includes a country which launches or procures the launching of a space object, as well as a country from whose territory or facilities a space object is launched. Therefore, if the Cape York facility goes ahead, Australia will be treated as a launching-State even in respect of launches carried out from the facility by or on behalf of other countries.

Under the Convention, a launching-State is absolutely liable to pay compensation for damage or injury caused by its space object to persons or property on the earth's surface or to aircraft or passengers in flight. Fault or negligence on the part of the launching-State need not be established. However, where the damage has resulted wholly or partially from an act or omission by the claimant-State (or persons whom it represents) done with intent to cause damage or from gross negligence by that State (or the persons whom it represents), then the launching-State will be exonerated from absolute liability provided it has acted in conformity with international law, including the United Nations Charter and the Outer Space Treaty.

Importantly, the absolute liability provisions of the Liability Convention do not apply for the benefit of nationals of a launching-State or foreign nationals who participate in the launching or operation of a space object or who are in the immediate vicinity of a launching or recovery area. Therefore, nationals of a launching-State and participating nationals of a foreign State cannot claim damages against the launching-State pursuant to the Convention. By way of example, if a launching operation from Cape York injured an Australian citizen or his or her property, that person would have no claim against the Commonwealth Government under the Liability Convention. As things presently stand, the injured citizen would have to rely upon his or her common law rights in the domestic courts.

The Liability Convention is less onerous from the point of view of a launching-State in the case where a space object causes damage or injury to another space object or to persons or property on board another space object. In such a case, the liability of the launching-State is not absolute and only arises if there has been fault on its part or on the part of persons for whom it is responsible.

It has been argued that participation by private entities or individuals in the launching of a space object will render the countries of which those persons are nationals liable as launching-States. Although this view seems to run contrary to the strict language of the Liability Convention, it is thought that where a country has knowledge of the participation by one of its nationals in a launch and that country expressly or impliedly accepts that participation, then it would be treated as a launching-State for the purposes of the Convention.

It is obvious that careful domestic legislation and indemnity provisions will be required if proposals for the Cape York space port go ahead.

## RECENT CASES

### Application to Restrain Arbitration to Raise Arguments Under The Fair Trading Act (Vic)

*Morrison v Inmode Developments Pty Ltd*, Supreme Court of Victoria, Nathan J.

This case is a warning that taking unduly technical points in order to defeat the arbitration process under building contracts is not to be taken lightly.

The plaintiff proprietors sought a Supreme Court injunction restraining the continuation of an arbitration on the ground that they wished to raise arguments under the Fair Trading Act of Victoria (which reflects the provisions of the Commonwealth Trade Practices Act). The injunction was sought because it was argued (correctly) that an arbitrator under the Commercial Arbitration Act does not have power to hear matters falling within the ambit of the Fair Trading Act.

The facts of the case were relatively commonplace. A dispute arose under a building contract between the builder and the owners as to the true price of the building. The owners, having failed to pay the last two progress payments found themselves in receipt of a Notice of Dispute from the builder which eventually lead to the Institute of Arbitrators appointing Mr James Earle as arbitrator. A preliminary conference was set and, on the day before the preliminary conference, the owners issued a writ in the Supreme Court and duly seved the builder. The preliminary conference took place, but objections were made in that the owners alleged deficiencies in the defendant's Notice of Dispute, although the builder countered this by serving a second Notice of Dispute at the time of a second preliminary conference. As Mr Justice Nathan observed, there was no substance in these objections because notices under the Commercial Arbitration Act did not require the precision of pleadings, they were not documents of art, they merely required the parties to have brought before them the substance of the dispute and as the Notices did so, they did not fail for insufficiency, vagueness or uncertainty.

Mr Justice Nathan noted that the Writ which raised the issue of the Fair Trading Act was the first time in which this issue was raised. The plaintiff had not raised the issues of misleading conduct or false representation prior to the issue of the Writ and nor were these issues brought to the attention of the arbitrator at either of the two preliminary conferences.

Mr Justice Nathan therefore concluded the purpose of the Writ was to avoid proceeding with the arbitration under the contract and this the judge refused to allow the plaintiffs to do. He stayed the legal proceedings until the resolution of the arbitration between the parties leaving it open for the plaintiffs to later raise the issues of misleading conduct and false representation should the matter ever proceed to court after the arbitration had been completed.

