

**ALLIED CONSTRUCTIONS PTY LTD V. NOVACOAL AUSTRALIA PTY LTD (1991) 25 NSWLR 54**

Supreme Court of New South Wales – 15 November 1991

**FACTS**

Novacoal retained Allied Constructions to build a concrete lined shaft. The parties used an AS2124-1984 contract.

When the contract was finalised, some qualifications were made by Allied about the total inflow of water. If the inflow of water exceeded 6 litres a second, then Allied and Novacoal were to negotiate for an additional payment.

The directions made by the Superintendent were not to the liking of Allied and they issued proceedings claiming payment for a latent condition and for the additional work.

Novacoal issued an application under section 52 of the Commercial Arbitration Act (“the Act”) seeking an order that the proceeding be stayed.

**ISSUE**

Was General Condition 49.1 of AS2124-1984 an arbitration agreement for the purposes of the Act?

**FINDING**

General Condition 49.1 of the contract embodied an arbitration agreement within the meaning of the Act.

The clause provided that a party could elect to refer disputes to arbitration and this was an agreement to refer future disputes to arbitration.

**QUOTE**

Giles J said:

“Having considered these decisions, I remain of the view that GC 49.1 embodies an arbitration agreement within the meaning of the Act. I respectfully agree with the conclusion to which Foster J came in *Elders CED Ltd v Dravo Corporation* on a clause materially indistinguishable from GC 49.1 and some of the latter decisions go even further.

It is sufficient for present purposes that an agreement to arbitrate disputes under which there is an election to refer a dispute to arbitration or to let the matter rest is an agreement to refer future disputes to arbitration.” – page 65 of (1991) 25 NSWLR 54

## **IMPACT**

A clause such as GC 49.1 is arbitration agreements pursuant to the Commercial Arbitration Act. If a party is entitled to elect to refer a dispute to arbitration, then that election may be made even if proceedings have been issued.

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