SUPREME COURT OF QUEENSLAND

CITATION:	*AMCI (IO) Pty Ltd v Aquila Steel Pty Ltd* [2009] QSC 66
PARTIES:	**AMCI (IO) PTY LTD ACN 123 253 485** Applicant v **AQUILA STEEL PTY LTD ACN 097803 613** Respondent
FILE NO/S:	No 1487/2009
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	1 April 2009
DELIVERED AT:	Brisbane
HEARING DATE:	18 March 2009
JUDGE:	A Lyons J
ORDER:	**That the application for transfer of the proceedings to the Supreme Court of Western Australia pursuant to s 5(2) of the *Jurisdiction of Courts (Cross-vesting) Act* 1987 (Qld) is refused**
CATCHWORDS:	PROCEDURE – COURTS AND JUDGES GENERALLY – COURTS – CONCURRENT JURISDICTION OF DIFFERENT COURTS – TRANSFER OF PROCEEDINGS UNDER CROSS-VESTING LEGISLATION – Where appropriate and in the interests of justice – Company matters *Commercial Arbitration Act* 1990 (Qld) *Commercial Arbitration Act* 1985 (WA) *Jurisdiction of Courts (Cross-vesting) Act* 1987 (Qld) *Service and Execution of Process Act* 1992 (Cth) *Bankinvest AG v Seabrook* (1988) 14 NSWLR 711, followed *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400, considered *FAI Traders Insurance Company Limited v ANZ McCaughan* Unreported Supreme Court of NSW 17 May 1990, followed *Farah Constructions v Say-Dee Pty Ltd Securities Limited* (2007) 230 CLR 89, followed *Sagasco South East Inc and Ors v BHP Petroleum* [1998] SASC 6998, followed *Spiliada Maritime Corp v Cansulex Ltd* [1987] 1 AC 460, considered

World Firefighters Games Brisbane 2002 v The World Firefighters Games Western Australia Inc [2001] QSC 164, followed

COUNSEL: W Sofronoff QC with AM Pomerenke for the applicant
PL O'Shea SC with GB Dann for the respondent

SOLICITORS: Allens Arthur Robinson for the applicant
Mallesons Stephen Jaques for the respondent

A LYONS J:

Background

[1] AMCI (IO) Pty Ltd (AMCI) and Aquila Steel Pty Ltd (Aquila) are parties to the Australian Premium Iron (API) Joint Venture Agreement dated 14 February 2005 (JVA). The joint venture concerns the exploration, mine development and mine operation of prospective iron ore tenements situated in the Pilbara region of Western Australia.

[2] On 24 December 2008, Aquila issued a notice of dispute pursuant to cl 12 of the JVA. That dispute related to a resolution to direct the manager of the JVA to proceed with the completion of a feasibility study in relation to a preferred port site.

[3] On 16 January 2009, AMCI's solicitors wrote to Aquila's solicitors contending that cl 12 of the JVA was unenforceable for a number of reasons including:

(a) That the dispute resolution process contemplated by the clause was too uncertain, as the arbitrator is given no criteria upon which to make a decision; and

(b) The clause is an improper attempt to oust the jurisdiction of the court because all unresolved disputes ultimately result in a potential forced sale.

[4] The letter also foreshadowed the commencement of proceedings to determine the resolution of the issues if Aquila did not agree that the clause should be severed. There had been previous proceedings between the parties in 2007 and 2008 in this court concerning other joint ventures between the parties.

[5] On 21 January 2009, Aquila commenced proceedings by way of a Writ of Summons in the Supreme Court of Western Australia in relation to the dispute about the location of the preferred port for the joint venture. In those proceedings Aquila's claim against AMCI was as follows:

"A. A declaration that clause 12 of the API JVA is valid and enforceable.

B. A declaration that, on the proper construction of clause 12 of the API JVA, the Dispute falls within the scope of clause 12 of the API JVA.

C. Declarations consequential on the relief sought in paragraphs A and B above."

[6] On 23 January 2009, AMCI wrote to Aquila indicating that it wished to have the question as to the enforceability of cl 12 determined expeditiously, setting out a timetable for the exchange of pleadings and indicating that it wished to have the matter listed for hearing as soon as possible after the close of pleadings on 23 February 2009. AMCI also agreed to have the matter admitted to the Commercial and Managed Case List (CMC List).

