Supreme Court
New South Wales

Case Title:	teleMates (previously Better Telecom) Pty Ltd -v- Standard SoftTel Solutions Pvt Ltd
Medium Neutral Citation:	[2011] NSWSC 1365
Hearing Date(s):	28 September & 28 October 2011 and written submissions
Decision Date:	11 November 2011
Jurisdiction:	Equity Division - Commercial List
Before:	Hammerschlag J
Decision:	Prayers (1) to (5) of the Summons dismissed
Catchwords:	INTERNATIONAL ARBITRATION - ss 2(b), 16 and 18 International Arbitration Act 1974 (Cth) - Arts 5, 6, 11 and 16 UNCITRAL Model Law - Select Legislative Instrument 2011 No. 10 - challenge to an arbitrator's jurisdiction - arbitration clause in a written agreement between the parties provided that the parties shall agree to appoint an arbitrator and that the arbitral proceedings shall be in accordance with the provisions of the Institute of Arbitrators and Mediators Australia (IAMA) - defendant seeks arbitration and requests IAMA to nominate an arbitrator - IAMA makes a nomination and the arbitrator accepts - plaintiff challenges validity of the arbitrator's appointment - arbitrator rules as a preliminary matter that he has jurisdiction - Art 16(3) of the Model Law provides that an arbitral tribunal may rule on a plea of lack of jurisdiction as a preliminary question and that if it does so and rules that it has

	jurisdiction, any party may request, in 30 days after having received notice of the ruling, the Court to decide the matter - Art 5 of the Model Law provides that in matters governed by the Model Law, no court shall intervene except so provided in the Model Law - plaintiff brings proceedings after expiry of the 30 day period for declaratory relief that the arbitrator was not validly appointed - held that Court precluded from intervening
Legislation Cited:	International Arbitration Act 1974 (Cth)
Cases Cited:	Gold Coast City Council v The Rutherford Group [1980] Qd R 275 Stoltenberg v Doring [1983] 1 NSWLR 121 Heathersage Nominees Pty Ltd v Pineview Holdings Pty Ltd (Supreme Court of Western Australia, 14 September 1990, unreported) Whitfords Beach Pty Ltd v Gadson (1991) 6 WAR 537 Re Contrapac Pty Ltd (Supreme Court of Queensland, 17 July 1992, unreported) David Grant & Co Pty Ltd v Westpac Banking Corp (1995) 184 CLR 265
Texts Cited:	Nigel Blackaby et al, Redfern and Hunter On International Arbitration, 5th Ed (2009) Oxford University Press
Category:	Principal judgment
Parties:	teleMates (previously Better Telecom) Pty Ltd ACN 115 815 435 - Plaintiff Standard SoftTel Solutions Pvt Ltd - Defendant
Representation	
- Counsel:	Counsel: J.B. Simpkins SC - Plaintiff

- Solicitors:	Solicitors: Sydun & Co Solicitors - Plaintiff
File number(s):	2011/58598
Publication Restriction:	

JUDGMENT

BACKGROUND

1 HIS HONOUR: The plaintiff (previously known as Better Telecom) is an Australian company which supplies telephony services. The defendant is an Indian company which provides marketing and support services.

2 On 5 March 2009, the parties entered into a written Dealer Agreement ("the Dealer Agreement") under which the plaintiff appointed the defendant to market, promote and solicit applications for the plaintiff's services and to support those services by dealing with customer enquiries and concerns.

3 The Dealer Agreement was for an initial term of 12 months with further automatic yearly renewals unless appropriate timely notice was given.

4 Clause 21 of the Dealer Agreement provides as follows:

> **Dispute Resolution**
>
> If any dispute, difference or claim arises between the parties in connection with this Agreement or the validity, interpretation or alleged breach of this agreement or anything done or committed [sic] to be done pursuant to this agreement, the parties shall refer the dispute, difference or claim for resolution for Arbitration. Both parties shall agree to appoint an Arbitrator. The Arbitral proceedings shall be in accordance with the provisions of "The Institute of Arbitrators & Mediators Australia (IAMA)" and the laws of the State of New South Wales, Australia, shall be applicable. All proceedings in such arbitration shall be conducted

in English. The venue of arbitrators shall be mutually decided within New South Wales Australia.

5 The Institute of Arbitrators & Mediators Australia (IAMA) is a not-for-profit company which provides an arbitration and mediation service. On 1 January 2007 it published a set of arbitration rules known as the IAMA Arbitration Rules ("the IAMA Rules"). IAMA maintains a panel of arbitrators.

