The Cost of Construction Expedience: Undocumented Variations and Arbitral Jurisdiction in Miller v Monaghan

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In the physical execution of capital projects, there is a persistent friction between the rigid administrative mechanics of a written contract and the urgent, on-the-ground necessity to maintain operational momentum. When site conditions evolve or project scopes expand, the formal machinery of written notices, cost estimates, and countersignatures is frequently abandoned in favor of verbal approvals. It is a pragmatic, operational shortcut designed to save time, but one that almost inevitably invites a legal reckoning when the final invoices are issued. When a dispute arises over these undocumented variations, a critical jurisdictional question frequently emerges: If the parties completely ignored the strict variation procedures mandated by their contract, does the dispute over that "off-the-books" work still fall under the contract's arbitration agreement? Or does the procedural failure sever the dispute from the contract entirely, stripping the arbitrator of jurisdiction? This precise tension was recently adjudicated by the Supreme Court of Western Australia in *Miller v Monaghan* [2026] WASC 441. The judgment provides an instructive framework for capital allocators, general counsel, and construction professionals regarding the breadth of standard arbitration clauses and the limits of contractual non-compliance in establishing arbitral jurisdiction. **The Factual Matrix: Expedience Over**

Procedure The dispute in *Miller* centered on a standard form residential building contract executed in April 2024 for a sum of $675,910. The contract contained a highly prescriptive mechanism for variations under cl 12, requiring a written request from the owner, the preparation of a formal variation document by the builder detailing the cost, and the explicit, signed agreement of the owner before the work commenced. As is common in the industry, the paperwork fell behind the physical reality of the build. The plaintiff builder issued an invoice for $106,773.52 for additional work carried out on a "cost-plus" basis. The builder openly conceded that the formal variation procedure in cl 12 was not followed for every item of additional work. Instead, the builder justified the departure through an alleged verbal agreement driven by timeline pressures. As Justice Lundberg noted in the judgment, the plaintiff deposed:

> *"[45] In that context, to keep the Works progressing and to allow Mr and Mrs Monaghan to have their variations, I said to Mr Monaghan, at a meeting at 10 Sabina Drive in late-September 2025, 'All these changes are getting too complicated to keep up with the paperwork with, so all these additional works will need to be carried out at cost plus a reasonable margin and reconciled as we go, if we 're to get you in before Christmas'. Mr Monaghan said to me: 'That's fine'."*

When the defendant owner disputed the invoice, citing the absence of signed variations alongside invoicing errors, the builder sought to invoke the contract's arbitration clause (cl 18). Following a refusal by the contractual appointing authority (the Housing Industry Association) to appoint an arbitrator, the builder applied to the Supreme Court under s 11(4) of the *Commercial Arbitration Act 2012* (WA) to force the appointment. **The Jurisdictional Question: Are Non-Compliant Variations Arbitral?** For the Court to exercise its power to appoint an arbitrator, it first had to be satisfied that the

dispute actually fell within the parameters of the arbitration agreement. This raised a formidable jurisdictional argument: if the builder completely bypassed the mandatory contractual procedure for raising variations, is the resulting dispute still subject to the contract's arbitration clause? The vulnerability of this position was addressed by Justice Lundberg:

> *"[26] The questions of whether the Variations were carried out, the value of the Variations and Mr Miller's entitlement are all matters falling for determination within the scope of the foreshadowed arbitration proceedings. It would not be appropriate to determine such matters in the context of the current hearing.*
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> *[27] There is an argument potentially available as to whether the Variations-dispute falls within the ambit of the arbitration agreement because the Parties do not appear to have complied with the procedure for the raising of variations under cl. 12 of the Contract. Whilst it is accepted that neither party complied, that does not preclude the dispute from being arbitral."*

The Determination: The "Widest Import" of the Bargain

The Court rejected the premise that procedural non-compliance negates arbitral jurisdiction, relying heavily on the broad drafting of the arbitration clause itself. Clause 18 of the Building Contract dictated that "any dispute, disagreement or difference… relating to this Contract" must be referred to arbitration.

Applying established principles of commercial construction, the Court noted that phrases such as "relating to" are heavily favored by the judiciary to capture precisely this kind of administrative deviation. Quoting the precedent set by Martin

CJ in *Fitzpatrick v Emerald Grain Pty Ltd*, the Court reaffirmed that the phrase is "properly construed as a term of the widest import which should not, in the absence of compelling reasons, be read down."

Justice Lundberg concurred with the plaintiff's submission, determining verbatim:

> *"I respectfully agree, bearing in mind the breadth of the arbitration agreement in this case, as objectively assessed.*
>
> *That is, the court can be presently satisfied that, subject to the findings which might be made on the evidence, the subject matter of the variations claimed by the plaintiff is a dispute relating to the Building Contract and capable of being referred to arbitration."*

Crucially, the Court recognized that while the paperwork was flawed, the legal remedies to rectify that flaw, such as relying on the owner's verbal consent, are inherently tied to the contract's execution and remain the exclusive domain of the arbitrator:

> *"It is at least arguable that, although there was non-compliance with the variation procedure in cl 12 of the Building Contract, the plaintiff may be able to rely on the conduct of the parties to make good his contentions, relaying on some species of estoppel. Whether that will be the case requires a trier of fact to assess the competing evidence and credibility of the witnesses, which is beyond the scope of this application. It is enough to say that the plaintiff's claims for payment of the works undertaken as variations, which form the basis of the dispute between the parties, are matters relating to the Building Contract."*

Finding that the dispute squarely fit within the arbitration

agreement, the Court exercised its statutory power to formally appoint the arbitrator. Furthermore, the Court ordered the defendant to pay the plaintiff's legal costs for the application on a party/party basis, noting that the plaintiff's conduct "involved nothing more than an adherence to the parties' bargain" and that the application "was necessary and appropriate in order to overcome the stalemate in the arbitral process." **Pragmatic Imperatives for the Construction Sector** The *Miller v Monaghan* decision offers stark, practical guidance for stakeholders in the construction industry. Courts will read phrases like "relating to this Contract" with a broad and flexible approach. A mutual or unilateral failure to comply with the administrative mechanics of a variation clause will unlikely sever the dispute from the arbitral tribunal. Skipping the paperwork may prejudice a party's chances of actually winning the arbitration on the merits, forcing them to rely on complex, evidence-heavy arguments like estoppel. However, as the Supreme Court of Western Australia has clearly signaled, that arduous evidentiary battle will unequivocally be fought in arbitration, exactly as the contract originally intended.

Author: Mahmoud Abuwasel
Title: Partner – Disputes
Email: mabuwasel@waselandwasel.com
Profile:
https://waselandwasel.com/about/mahmoud-abuwasel/

Lawyers and consultants.
Tier-1 services since 1799.
www.waselandwasel.com
business@waselandwasel.com