[7] On 27 January 2009, Aquila filed a chamber summons seeking orders that the matter be admitted to the CMC List. Pursuant to O 59 r 9(1) the Memorandum of Conferral certified that the parties agreed that the matter be admitted to the CMC List and that a timetable in respect of pleadings was to be agreed. That application was listed for a review before the Chief Justice of Western Australia and was scheduled for 11 February 2009.

[8] On 28 January 2009, a Memorandum of Appearance was filed and served by AMCI.

[9] On 5 February 2009, a Statement of Claim was filed by Aquila.

[10] The underlying dispute with respect to the port location was settled on 6 February 2009. On that date however, the solicitors for AMCI stated that the resolution of cl 12 remained a live issue and indicated that the hearing in relation to that issue could now be dealt with quickly as there was no question of fact. They proposed that the parties co-operate with respect to the proposed directions for the review hearing on 11 February 2009.

[11] On 10 February 2009, Aquila forwarded a Notice of Discontinuance to the Supreme Court of Western Australia which stated that the "Plaintiff wholly discontinues the proceeding against the Defendant." At 5.08 pm an email was forwarded by the solicitors for Aquila to the parties which stated, "I confirm that since the matter has now been discontinued tomorrow's hearing has been vacated."[1] A copy of this notice was sent to AMCI without prior notice that proceedings were to be discontinued.

[12] On 11 February 2009, AMCI filed an originating application in this Court, seeking the following orders:

> "1. A declaration that clause 12 of the Joint Venture Agreement Constituting the Australian Premium Iron Joint Venture dated 14 February 2005 (the *JVA*) is unenforceable.
>
> 2. An order that clause 12 of the JVA be severed from the JVA.
>
> 3. Alternatively to 1 and 2 above:
>
> (a) a declaration that:
>
> (i) the words *'and the arbitrator will be asked to identify a Participant ("Vendor Participant") who he thinks should sell its Venture Interest if the dispute cannot be resolved under this clause 12'* appearing in clause 12.3(d) of the JVA; and

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1 Exhibit "MGL 11" to Affidavit of Michael Lundberg sworn 4 March 2009

(ii) clause 12.3(i) of the JVA,

are unenforceable;

(b) an order that the words referred to in paragraph 3(a)(i) and clause 12.3(i) be severed from the JVA."

[13] By letter dated 19 February 2009,[2] the solicitors for Aquila confirmed they acted for Aquila in relation to the Queensland Supreme Court proceedings but questioned the commencement of the proceedings on the basis that the JVA had no connection to Queensland. At para 9 of that letter, the solicitors advised as follows:

> "As you know, our client discontinued these proceedings following the resolution of the underlying dispute between our clients concerning the port location. The resolution of that issue was announced to the ASX by our client on Friday, 6 February 2009. There being no extant notice of dispute between our clients under the API JVA at that time, the proceedings were discontinued. Further, there being no extant notice of dispute it is not apparent why this matter should be programmed to a hearing on an urgent basis."

[14] The affidavit of Michael Ilott, the solicitor for AMCI, states that in his view the nature of the proceeding involves a legal question as to the enforceability of cl 12, that it is unlikely that any admissible evidence will be lengthy or controversial, that the trial would take one day and that there were trial dates available in the Brisbane Supreme Court in April and May.