6 Rule 2 of the IAMA Rules defines Agreement to mean any written agreement between parties to submit present or future disputes to arbitration.

7 Rule 5 of the IAMA Rules provides that:

> (1) Nomination of arbitrators shall be by IAMA, which may delegate its power of nomination to the person acting as the:
>
> (a) President; or
> (b) Chairman of any State or Territory Chapter.
>
> (2) Nothing in these Rules prevents the parties from agreeing on an arbitrator or arbitrators of their choice.

8 Rule 6 of the IAMA Rules provides that:

> (1) This Rule applies except where it is inconsistent with an Agreement.
>
> (2) If a dispute or difference of the kind described in an Agreement arises, any party to it may give a Notice of Dispute to the other party or parties.
>
> (3) The Notice of Dispute shall be served at the address of such party or parties recorded in the Agreement. Service may be effected personally, or by mail, facsimile, telecommunication or electronic transmission.
>
> (4) Unless settled beforehand, the dispute or difference described in the Notice of Dispute shall be deemed to be

referred to arbitration in accordance with these Rules ten (10) days after service of the Notice of Dispute.

(5) The parties may agree in writing that a Notice of Dispute is not required and may then jointly seek nomination of an arbitrator by IAMA under paragraph 2 of Rule 8.

9 Rule 8 of the IAMA Rules provides that:

(1) Where a Notice of Dispute has been given under either the Agreement or Rule 6, and the dispute has not been settled within any time there specified, any party may request IAMA to nominate an arbitrator and in doing so must submit the following to IAMA:

(a) a copy of the Notice of Dispute;
(b) a copy of the Agreement;
(c) the names and addresses of the parties to the dispute; and
(d) a description of the dispute sufficient to enable IAMA to nominate an appropriate arbitrator.

(2) If the parties agree to jointly seek nomination of an arbitrator then, in addition to the material in paragraph 1 of this Rule, they shall provide to IAMA a copy of the agreement for the joint appointment.

(3) Within ten (10) days after receipt of the material described in paragraphs 1 or 2, or any further information IAMA may require to enable a nomination, IAMA shall nominate an arbitrator and inform the parties and the Nominee Arbitrator of such nomination.

(4) Unless the Agreement provides otherwise, IAMA shall nominate one arbitrator only.

10 In early May 2010, the parties fell into dispute about whether the Dealer Agreement had been terminated or its term extended. The defendant also claimed that the plaintiff owed it money.

11 In a letter dated 7 May 2010, Barristers at Law on behalf of the defendant wrote to the plaintiff asserting that the Dealer Agreement had been automatically renewed until 4 March 2011 and that the plaintiff had

wrongfully terminated it on 16 April 2010. The defendant demanded payment to it by 19 May 2010 of $314,382. It indicated that failing such payment it would invoke arbitration under the IAMA Rules.

12 By letter dated 13 May 2010, the plaintiff responded to the effect that the Dealer Agreement had never rolled over and that the parties had agreed to part ways. It stated that it was seeking compensation from the defendant for losses relating to accounts supplied by the defendant.

13 Between 22 and 26 May 2010, the defendant requested IAMA to nominate an arbitrator.

14 On 1 July 2010, IAMA nominated Mr David McGrane as arbitrator ("the arbitrator").

15 On 19 July 2010, the plaintiff's solicitors wrote to the arbitrator asserting that under cl 21 of the Dealer Agreement any arbitration could only be by agreement and that at no time had the plaintiff consented to either the referral or the appointment.

16 The arbitrator fixed a preliminary conference for 3 August 2010. At the conference the plaintiff reiterated its lack of agreement to arbitration or to the terms and scope of it. The arbitrator ruled provisionally that the arbitration should proceed notwithstanding the plaintiff's jurisdictional objections. He recorded that some of the plaintiff's assertions as to jurisdictional matters could only be tested by the submission of evidence, counter-submission and him ruling on such evidence.

17 Both parties provided written submissions to him by way of a somewhat lengthy exchange of emails and correspondence. It will suffice to record only in the briefest terms the central propositions which each party put to the arbitrator.