Mr Justice Nathan observed:

> "The provisions of the Fair Trading Act should not be used as a flocculent to launder the Commercial

> Arbitration Act of potency and to suspend the arbitration process in a wash of legalism".

He was satisfied:

> "the plaintiffs have clothed their dispute with the defendant builder in the terms of the Fair Trading Act so as to obscure the real nature of the dispute, which is the performance of the building contract and the arbitration of the dispute arising out of the performance of that contract".

The case is a salutary reminder that excessive legalities will not be allowed to abort the parties' original intention as evidenced by their building agreement to refer disputes between them to a process of resolution by way of arbitration. Long Live Arbitration!

- **John Pilley, State Director, BISCOA, Victoria. Reprinted with permission from Building Dispute Practitioners' Society Newsletter.**

**Nomination of Arbitrator**

*Kudeweh v T & J Kelleher Builders Pty Ltd and MJ O'Brien*, Supreme Court of Victoria, unreported 9 December, 1988, Ormiston J.

This case dealt with a number of matters arising out of the arbitration clause (clause 26) of the Housing Industry Association booklet type Building Agreement. The comments are of general application.

The chronology of events is important in understanding the reasons why this matter came to Court:

1. Early in the course of the contract works a dispute or difference arose.
2. By a letter dated 17 December 1987, and posted on that day, the builder served a Notice of Dispute, bearing the same date as the letter, upon the owner.
3. The Notice of Dispute was received by the owner on 21 December, 1987.
4. By a letter dated 23 December 1987 the builder's solicitors wrote to the Chairman of the Victorian Chapter of the Institute of Arbitrators, Australia suggesting that there was little prospect of the parties agreeing upon an arbitrator and requesting the Chairman to appoint an arbitrator in the new year. It was asserted that the fourteen day period of time provided for in the contract within which the parties were to agree upon an arbitrator expired on 31 December 1987.
5. The Chairman of the Victorian Chapter of the Institute of Arbitrators nominated Mr M J O'Brien as arbitrator on 2 January 1988.
6. It appears that the Chief Administrator of the Institute of Arbitrators ascertained that Mr O'Brien would accept the nomination on 4 January 1988.
7. The arbitrator, the builder and the owner were advised of the nomination of the arbitrator by a letter dated 5 February 1988.
8. The arbitrator entered upon the reference on 29 January 1988 at the preliminary hearing.

Prior to the preliminary hearing, the owner paid to the builder the amount sought by the builder. However, the owner did not make any payment in respect of the costs of the arbitration and the builder sought an order from the arbitrator requiring the owner to pay its costs. The question raised by the owner before the Court was whether or not the arbitrator had been validly appointed and accordingly whether or not the arbitrator could make the award sought by the builder, or indeed any award.

The essential basis of the owner's argument was that the arbitrator had been nominated to act as arbitrator before the expiration of the fourteen day period referred to in clause 26 of the agreement. That clause, insofar as is relevant, provided as follows:

> The said dispute or difference is thereby submitted to the arbitration of a person to be agreed upon by the parties hereto or failing agreement, upon such a person within fourteen days after receipt by the other party of the said Notice of Dispute or Difference, then the said dispute or difference is submitted to the arbitration of a nominee of the Chairman (or the acting Chairman) of the Victorian Chapter of the Institute of Arbitrators Australia.

The issues raised in the owner's submissions can be summarised as follows:

(i) Is it obligatory for the parties to wait for the expiration of fourteen days after the service of the Notice of Dispute before seeking the nomination of an arbitrator from the Institute of Arbitrators?

(ii) When does the fourteen day period referred to in clause 26 start to run?

(iii) When can it be said that the arbitrator has been appointed?

Each of these questions will be considered separately.

Is the fourteen day period a mandatory requirement?

In considering this question it should be borne in mind that the act which is in question, that is the act of nominating an arbitrator, is an act of a party independent of the contracting parties. The nomination is made by the Chairman of the Victorian Chapter of the Institute of Arbitrators. Accordingly, if the nomination occurs within the fourteen day period it is not possible for one party to argue that the other has breached the contract.

However, the Judge did suggest that there may be an implied term in the contract between the parties that one party will not take any step which might deny the other party a fair opportunity to reach agreement on the choice of an arbitrator. In this context it may be said that one party would be in breach of that implied term if it sought the nomination of an arbitrator within the fourteen day period