The dispute resolution clause

[15] Clause 12 of the JVA is headed "Dispute Resolution" and provides as follows:

> "12.1 The Participants agree to use all reasonable efforts in good faith to resolve any dispute which arises between them in connection with this Agreement and in particular any deadlock at a meeting of the Management Committee.
>
> 12.2 If the Representatives are unable to agree on a matter before the Management Committee, any Participant may give to the other Participant a notice of a dispute and that it requires the provisions of this clause 12 to apply to that dispute.
>
> 12.3 Unless otherwise agreed, where there is a dispute:
>
> (a) each Participant must in seeking to resolve the dispute, act in good faith, act in the best interests and with regard to the purpose of the Joint Venture as set out in a Recital C of this Agreement, make timely decisions, be genuine and open in communication with other Participant and attend all meetings scheduled for the resolution of the dispute;

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2 Exhibit "MGL 11" to Affidavit of Michael Lundberg sworn 4 March 2009

(b) Representatives of the Management Committee or other senior executives of the Participants must meet to try and resolve the dispute within 30 days of the notice of dispute being given;

(c) if the dispute is not resolved in that period, a Participant may require the chief executive officers of each of the Participants to meet within a further period of 14 days;

(d) if:

(i) notwithstanding the above procedures, the dispute is not resolved by the expiry of the period referred to in clause 12.3(c); and

(ii) where the dispute relates to a decision of the Management Committee, the decision has been before the Management Committee at two Meetings held not less than 6 weeks apart,

either Participant may require the dispute to be submitted to non-binding arbitration by a single arbitrator in accordance with and subject to the Institute of Arbitrators and Mediators Australia Rules for the Conduct of Commercial Arbitrations. That arbitration is to be conducted in Perth, Western Australia and the arbitrator will be asked to identify a Participant (Vendor Participant) who he thinks should sell its Venture Interest if the dispute cannot be resolved under this clause 12;

(e) if the Participants cannot agree upon a single arbitrator the arbitrator is to be appointed by the President of the Western Australia Chapter of the Institute of Arbitrators and Mediators Australia;

(f) the award of the arbitrator is not binding on the Participants except to the extent that the Vendor Participant is identified;

(g) until the arbitrator gives his decision the Participants must continue to observe their obligations under this Agreement other than those obligations that are the subject of the dispute;

(h) if the Participants have not resolved the dispute within a further 30 days following the non-binding arbitration the dispute will be

> referred back to the chief executive officers of each of the Participants for a further period of 14 days; and
>
> (i) if, following the further period of 14 days the Participants have not resolved the dispute, the Vendor Participant will be regarded as being a Defaulting Participant for the purpose of clause 10 (and only for that purpose) such that the other Participant will have the option to purchase the Venture Interest of the Vendor Participant."

This application

[16] Aquila, the respondent in the proceedings filed in this Court on 11 February 2009, by their application filed on 24 February 2009, applies for an order pursuant to s 5(2) of the *Jurisdiction of Courts (Cross-vesting)* Act 1987 (Qld) (the JC Act), that the proceeding be transferred to the Supreme Court of Western Australia.

[17] The basis of Aquila's application is that:

(i) pursuant to s 5(2)b(ii), the Supreme Court of Western Australia is the more appropriate court;

or

(ii) pursuant to s 5(2)(b)(iii) of the JC Act, it is otherwise in the interests of justice for the matter to be transferred.

[18] That application is opposed by AMCI.

Relevant legislation

[19] Section 5(2) of the JC Act provides:

> "Where—
>
> (a) a proceeding (the ***relevant proceeding***) is pending in the Supreme Court (the ***first court***); and
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> (b) it appears to the first court that—
>
> (i) the relevant proceeding arises out of, or is related to, another proceeding pending in the Supreme Court of another State or of a Territory and it is more appropriate that the relevant proceeding be determined by that other Supreme Court; or
>
> (ii) having regard to—
>
> (A) whether, in the opinion of the first court, apart from this Act and any law of the Commonwealth or another State relating to cross-vesting of jurisdiction, the relevant proceeding or a substantial part of the relevant proceeding would have been incapable of being instituted in the first court and capable of being instituted in the Supreme Court of another State or Territory; and

(B) the extent to which, in the opinion of the first court, the matters for determination in the relevant proceeding are matters arising under or involving questions as to the application, interpretation or validity of a law of the State or Territory referred to in sub-subparagraph (A) and not within the jurisdiction of the first court apart from this Act and any law of the Commonwealth or another State relating to cross-vesting of jurisdiction; and

(C) the interests of justice; it is more appropriate that the relevant proceeding be determined by that other Supreme Court; or

(iii) it is otherwise in the interests of justice that the relevant proceeding be determined by the Supreme Court of another State or of a Territory;

the first court shall transfer the relevant proceeding to that other Supreme Court."