18 The plaintiff submitted that cl 21 of the Dealer Agreement expressly requires both parties to agree to appoint an arbitrator and that the plaintiff had not been asked to agree to the appointment of the arbitra tor, let alone had agreed to it. It submitted that cl 21 of the Dealer Agreement did not incorporate the IAMA Rules which provide for appointment of an arbitrator other than by agreement. It submitted that cl 21 incorporated the IAMA Rules only so far as they applied to procedures for the arbitration once the arbitral tribunal had been constituted. It put that the appointment of the arbitrator was invalid and of no effect.

19 The defendant submitted that it was not bound to invite the plaintiff to join in an "agreed arbitrator-appointment". It submitted that cl 21 of the Dealer Agreement had the effect of incorporating all of the IAMA Rules including those which made provision for the appointment of an arbitrator in the absence of agreement between the parties. It submitted that the arbitrator had been validly appointed pursuant to the IAMA Rules.

20 On 18 January 2011, the arbitrator published an award entitled Interim Award - As To Jurisdiction Of These Proceedings ("the Award"). He ruled that the arbitral proceedings were governed by the *International Arbitration Act* 1974 (Cth). He determined, contrary to the plaintiff's submission, that cl 21 of the Dealer Agreement incorporates the IAMA Rules which provide for the appointment of an arbitrator. He ruled that he had power to rule on his jurisdiction. He determined that he had been properly appointed and that he had jurisdiction to determine the dispute.

THE INTERNATIONAL ARBITRATION ACT 1974 (CTH) AND THE MODEL LAW

21 The arbitral proceedings between the parties are governed by the *International Arbitration Act* 1974 (Cth) ("the Act"). The Act incorporates the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law") adopted by the United Nations Commission on International

Trade Law on 21 June 1985. The English text of the Model Law is set out in Schedule 2 to the Act .

22 Section 16(1) of the Act gives the Model Law the force of law in Australia. Section 2B provides that the Act binds the Crown in right of the Commonwealth and in right of each of the States of Australia.

23 Article 11 of the Model Law provides as follows:

Appointment of arbitrators

(1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.

(2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.

(3) Failing such agreement,

(a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6;

(b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6.

(4) Where, under an appointment procedure agreed upon by the parties,

(a) a party fails to act as required under such procedure, or

(b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or

(c) a third party, including an institution, fails to perform any function entrusted to it under such procedure,

any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(5) A decision on a matter entrusted by paragraph (3) or (4) of this article to the court or other authority specified in article 6 shall be subject to no appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

24 Article 5 of the Model Law provides as follows:

Extent of court intervention

In matters governed by this Law, no court shall intervene except where so provided in this Law.

25 Article 6 of the Model Law provides as follows:

Court or other authority for certain functions of arbitration assistance and supervision

The functions referred to in articles 11 (3), 11 (4), 13 (3), 14, 16 (3) and 34 (2) shall be performed by . . . [Each State enacting this model law specifies the court, courts or, where referred to therein, other authority competent to perform these functions.]

26 Article 16 of the Model Law provides as follows:

Competence of arbitral tribunal to rule on its jurisdiction

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

27 Prior to 5 July 2010, s 18 of the Act provided as follows:

Courts specified for purposes of Article 6 of Model Law

The following courts shall be taken to have been specified in Article 6 of the Model Law as courts competent to perform the functions referred to in that article:

(a) if the place of arbitration is, or is to be, in a State-the Supreme Court of that State;

(b) if the place of arbitration is, or is to be, in a Territory:

(i) the Supreme Court of that Territory; or

(ii) if there is no Supreme Court established in that Territory-the Supreme Court of the State or Territory that has jurisdiction in relation to that Territory;

(c) in any case-the Federal Court of Australia.

28 Under the section as it then stood, this Court was one of the courts taken to have been specified in Art 6 of the Model Law as competent to perform the functions referred to in that article. However, on 5 July 2010, s 18 was repealed and the following s 18 inserted in its stead:

Court or authority taken to have been specified in Article 6 of the Model Law

(1) A court or authority prescribed for the purposes of this subsection is taken to have been specified in Article 6 of the Model Law as a court or authority competent to perform the functions referred to in Article 11(3) of the Model Law.

(2) A court or authority prescribed for the purposes of this subsection is taken to have been specified in Article 6 of the Model Law as a court or authority competent to perform the functions referred to in Article 11(4) of the Model Law.

