, for example, that an agreement between the parties has been lawfully rescinded and that neither party is entitled to claim damages or seek any remedy against the other.*
24. *The Declarations made by the Arbitrator resolve important intermediate issues between the parties and set the course for the remainder of the Arbitration. There is some distance to travel and probably a considerable volume of evidence to be taken. Damages have yet to be considered and, possibly, assessed. This will involve reflecting upon a significant number of contingencies. The term of the Distribution Agreement was 99 years from 1988.*
25. *Declarations 2 and 3 relate to the issues of whether there had been a breach of the Agreement because of the trademark applications of TAPL and TNZL and whether ACDT was entitled to terminate the Distribution Agreement on that account. Those issues having been resolved they are unlikely to arise again or have any ongoing effect.*
26. *As to Declaration 4 the requisite period of notice had not been given. There was the further issue whether ACDT was entitled to withdraw all products from the Second Schedule of the Distribution Agreement. The Arbitrator's decision does not preclude a further notice being given but it would have to be in somewhat different terms from the one previously given. That is an issue for another day. While Declaration 4 resolves a present issue it does no more.*
27. *Declaration 5 depends upon the term implied into the Distribution Agreement and to which the covenant in clause 7(b) is subject. While Declaration 5 is adequate for the purpose of the Arbitration and when read in the light of the award, the Court would not make a declaration in that bald form.*
28. *At the present time there does not seem to be sufficient utility in the Court making Declarations in terms of paragraphs 2 to 5 at the end of the Partial Award. However, depending on the terms of a later award or the final award, that position could change.*

An application was then made to the Court of Appeal for leave to appeal, which was heard on full submissions so that, if leave to appeal was granted, the matter could be determined without further hearing. In refusing leave to appeal, Giles JA (with whom Handley and Santow JJA agreed) said:

- 5 Smart AJ declined to make the order essentially because there was no utility in making it. His Honour contemplated the possibility that declarations made by arbitrators could be enforced in the same manner as a judgment or order of the Court, was of the view that there was no utility in this case in granting leave to enforce the declarations.
- 6 It is important to note that s 33 begins by referring to enforcement by leave, the entry of judgment in terms of the award being consequential upon the grant of leave. ***The first question, then, must be what is desired by way of enforcement, and it is only when that question is asked and satisfactorily answered that there can be sensible attention to whether leave should be granted.***
- 7 When the question was asked in the present application two answers were given.
- 8 The first answer was that there is no discretion under s 33, and that the applicant for an order pursuant to that provision is entitled as of right to the entry of judgment in terms of the award. Exceptions to this were recognised, but it was submitted that the exceptions went to jurisdictional facts enlivening the entry of judgment in terms of the award. Reference was made to Russell on Arbitration, 21st ed, para 8-003.
- 9 ***I do not agree that there is no discretion. It is connoted by the words "by leave of the Court" in s 33, and the paragraph in Russell on Arbitration clearly shows that there is a discretion. But in any event the purported answer is not an answer to the question. It is still necessary to know what is meant by enforcement and what is intended by way of enforcement in order to determine whether leave should be given.***
- 10 That takes one to the second answer, which was that there was an entitlement to have not just the declarations in the interim award, but declarations which would "speak to the world" through being translated into a judgment entered in terms of the award. It was submitted that that translation was itself enforcement.
- 11 ***I do not think that it is. Enforcement is a plain word, and means something quite different from a restatement of the effect of the award in the form of a judgment. The summary procedure provided by s 33 of the Act is a procedure with a purpose, the purpose of enabling the victorious party in an arbitration to obtain the material benefit of the award in its favour in an easier manner than having to sue on the award. There has been nothing put forward in this case to suggest any occasion for enforcement of the declarations made in the interim award. They are binding on the parties, and bind them for the balance of the arbitration and beyond that.***
- 12 ***I agree with Smart AJ's view that there is no utility in making the order sought, but for the perhaps more fundamental reason that there is just no question of enforcement yet arising. In the absence of any question of enforcement arising, it would not be appropriate to grant leave to enforce the award. (emphasis added)***