What the court must consider in relation to s 5 (2)(b)(ii)

[20] The JC Act imposes three considerations with respect to the determination whether it is more appropriate that the current proceedings be determined by the Western Australia Supreme Court:

(i) Whether, apart from the cross-vesting legislation, the proceeding or a substantial part of it would have been incapable of being instituted in this court and capable of being instituted in the Supreme Court of Western Australia; and

(ii) The extent to which, in the opinion of this court, the matters to be determined are matters arising out of or involving questions of the application, interpretation or validity of a law of the State of Western Australia and not within this jurisdiction of this court, apart from the JC Act and any other cross-vesting law; and

(iii) The interests of justice.

What the court must consider in relation to s 5 (2)(b)(iii)

[21] In relation to s 5(2)(b)(iii) of the JC Act, the sole criteria is which court, in the interests of justice, is the more appropriate to hear and determine the substantive dispute.

[22] The "interests of justice" are the same under s 5(2)(b)(ii)(C) as under s 5(2)(b)(iii) and "the inquiry directed by consideration of the term 'interest of justice' encompass all the matters that determine which is the more appropriate forum…"[3] which involves determining with which court the action has the most real and substantial connection.

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3 *Bankinvest AG v Seabrook* (1988) 14 NSWLR 711 at 730

[23] The applicant does not have the onus of proof and each case depends on its own facts. As Rogers A-JA held in *Bankinvest AG v Seabrook*,[4] "The only lodestar that a judge may steer by is, what do the interests of justice dictate should be done? It is inapt to speak in terms of onus. Bearing in mind that the court may make an order on its own motion the language of onus being dischargeable is inapplicable." In the final event, the court must consider all the relevant factors and determine, "what court is more appropriate and what court is pointed to by the interests of justice."[5]

[24] If those criteria are established, then pursuant to 5(2) (b) of the JC Act this Court must then transfer the proceeding to the Supreme Court of Western Australia. As the majority of the High Court held in *BHP Billiton Ltd v Schultz*:[6]

> "If it appears to that court that it is in the interests of justice that the proceedings be determined by another designated court, then the first court 'shall transfer' the proceedings to that other court. There is a statutory requirement to exercise the power of transfer whenever it appears that it is in the interests of justice that it should be exercised. It is not necessary that it should appear that the first court is a 'clearly inappropriate' forum. It is both necessary and sufficient that, in the interests of justice, the second court is more appropriate."

[25] This was again recently stated in *White Enhancements Pty Ltd v Quick Fit Tyre Pty Ltd*:[7]

> "The statute does not confer a discretion on the Court. If the Court is satisfied that it is in the interests of justice that the action be determined by another Supreme Court, the Court must order that the proceedings be transferred to that Court."

[26] Whilst it is clear that there is no actual onus on Aquila to establish that the proceeding should be transferred, in *FAI Traders Insurance Company Limited v ANZ McCaughan Securities Limited*[8] Roger CJ said:

> "Whilst I do accept that there is any question of onus involved, I think it is right that no order for transfer should be made where in balancing the considerations of what is the most appropriate court, no advantage can be seen in a transfer."

[27] A convenient checklist in relation to the relevant issues is set out in *World Firefighters Games Brisbane 2002 v The World Firefighters Games Western Australia Inc*.[9] In that decision Philippides J set out the considerations to be taken into account under the cross-vesting legislation to determine whether the proceeding should be permitted to continue or should be transferred. Her Honour referred to the *Bankinvest AG v Seabrook*[10] decision and stated that the court in that case held that, in determining under s 5(2)(b)(iii), which forum the "interests of justice" favoured, regard was to be had to the forum with which the action has "the most real and substantial connection" and that in assessing this, the court looks at the connecting factors regarded by Lord Gough in *Spiliada Maritime Corp v Cansulex*