(3) The following courts are taken to have been specified in Article 6 of the Model Law as courts competent to perform the functions referred to in Articles 13(3), 14, 16(3) and 34(2) of the Model Law:

(a) if the place of arbitration is, or is to be, in a State-the Supreme Court of that State;

(b) if the place of arbitration is, or is to be, in a Territory:

(i) the Supreme Court of that Territory; or

(ii) if there is no Supreme Court established in that Territory-the Supreme Court of the State or Territory that has jurisdiction in relation to that Territory;

(c) in any case-the Federal Court of Australia.

29 Section 18(3) omits reference to Arts 11(3) and (4) of the Model Law. Those articles are now the subject of ss 18(1) and (2).

30 The amendment had the effect that only a court or authority prescribed for the purposes of s 18(1) is taken to have been specified in Art 6 of the Model Law as a court or authority competent to perform the functions referred to in Art 11(3) of the Model Law.

31 On 24 February 2011, the following Regulation described as Select Legislative Instrument 2011 no. 10 was made under the Act:

> For subsections 18(1) and (2) of the Act, the Australian Centre for International Commercial Arbitration is prescribed.

32 The Australian Centre for International Commercial Arbitration (ACICA) is a not-for-profit public company established in 1985. It maintains a panel of international arbitrators.

33 Curiously, between 5 July 2010 and 24 February 2011 (and therefore as at the date of the Award), no court or authority was prescribed for the purposes of s 18(1). Consequently, during that period no court or authority was taken to have been specified in Art 6 of the Model Law to be competent to perform the functions referred to in Art 11(3).

34 It is not necessary to dwell further on this lacuna. Presently, only ACICA is specified as competent to perform the functions referred to in Art 11(3) and (4).

THE PROCEEDINGS

35 By Summons sued out of the Court on 22 February 2011 and amended (with leave) on 28 September 2011, the plaintiff claims the following relief:

> (1) A Declaration that In [sic] the circumstances that have occurred Mr McGrane has not been appointed as the Arbitral

Tribunal for the purposes of determining the dispute between the Plaintiff and the Defendant.

(2) A declaration that the Plaintiff and the Defendant have failed to agree on a procedure for appointing the arbitrator within the meaning of Article 11(3) of the Model Law.

(3) Alternatively to order 2, a declaration that the Defendant has failed to act as required by the procedure for the appointment of an arbitrator (within the menaing [sic] of Article 11(4) of the Model Law) in that it has failed to take any or any reasonable steps to agree with the Plaintiff upon the identity of the arbitrator.

(4) A declaration that the parties are entitled to seek the nomination of an arbitrator by ACICA under Article 11 of the Model Law.

(5) An interim order pending final determination of these proceedings restraining the Defendant from proceeding with a purported arbitration before the Nominee (as defined in the Commercial List Statement).

(6) An order that the Defendant provide security for costs of the arbitration in such manner and amount as the Court shall think fit.

(7) An order staying the arbitration until compliance with order 6.

(8) Costs.

36 The Court is presently concerned with only prayers (1) to (5) in the Summons which concern the validity of the appointment of the arbitrator.

37 The defendant did not appear to oppose the relief sought. The arbitrator was given notice of the hearing and provided written confirmation that he did not intend to participate.

THE PLAINTIFF'S CONTENTIONS

38 Mr J.B. Simpkins of Senior Counsel appeared for the plaintiff.

39 He put firstly, that cl 21 of the Dealer Agreement provides only for the appointment of an arbitrator where both parties agree. As had earlier been put to the arbitrator, he put that, cl 21 of the Dealer Agreement incorporates only those IAMA Rules which govern procedures for the arbitration once the tribunal has been properly constituted. It followed, he put, that there had been no valid appointment of the arbitrator.

40 Next, he put that Art 16 of the Model Law, which provides that the arbitral tribunal may rule on its own jurisdiction, only applies where the arbitral tribunal has been validly constituted and thus has no application here because there was no validly constituted arbitral tribunal to start with.

41 Next, he put that the present case is one of an arbitration with a sole arbitrator where the parties have been unable to agree on an arbitrator as contemplated by Art 11(3)(b) of the Model Law and that the sole route to appointment of an arbitrator is a request to, and appointment by, ACICA pursuant to that article.

42 Finally, he put that the Court has jurisdiction to determine matters concerning an arbitrator's jurisdiction and that the Court should intervene in the present case. He put that absent clear language to the contrary, it should not be inferred that the Court's jurisdiction to intervene has been ousted.