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4 (1988) 14 NSWLR 711 at 727
5 *Bankinvest AG v Seabrook* (1998) 14 NSWLR 711 at 729
6 (2004) 221 CLR 400 [14] per Gleeson CJ, McHugh and Heydon JJ
7 [2008] ACTSC 122 [24]
8 Unreported Supreme Court of NSW 17 May 1990 at pp11-12 per Roger CJ Com Div
9 [2001] QSC 164
10 (1988) 14 NSWLR 711

Ltd[11]as relevant to the selection of the "appropriate forum". Her Honour then indicated that the range of factors considered relevant in assessing the more appropriate forum included:

> "(a) the application of the substantive law, if it is peculiar to a particular jurisdiction;
> (b) forensic advantages or disadvantages conferred by the competing procedural laws;
> (c) the plaintiff's choice of forum and the reasons for that choice;
> (d) substantive connections with the forum (for example, residence, domicile, place of occurrence and choice of law);
> (e) balance of convenience to parties and witnesses;
> (f) comparative costs and delay;
> (g) convenience of the court system."

The application of the substantive law

[28] Clause 24.1 of the JVA provides that the JVA is governed by the laws of Western Australia and the Commonwealth of Australia. Clause 24.2 then provides that each party irrevocably submits to the "non-exclusive" jurisdiction of the courts of Western Australia.

[29] Aquila contends that pursuant to cl 24, therefore the JVA itself contemplates that the proper law is the law of Western Australia and that disputes be resolved through the Western Australian Court System. Furthermore, the JVA provides that arbitration should occur in Perth (cl 12.3(d)) and that if the identity of the arbitrator is not agreed, the President of the West Australian chapter of the Institute of Arbitrators and Mediators Australia would identify a mediator (cl 12.3(e)).

[30] However, it is clear that the declarations sought relate to the construction of cl 12 of the JVA particularly the provision for arbitration in that clause. The question in the proceeding therefore is in essence a legal question which relates to the construction and enforceability of that clause in the JVA. The hearing of AMCI's application will therefore primarily involve legal arguments as to the operation and effect of the clause, the reasonableness of the clause in the context of this joint venture as well as arguments as to whether the clause can be severed. This legal question will be essentially determined by reference to common law principles and there is no aspect of the applicable substantive law which is peculiar to Western Australia. Furthermore there is common commercial arbitration legislation throughout Australia and there is no difference between the jurisdictions. The *Commercial Arbitration Act* 1990 (Qld) and the *Commercial Arbitration Act* 1985 (WA) are identical.

[31] As the majority of the High Court held in *Farah Constructions v Say-Dee Pty Ltd*:[12]

> "Intermediate appellate courts and trial judges in Australia should not depart from decisions in intermediate appellate courts in another jurisdiction on the interpretation of Commonwealth legislation or uniform national legislation unless they are convinced the interpretation is plainly wrong. Since there is a common law of

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11 [1987] 1 AC 460 at 478

12 (2007) 230 CLR at 135

> Australia rather than of each Australian jurisdiction, the same principle applies in relation to non-statutory law."

[32] Aquila essentially agrees that there is no material difference between any applicable Queensland and Western Australian law.

[33] In terms then of the application of the substantive law, it is clear that the applicable substantive law is not peculiar to Western Australia.

Forensic advantages or disadvantages conferred by the competing procedural laws

[34] There is no evidence to indicate that there is any difference in the procedural laws such that it confers an advantage or disadvantage and makes Western Australia a more appropriate forum. There is nothing to suggest that there is an advantage or disadvantage in any applicable procedural law, in either Queensland or Western Australia.

The plaintiff's choice of forum and the reasons for that choice

[35] AMCI has chosen the Queensland Supreme Court and as Counsel for AMCI indicates "like Aquila it simply prefers the forum of its own home State. Ordinarily these preferences would cancel each other out."[13] Whilst AMCI has chosen Queensland as its forum, the High Court's decision in *BHP Billiton Ltd v Schultz*,[14] means that generally this is not a factor for consideration in itself. The High Court held that the fact that the plaintiff has chosen to bring proceedings in a court where it may gain an advantage at the expense of the defendant, whereas on a transfer it would lose that benefit to the defendant's advantage, "is generally a neutral factor".[15]

[36] However in this case there is a fundamental factual difference which I consider converts this factor of the plaintiff's choice of forum from being a neutral factor to a factor which I consider is relevant. The factual difference is that there were proceedings on foot in Western Australia whereby Aquila sought declarations in relation to the enforceability of cl 12 but Aquila made a unilateral election not to have the question of the enforceability of cl 12 determined in that forum when those proceedings could have continued.

[37] There are in fact no current proceedings on foot in Western Australia and AMCI filed the current proceedings in this Court on the day after the proceedings were discontinued in Western Australia. The current proceedings seek declarations in relation to cl 12 and therefore the current proceedings claim the same relief as that sought in the Western Australian proceedings. It is clear that a Notice of Discontinuance was unilaterally filed by Aquila in relation to the entire proceedings and the review hearing listed before the Chief Justice was vacated. I consider that Aquila's unilateral act in electing not to have the question of the enforceability of cl 12 determined in the Supreme Court of Western Australia has had the following consequences:

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13 Submissions para 45

14 (2004) 221 CLR 400 [25] per Gleeson CJ, McHugh and Heydon JJ

15 *White Enhancements Pty Ltd v Quick Fit Tyre Service Pty Ltd as Trustee* [2008] ACTSC 122 [24]

(a) The time and resources devoted to the interlocutory steps in the Western Australian proceeding were wasted;
(b) AMCI was unable to have the question of the enforceability of cl 12 determined as soon as possible as it had sought;
(c) AMCI was left with little choice but to commence a fresh proceeding if it wished to have this question determined.

[38] It is clear that it is AMCI's intention to have the question of the enforceability of cl 12 determined as soon as possible. It is also clear that Aquila's current application is in fact an attempt to have the proceeding transferred to the forum which it unilaterally abandoned on 10 February 2009. Furthermore the affidavits indicate that Aquila does not propose to seek orders that the proceedings be listed urgently for trial and Aquila considers that if necessary the parties can retrace the interlocutory steps.

[39] I agree with Counsel for AMCI's submission that this would involve:
(a) Time and resources which AMCI has devoted to the presented proceeding being wasted;
(b) The abandonment of the prospect of a final hearing in April or May 2009 in this Court;[16]
(c) Further delay and disruption necessarily attendant upon a change of venue.

[40] As the affidavit of Michael Ilott indicates the trial should take one day and that there are a number of trial dates available in April and May 2009 if the proceedings are continued in the Queensland Supreme Court.

[41] I consider therefore that the reasons for the plaintiff's choice of forum are relevant factors in the current case. However the substantive connections also need to be considered before a final determination can be made.

Substantive connections

[42] In relation to the substantive connections, it is clear that AMCI's registered office, main place of business, documents and personnel providing instructions are in Queensland.[17]

[43] However Aquila's registered office is in Western Australia, and its main place of business is in Western Australia. Aquila's books and records and its executive chairman, general counsel and company secretary who provide instructions and the personnel involved in the JVA are all in Western Australia.

[44] Significantly the manager of the joint venture API Management also has its registered office and main place of business in Western Australia.[18] The meetings of the Management Committee for the joint venture are always held in Perth and AMCI representatives always travel from Brisbane to attend those meetings.[19] API Management's books and records are situated in Western Australia.[20]

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16 Ilott, "MGI-3"
17 Affidavit of Marian Frances Gibney sworn 13 March 2009
18 Affidavit of Michael Grant Lundberg sworn 16 March 2009
19 Affidavit of Michael Grant Lundberg sworn 16 March 2009 at para 6(f)
20 Affidavit of Michael Grant Lundberg sworn 16 March 2009 at para 6(c) and (e)(iv)

[45] Aquila states that its likely witnesses live in Western Australia[21] and whilst AMCI's witnesses are in Brisbane[22] it is not clear it would call any witnesses. In the event that they did, Aquila states that as AMCI's representatives travel to Perth for management committee meetings, travel to Perth for litigation would be no different. Aquila also contends that its small Brisbane office has no involvement with the JVA and is responsible for Aquila's Queensland coal operations[23.] Aquila's lawyers are in Perth,[24] whilst AMCI's are in Brisbane.[25] Aquila submits therefore that these factors favour Western Australia as the appropriate forum.