43 Mr Simpkins drew attention to examples of cases where the Court has intervened in arbitral proceedings for example by making a declaration as to claims that may be arbitrated, granting an injunction to restrain an arbitration where a condition precedent to a valid submission had not been satisfied or restraining a party from proceeding with an arbitration under an unenforceable contract, determining whether or not there was a concluded contract and if there was, whether it contained an arbitration clause; see *Gold Coast City Council v The Rutherford Group* [1980] Qd R 275; *Stoltenberg v Doring* [1983] 1 NSWLR 121; *Heathersage Nominees Pty*

Ltd v Pineview Holdings Pty Ltd (Supreme Court of Western Australia, 14 September 1990, unreported); *Whitfords Beach Pty Ltd v Gadson* (1991) 6 WAR 537; *Re Contrapac Pty Ltd* (Supreme Court of Queensland, 17 July 1992, unreported).

CONSIDERATION

44 The Court did not have the benefit of submissions from a contradictor on the question of whether, on the proper construction of cl 21 of the Dealer Agreement where the parties do not agree to the appointment of an arbitrator, the appointment mechanism in Rule 8 of the IAMA Rules applies. There are respectable arguments each way. On the one hand, cl 21 is in imperative terms and appears to require the parties to agree to the appointment of an arbitrator. On the other hand, arbitral proceedings commence and the IAMA Rules on their face apply from the point of time when a Notice of Dispute is given (which in this case is the letter dated 7 May 2010), that is, before the appointment of the arbitrator. It is undoubtedly arguable that the appointment procedures under the IAMA Rules apply where the parties do not reach agreement.

45 It is, however, not necessary to decide this point because, for the reasons which follow, the plaintiff's claim faces an insuperable hurdle in any event.

46 Article 16(1) of the Model Law provides that the arbitral tribunal may rule on its own jurisdiction. Article 16(2) provides that a plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence.

47 The plaintiff challenges (and challenged before the arbitrator) the arbitrator's competence and authority. However the prayers for relief in the Summons may be framed, that challenge was, and remains, one as to jurisdiction.

48 Article 16(3) provides that the arbitral tribunal may rule on such a plea either as a preliminary question or in an award on the merits. It provides that if the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within 30 days after having received notice of such a ruling, the court to decide the matter.

49 By the Award, the arbitrator undoubtedly ruled as a preliminary question, as contemplated by Art 16(3), that he had jurisdiction.

50 Article 5 of the Model Law provides that in matters governed by the Model Law, no court shall intervene except where so provided by the Model Law.

51 The plaintiff's entitlement to have the Court decide the matter is "a matter governed by" the Model Law within the meaning of Art 5.

52 The plaintiff received notice of the Award on 18 January 2011. It had the chance within 30 days to request the Court to decide the matter, but it did not take it. Thirty calendar days expired on Thursday 17 February 2011. The Summons was filed on 22 February 2011.

53 The scheme established by the Model Law makes no provision for the period to be extended. Articles 16(3) and 5 of the Model Law make it clear that absent a request within the period specified in Art 16(3) no court may intervene to determine the matter of an arbitral tribunal's jurisdiction where the tribunal has itself determined that matter in favour of jurisdiction as a preliminary question. Such a request within time was an essential condition of the plaintiff's right to have the Court decide the matter; see *David Grant & Co Pty Ltd v Westpac Banking Corp* (1995) 184 CLR 265 at 277.

54 This position reflects two of the underlying policies of the Act, namely, that disputes which the parties have submitted to arbitration should be speedily resolved and that intervention of the Court should be minimised.

55 The authorities to which Mr Simpkins referred did not concern the operation of statutory provisions such as those under consideration here.

56 The proposition that Art 16 does not apply because the arbitrator was not validly appointed is unsustainable. In every case where there is a total challenge to jurisdiction on the basis that the arbitrator has not been validly appointed, if the tribunal is to decide its own jurisdiction it must first, and is entitled to, assume it. This principle, known as the doctrine of separability, allows it to do so; see Nigel Blackaby et al, *Redfern and Hunter on International Arbitration* , 5 th Ed (2009) Oxford University Press at [5.94] and following.

57 Article 16 of the Model Law is the statutory embodiment of this principle. It confirms an arbitral tribunal's jurisdiction to determine its own jurisdiction, amongst others, by determining the validity of its appointment.

58 It follows that the Court cannot intervene and that the arbitrator's Award must stand.

59 Prayers (1) to (5) of the Summons are dismissed.

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