[46] I consider that ordinarily these factors would have been significant issues in relation to the question of substantive connection to the forum. In the *BHP Billiton Ltd v Schultz*[26] decision the High Court stated:

> "In many cases, there will be such a preponderance of connecting factors with one forum that it can readily be identified as the most appropriate, or natural, forum. In other cases, there might be significant connecting factors with each of two different forums. Some of the factors might cancel each other out. If the action is between two individuals, and the plaintiff resides in one law area and the defendant in another, there may be no reason to treat the residence of either party as determinative, although, as already noted, it will ordinarily be the residence of the defendant that is important to establish jurisdiction. Weighing considerations of cost, expense, and convenience, even when they conflict, is a familiar aspect of the kind of case management involved in many cross-vesting applications."

[47] However given that the issue in this case relates simply to the construction of a contract I do not consider that those factors which relate to the place of business of the operations are necessarily determinative in relation to this issue of construction of the contract. None of the issues to be determined in the current proceedings actually relate to any act or omission in relation to the actual joint venture being conducted in Western Australia. In the circumstances of this case therefore, I do not consider that there are a preponderance of connecting factors with one forum.

[48] I also consider that in terms of witnesses it is not clear on the evidence before me what witnesses may be called or where the necessary witnesses reside. Furthermore it would appear that it is highly unlikely that anything other than formal evidence will be admissible. I consider that the issue of balance of convenience to the witnesses is a neutral factor on the basis of the current evidence. Furthermore in relation to the question of documents and witnesses I adopt the approach of Mullighan J in *Sagasco v South East Inc and Ors v BHP Petroleum*[27] where he said "I do not regard this as a matter of much significance." He considered that documents relevant to the litigation may be easily transported and copies can be made and kept. He also considered that it was a matter of significance that "the major parties are not impecunious and so the transporting of witnesses and

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21 Affidavit of Michael Grant Lundberg sworn 16 March 2009 para 6
22 Affidavit of Marian Frances Gibney sworn 13 March 2009 para 10
23 Affidavit of Michael Grant Lundberg sworn 16 March 2009 para 6(h)
24 Affidavit of Michael Grant Lundberg sworn 4 March 2009 para 31
25 Affidavit of Marian Frances Gibney sworn 13 March 2009 para 9
26 (2004) 221 CLR 400 [25] per Gleeson CJ, McHugh and Heydon JJ
27 [1998] SASC 6998 at [18]

documents interstate will not cause relevant hardship in the financial sense." Given the current circumstances in this case agree with that approach.

[49] Aquila also submits that there is a substantive connection with Western Australia because of the choice of law which the parties have chosen. Aquila contends governing law clauses can be a significant factor[28] because this is usually an indication of the natural forum, with which the action has the most real and substantial connection[29] and in this case they submit this factor favours Western Australia as the appropriate forum.

[50] Aquila also argues that it is relevant that the parties have consented to the non-exclusive jurisdiction of the courts of Western Australia, have agreed that arbitration will be held in Perth and that the President of the West Australian chapter of the Institute of Arbitrators and Mediators Australia would identify a mediator. Aquila also argues that exclusive jurisdiction clauses agreed to by the parties are a relevant consideration under the cross vesting scheme, as the interests of justice require that due acknowledgment be accorded to such a clause as representing the bargain between the parties and that proper regard be given to the need to hold parties to their bargain.[30]

[51] Aquila also contends that a non-exclusive jurisdiction clause coupled with a clause for arbitration in accordance with the *Commercial Arbitration Act 1985* (WA) was held in *Sagasco*[31] to enhance the significance because it confirmed the intention of the parties as to where disputes should be resolved.

[52] Whilst I have taken those arguments into account I note that despite the bargain the parties entered into and despite the fact that AMCI actually entered an appearance in relation to the Western Australian proceedings Aquila discontinued those proceedings in the face of a clear indication that AMCI wished the underlying issue be finally determined.

[53] I also note that in the present case cl 24.2 is a non-exclusive jurisdiction clause and that whilst clauses of this nature have been described as "significant" in determining the more appropriate forum[32] they are not necessarily determinative. In *Sagasco* the court ultimately held that "This provision is indicative but not determinative of an application of this nature."[33] In the circumstances of this case I do not consider that the "non exclusive" jurisdiction clause is determinative because of what I consider to be the significance of the abandonment of the proceedings in Western Australia.

[54] It is clear that in terms of the comparative cost and delay and convenience of the court system there is a clear indication that the matter can proceed in April or May in Queensland. The current evidence indicates that unless the matter was listed as urgent it would not necessarily be heard within this timeframe in Western Australia. There is no evidence of differences in cost in relation to either jurisdiction. It is also

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28 *Spiliada Maritime Corp v Cansulex Ltd* [1987] 1 AC 460 at 486F

29 *BHP Billiton Ltd v Schultz* at [170]; *PRD Realty Pty Ltd v King and Ors* [2007] NSWSC 734 at [23] per Gzell J

30 *World Firefighters* at [38]; cf *Zeke Services Pty Ltd & Anor v Traffic Technologies Ltd & Anor* [2005] QSC 135 at [39] per Chesterman J who described an exclusive jurisdiction clause as "but one factor"

31 [1998] SASC 6998 at [14]

32 *Sagasco* at para 16, *Power & Water Authority v MacMahon Contractors Pty Ltd* [1995] NTSC 102

33 *Sagasco*, ibid at [16]

clear that the current issue between Aquila and AMCI has been discussed since August 2008.

Consideration of s 5(2)(b)(ii)A and s 5(2)(b)(ii)B

[55] There is no doubt that the purpose of the transfer and removal provisions is to ensure that cases are heard in the court in whose ordinary jurisdiction they belong and that the aim of the cross-vesting provisions is not to affect a general shake up of the role of the courts.[34] Whilst Aquila have argued that the court should transfer the proceedings on this basis of these sections I do not find any merit in the argument that these provisions are relevant in the circumstances of this case.

Determination

[56] As Street CJ said in *Bankinvest*:[35]

> "Viewed from this standpoint it can be seen to be highly desirable that the judicial administration of the day to day working of the cross vesting scheme is not encumbered by an encrustation of judge-made pronouncements of principles to be applied when considering a transfer order. It call for what I might describe as a 'nuts and bolts' management decision as to which court, in the interests of justice, is the more appropriate to hear and determine the substantive dispute. Consideration of textured principle and deep learning-in particular principles of international law such as forum non conveniens-have no place in a cross vesting adjudication. There is, in substance, no principle to be enunciated other than the necessity of applying the specific considerations stated in the cross vesting legislation, primary amongst which is the pursuit of the interests of justice."

[57] In balancing all the competing considerations as required by the legislation and in making the "nuts and bolts" decision I consider that there are a number of factors which indicate that the matter should be determined in this Court in the "interests of justice". Those factors are:

(i) the current proceedings relate to a question of construction of a contract which is a purely legal question;

(ii) the current proceedings do not relate to conduct which occurred within a particular jurisdiction;

(iii) there are proceedings currently instituted in this Court;

(iv) there are no proceedings currently pending in Western Australia;

(v) a one day trial can be accommodated in April or May in this Court;

(vi) a trial in the Western Australian Supreme Court will not be heard as speedily as the Queensland proceedings unless it has an urgent listing;

(vii) there will necessarily be disruption and delay attendant on a change of venue;

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34 *Bankinvest AG v Seabrook* (1988) 14 NSWLR 711 at 724

35 (1988) 14 NSWLR 711 at 714

(viii) previous proceedings on the same issue seeking similar relief were discontinued in the Supreme Court of Western Australia by the applicant for the transfer in February 2009;

(ix) the issues in relation to cl 12 need to be determined as there has been an underlying dispute in relation to this issue since at least August 2008;

(x) there are no significant issues in relation to the location of documents or witnesses.

[58] I consider the interests of justice indicate that the application for transfer of the proceedings to the Supreme Court of Western Australia pursuant to s 5(2) of the *Jurisdiction of Courts (Cross-vesting) Act* 1987 (Qld) should be refused.